THE INDIAN DECISIONS, NEW SERIES,

ALLAHABAD, Vol. VI.

THE

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JUDGES OF THE HIGH COURT OF ALLAHABAD DURING 1888—1890.

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HON'BLE SIR JOHN EDGE, *Kt.*

Puisne Judges:

HON'BLE MR. DOUGLAS STRAIGHT.

" " M. BRODHURST.

" " W. TYRRELL.

" " SYED MAHMOOD.

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1887 JUNE 1.

APPELLATE CIVIL.

10 A. 1= 7 A.W.N. (1887) 238.

[1] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

BEHARI LAL AND OTHERS (*Plaintiffs*) *v.* GANPAT RAI AND ANOTHER (*Defendants*).* [1st June, 1887.]

Civil Procedure Code, ss. 244, 291—*Sale in execution of decree—Tender of debt by transferee of property—Question for Court executing decree—Separate suit.*

Held that the assignees of a purchaser from a judgment-debtor of property, the subject matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale.

Held also, where the executing Court had refused to accept the money and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291, was not barred by s. 244 of the Code.

THE facts of this case were as follows :—The defendants, Ganpat Rai and Shambhu Nath, in execution of a decree for enforcement of hypothecation of zamindari property, which they had obtained against Musammat Gaura, caused the property to be attached and advertised for sale. Subsequently, the decree-holders having failed to pay the necessary fee for the issue of the proclamation of sale, the case was struck off the file on the 17th September, 1884.

On the 18th December, 1884, the judgment-debtor conveyed her proprietary right in the property to one Kundan Lal by a deed of sale which was registered on the date of execution.

[2] On the 6th January, 1885, the defendants made a fresh application for execution of their decree, and by an order passed on the next day, the 20th February was fixed for sale of the property.

On the 18th February, 1885, Kundan Lal conveyed his rights under the deed of the 18th December, 1884, to the plaintiffs, Behari Lal, Bindraban, Tej Nath, Shambhu Nath, Rahman Bakhsh and Balram, by a deed of sale which was registered on the same date.

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* First Appeal, No. 64 of 1886, from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 29th July 1885.

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On the 20th February, the date fixed for the sale, the plaintiffs made an application under s. 291 of the Civil Procedure Code, to the Deputy Collector, who was the officer conducting the sale, for leave to pay the amount of the judgment-debt and costs into Court. This application was opposed by the decree-holder on the allegation that the sale in favour of the petitioners had not been completed, and that the judgment-debtor had denied her sale to Kundan Lal. The Deputy Collector passed the following order:—"I cannot give permission to the petitioners to deposit money on the part of the judgment-debtor in any Court, inasmuch as the decree-holders cannot receive it. The petitioners should seek relief formally in reference to their right of purchase." The petitioners thereupon renewed their application to the Court executing the decree, but the application was rejected. The sale then took place, and the property was purchased by the decree-holders themselves on the 20th February, 1885.

The plaintiffs then instituted the present suit, in which they prayed "that the plaintiffs' right to pay off the amount of the defendants' decree, as representatives of the judgment-debtor, be declared; and that by setting aside the sale of the 20th February, 1885, at which the defendants became the purchasers, a decree for the property in suit be passed in the plaintiffs' favour with costs."

The Court of first instance (Subordinate Judge of Saharanpur) found that "the original vendor, Musammat Gaura, whose rights were under attachment and put up to sale, denied the sale executed by her." The material portion of the Court's judgment was as follows:—"In this case, when the plaintiffs offered to pay the money on the day fixed for sale, the defendants decree-holders, who represented the mortgagee, refused to receive the money, declaring the sale to be disputed and unadmitted. They were not bound, and [3] could not be compelled, to receive it. The Court could not receive the money in deposit and stay the sale by reason of such deposit. S. 291 does not contemplate the payment of money by a stranger asserting a disputed or unproved right in the property, and render it incumbent on the Court to receive it. As the decree-holders' refusal to receive the money and the Court's order not allowing it to be deposited were legally valid, and as the not staying of the sale was a necessary consequence thereof, the plaintiff is not entitled to the relief he seeks by his suit, nor is such a a suit maintainable. Moreover, even if the sale alleged by the plaintiff had beem admitted, he would not have been competent to bring a fresh suit. What he should have done was to apply to be made a party to the execution case." The Court accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

The Hon. Pandit *Ajudhia Nath*, for the appellants.

The Hon. *T. Conlan* and Mr. *C. H. Hill*, for the respondents.

EDGE, C. J., and TYRRELL, J.—In this case the respondents had obtained a decree on a hypothecation-bond against Musammat Gaura. They attached her property in execution thereof, but not having paid the proper fees into Court, the Court made an order striking the execution off the list of pending cases. That was on the 17th September, 1884. On the 18th December following Musammat Gaura sold the property in question to Kundan Lal. That sale-deed was registered on the 18th February. Kundan Lal sold the property to the appellants-plaintiffs. That sale-deed was registered. On the 6th January, 1885, the respondents-decree-holders put in an application for execution against the property. The 20th February following was fixed for the sale. On the 20th February the appellants,

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acting under s. 291 of the Code of Civil Procedure, presented a petition for leave to pay the judgment-debt and costs into Court. That petition was opposed by the respondents, they raising a doubt as to the transfer. The Deputy Collector referred the case to the Court, which seems to have been close by. The application was then made to the Court, and was refused. The sale proceeded, and the decree-holders-respondents purchased on the same day. Upon that this suit was brought. The Subordinate Judge dismissed the suit, apparently on the ground that as Musammat Gaura had questioned the sale made by her, the appel-[4]lants were not persons entitled to have the sale stayed by paying the money into Court. He also held that s. 244 barred the suit. This involved one question of fact and two questions of law. The question of fact was whether Musammat Gaura had sold the property to Kundan Lal. The evidence proved that she did, and had executed the sale-deed of the 18th December, 1884. When that deed was registered, she was identified by a person deputed by the Registrar for that purpose from the office. Mr. *Conlan* admits that he cannot dispute that the sale did take place. The first question of law is, whether the appellants, who were the assignees who purchased from Kundan Lal, who purchased from Musammat Gaura, were entitled to come in and protect the property by tendering the money under s. 291 of the Code of Civil Procedure. The only right of the decree-holders was to have this debt and costs paid to them, or to have the property sold to satisfy this judgment and costs. It is only as a matter of grace that a decree-holder is allowed to purchase at auction-sale at all. If the debt and costs are paid by a third person on behalf of the debtor, the decree-holder ceases to have any interest in the property, and the money so paid cannot be recovered from him. The judgment-debtor might object to the intervention of a third party, but that is not the present case. Indeed, we are strongly of opinion that if Musammat Gaura had attempted to interfere, the assignees would have been entitled to an injunction against her; and further, we think they would be entitled to use her name in paying the money into Court, because her rights had passed to her vendees. Consequently, we are of the opinion that the executing Court was bound to accept the money and stop the sale.

The only other point now remaining is, whether the case is governed by s. 244 or not. We think that the current of decisions shows that s. 244 does not apply to a case like this, and that current of decisions is opposed to the doctrine in the case cited to us (1). On these grounds we decree the appeal with costs, that is to say, the appellants should have a decree conditioned on payment into Court within thirty days of the judgment-debt and costs as it stood on the 20th February, 1885, at the first stage of the sale, *minus* the costs of this litigation.

Appeal allowed.

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(1) *Ramachandra Kolatkar* v. *Mahadaji Kolatkar*, 9 B. 141.

1887
JUNE 13.

APPELLATE CIVIL.

10 A. 5=
7 A.W.N.
(1887) 218.

10 A. 5=7 A.W.N. (1887) 218.

APPELLATE CIVIL.

[5] *Before Mr. Justice Mahmood.*

IJRAIL (*Defendant*) v. KANHAI AND ANOTHER (*Plaintiffs*).*
[13th June, 1887.]

Jurisdiction—Civil and Revenue Courts—Suit for partition and possession of a share in a particular plot in a patti—Act XIX of 1873 *(N W.P. Land Revenue Act)*, ss. 135, 241 *(f)*.

A suit by a co-sharer in a joint zamindari estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a Civil Court, with reference to ss. 135 and 241 of the N.W.P. Land Revenue Act (XIX of 1873). *Ram Dayal* v. *Megu Lal* (1) distinguished.

[R., 32 C. 1036=1 C.L.J. 421; 12 P.R. 1899.]

THE plaintiffs in this case, Kanhai and Bhaggu, obtained a decree against the defendant, Ijrail, on the 14th September, 1882, declaring their proprietary right to a one-third share in a plot of land measuring 5 bighas 19 biswas, adversely to the plea of the defendant that the plot was *sir* land belonging exclusively to himself. They subsequently brought the present suit in the Court of the Munsif of Kaimganj, praying for actual partition and possession of the one-third share to which their decree had declared them entitled. The claim was described in the plaint as a claim for "possession by means of partition of a one-third share of 5 bighas and 19 biswas *pucka*." The plot in which the one-third share in suit was held was part of a patti measuring 203 bighas 11 biswas.

The defendant pleaded that partition of the plot could not be had without partition of the entire *patti*, but that partition of the entire *patti* could be claimed only in the Revenue Court, with reference to ss. 135 and 241 (*f*) of the North-Western Provinces Land Revenue Act, and that the Munsif had therefore no jurisdiction to entertain the suit.

The Munsif held that he had jurisdiction, observing as follows:—
"In my opinion the plaintiffs should not be prohibited from suing in this Court, as the claim refers to a very small portion of land out of their one-third share in a *patti* of the village, and the whole *patti*, as admitted by both parties, is 203 bighas and 11 biswas *pucka*. The provisions of the Revenue Act cannot be applicable to the partition of such small portions of land. Had [6] the plaintiff claimed his whole share of the *patti* in the village, he would have claimed it in the Revenue Court and applied for partition there. This view is supported by *Ram Dayal* v. *Megu Lal* (1). As the claim is not only for partition but for possession of the land too, there is no reason to doubt its validity." The Munsif, after considering the suit upon the merits, passed a decree in favour of the plaintiffs.

The defendant appealed to the District Judge of Farukhabad, who gave judgment as follows:—

"I am of opinion that this case is ruled by the judgment given in the precedent cited by the lower Court, *viz.*, the case of *Ram Dayal* v. *Megu Lal* (1), and that the object sought by the plaintiffs does not require the intervention of the Collector for the purpose of giving effect to a decree

* Second Appeal, No. 1960 of 1886, from a decree of W.H. Hudson, Esq., District Judge of Farukhabad, dated the 15th July, 1886, affirming a decree of Maulvi Muhammad Unwar Husain, Munsif of Kaimganj, dated the 12th May, 1886.

(1) 6 A. 452.

previously obtained. The plaintiffs originally sued for a declaration that the plot of 5 bighas 19 biswas (now in suit) was not *sir* land belonging to the defendant, but that one-third of it belonged to them (the plaintiffs) and they obtained a decree on the 14th September, 1882. They now sue to get possession of this one-third share of this particular plot of land, and to get it by means of an actual physical partition of this plot. I do not think it was necessary for them to apply to the revenue authorities for a partition of their share in the whole estate in which they are co-parceners, inclusive of their zamindari right, in order to get their proportionate area of the plot in suit; and I therefore hold that they were entitled to sue in the Civil Court for possession of the land which the Civil Court had declared their right to. The other pleas of the appellants are futile, and the appeal is dismissed with costs."

The defendant appealed to the High Court.

Maulvi *Abdul Majid*, for the appellant.

Babu *Ratan Chand*, for the respondents.

MAHMOOD, J.—This was an action for the understanding of which the following few facts are necessary:—The subject-matter of dispute between the parties is certain land constituting an area of 5 bighas 19 biswas of land, being the aggregate area of four plots, *viz.*, Nos. 146, 337, 526, and 688 of *pukhta* or *pucka* measurement. These very plots were the subject-matter of litigation [7] between the parties upon a former occasion, in which litigation the parties being co-sharers of the land, the dispute was whether it did or did not form the private *sir* land of the present defendant-appellant, Ijrail. In that litigation Ijrail was unsuccessful and the final decree of the 14th September, 1882, declared that the plaintiffs-respondents now before me were entitled to a one-third share in the *patti* to which these lands appertain. Having obtained that decree the plaintiffs instituted this suit with the object of having these four plots of land specifically partitioned, upon the allegation that these lands were the joint property of the parties, and that circumstances had arisen which would entitle the plaintiffs to claim a separation of the shares for which they pray. Both the Courts below, feeling themselves bound by the adjudication of the 14th September, 1882, held that the plaintiffs were entitled to the one-third share in these plots, and with reference to the ruling of this Court, to which I was a party in the case of *Ram Dayal* v. *Megu Lal* (1), those Courts have held that such a suit was entertainable by the Civil Court. The main defence urged by the defendant-appellant in the Court below was that such an action virtually amounted to claiming partition of a portion of the mahal, irrespective of the other plots constituting the mahal; and he contended that although the plaintiffs were entitled to the one-third land, yet the share could not be separated in this isolated manner irrespective of the revenue law. Upon these grounds it was further contended by him that the action was not maintainable by the Civil Court. This contention having been disallowed by both the Courts below, the present second appeal repeats that contention, and I am of opinion that it has force. It is admitted on all hands that the parties are co-sharers of the *patti* in which these four plots are situate, also that these plots form part of numerous other plots of land situate in that same *patti*, also that all these plots are jointly owned by the parties along with other co-sharers of the *patti*, and this being so, the prayer contained in the plaint amounts simply to asking for a partition of four plots out of many, more plots included in the zamindari property. By s. 241 of

(1) 6 A. 452.

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Act XIX of 1873 (the Land Revenue Act), matters of this description have been excluded from the jurisdiction of the Civil Court, and the reason of the law seems to be that if isolated plots are to be [8] brought into litigation for purposes of partition in this manner, the broad partition which can be effected only by a Revenue Court, such as is contemplated by ss. 107 to 139 of the Revenue Act, could not be properly worked. The only ruling upon which reliance is placed for the opposite view by Mr. *Ratan Chand* on behalf of the respondents is the ruling to which I have already referred. And as the judgment in that case was delivered by myself, I think I need only say that the effect of that judgment is simply to hold that when a Civil Court has passed a decree whereby certain trees were to be uprooted, without specifying the exact area from where the trees were to be uprooted, the Court executing that decree (behind which decree such Court could not go) could give effect to that decree without resorting to the provisions contained in s. 265 of the Code. I do not understand that ruling to mean that any co-sharer of a joint zemindari estate could, by suing for partition and division of isolated plots of land, bring about a state of things whereby it would (when the question arises before the Revenue Court) be extremely inconvenient, if not impossible, to duly effect a partition, such as the Revenue Act in s. 135 and in other sections contemplates. I hold, therefore, that the nature of the claim set forth in the plaint in this suit, and the defence set up thereto, gave rise to a dispute of such a character as could not be entertained by a Civil Court, and should have been dismissed upon this ground *in limine*. For these reasons I decree this appeal, setting aside the decrees of both the lower Courts. The plaintiff-respondent's suit will stand dismissed with costs in all the Courts.

Appeal allowed.

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10 A. 8=7 A.W.N. (1887) 240.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

NAURANG SINGH AND OTHERS (*Defendants*) *v.* SADAPAL SINGH (*Plaintiff*).* [20th June, 1887.]

Arbitration—Revocation of submission to arbitration—Appellate decree in accordance with award—Second appeal—Civil Procedure Code, ss. 508, 521, 522, 582.

By reason of s. 582 of the Civil Procedure Code where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to [9] objection upon the grounds mentioned in s. 521 passes a decree strictly in accordance with the award, such appellate decree is entitled to same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal *Pureshnath Day* v. *Nobin Chunder Dutt* (1) and *Rughoober Dyal* v. *Maina Koer* (2) dissented from.

[Overruled, 29 A. 408=A.W.N. (1906), 64=3 A.L J, 168; Diss., 8 C.W.N. 390 ; F., 89 P.R. 1904=26 P.L.R. (1905).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

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* Second Appeal, No. 928 of 1886, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 25th February, 1886, reversing a decree of Babu Nihal Chandra, Munsif of Azamgarh, dated the 18th July, 1885.

(1) 12 W.R. 93. (2) 12 C.L.R. 564.

Mr. *G. T. Spankie*, for the appellants.

Mr. *W. S. Howell*, for the respondent.

1887 JUNE 20.

APPELLATE CIVIL.

10 A. 8 = 7 A.W.N. (1887) 240.

MAHMOOD, J.—Mr. *Spankie*, who has appeared on behalf of the defendants-appellants in this case, has conceded that in view of the ruling of this Court in the case of *Nainsukh Rai* v. *Umadai* (1), which followed the ruling of the Lords of the Privy Council in *Pestonjee Nussurwanjee* v. *Manockjee and Co.* (2), the first ground taken in the memorandum of appeal is not maintainable; and the learned counsel has also abandoned the third ground which appears in the memorandum of appeal. The only ground upon which he insists is the contention contained in the second ground of the memorandum of appeal; and in order to dispose of that contention it is necessary to refer to the following facts:—

The suit was for possession of certain zamindari shares, and it was instituted in August, 1884. On the 10th January, 1885, the parties agreed to refer the matter to arbitration, and on the same day the Court of first instance made an order referring the dispute to the arbitration of the persons named in the submission. Subsequently, on the 19th January, 1885, the defendants put in an application, complaining of the arbitrators, and praying that the case might be disposed of on the merits. On the 23rd January, 1885, an order was passed by the first Court to the effect that the objections raised by the defendants were not sufficient to disturb the submission, and that the proper time for presenting such objections was after the arbitration award. That award was made on the 16th February, 1885 and the defendants presented a second application containing their objections to the award, which objections charged the arbitrators with misconduct and corruption. Those objections were allowed by the Court of first instance, without going into the evidence on the allegations, on the 26th February, [10] 1885, and that Court proceeded to deal with the case upon the merits irrespective of the arbitration award of the 16th February, 1885. The result of such trial was to decree the claim in part. This decree was made on the 18th July, 1885, and from that decree an appeal was preferred by the plaintiff, and the lower appellate Court remanded the case under s. 566 of the Civil Procedure Code for inquiry as to whether the arbitration award of the 16th February, 1885, was valid with reference to the question raised by the defendants under s. 521 of the Civil Procedure Code. This order of remand was made on the 1st December, 1885, and the case going back to the Court of first instance, the defendants appear to have been served with notice calling upon them to produce evidence in the Court of first instance. But they did not do so, and the Court of first instance recorded its finding upon the issue remanded, finding that no such ground of complaint was proved as was contemplated by s. 521 of the Code, because the defendants had produced no evidence. Upon receipt of this finding the Court of first appeal held that the arbitration award of the 16th February, 1885, was not open to any legal objection; that it was valid and binding upon the parties, and holding this, that Court passed a decree in accordance with the terms of that award, thereby decreeing the whole claim of the plaintiff-respondent.

From that decree this second appeal has been preferred, and Mr. *Howell*, on behalf of the respondent, contends that the appeal does not lie, because under the last part of s. 522 of the Civil Procedure Code, the decree passed by the lower appellate Court, being in accordance with the award, is nonappealable. On the other hand, Mr. *Spankie*, relying upon

(1) 7 A. 273.

(2) 12 M. I. A. 130.

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the ruling of the Calcutta Court in the case of *Pureshnath Dey* v. *Nobin Chunder Dutt* (1), which was followed in the case of *Rughoobur Dyal* v. *Maina Koer* (2), contends that because the decree of the first Court was not in accordance with the arbitration award, the mere circumstance that the decree of the lower appellate Court reversing the decree of the Court of first instance gives effect to such award will not preclude the right of second appeal which would otherwise exist under the law. Then the learned counsel further argues that the Court of first instace, to which the case [11] was remanded under s. 566 of the Code, did not allow sufficient time to the defendants-appellants for producing evidence to prove the corruption and misconduct of the arbitrators, as they alleged in their petition of objections of the 18th February, 1885, and that therefore the non-production of evidence was matter to be dealt with as such, with reference to the allegations contained in the defendants-appellants' application of the 13th February, 1886, where they stated that one of the petitioners, had been seriously ill, and the other was taking care of the other appellant, and that only five days were allowed for production of evidence. I am of opinion that both the rulings upon which Mr. *Spankie* has relied supports his contention. But with due respect for the views of the learned Judges who decided those cases, I find myself unable to hold that the provisions of s. 521 or s. 522 of the Code are to be limited either to the Court of first instance or to the Court which makes the order referring the case to arbitrators. In neither of the rulings relied upon are there any reasons given for holding that those provisions are not available to the Court of appeal. It is conceded that if the Court of first instance in this case had disallowed the objections to the arbitration award taken by the defendants, and had passed a decree in accordance with the arbitration award, such a decree would have been final, under the last part of s. 522 of the Civil Procedure Code. What is contended is that a Court of first appeal when, in exercising its power as a Court of appeal empowered to deal with the merits, it does exactly what, if the Court of first instance did, would render the decree of that Court final, the decree of such appellate Court is not exempt from appeal under the last part of s. 522 of the Code. I am of opinion that the provisions of the whole of ss. 521 and 522 of the Code are applicable to the Court of first appeal by reason of the provisions of s. 582 of the Civil Procedure Code, and that when a Court of first instance wrongly sets aside an arbitration award, and passes a decree against the terms of such award, and a Court of appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by s. 521 of the Code, and upon that finding passes a decree strictly in conformity with the terms of such arbitration award, such decree of the Court of first appeal is entitled to the same [12] finality as a decree of the first Court would have been entitled to under the last part of s. 522 of the Code. This view seems to be supported by the fact that whilst cls. 25 and 26 of s. 583 of the Civil Procedure Code allow appeals from orders superseding an arbitration or modifying an award, no such appeal is allowed from orders passed under s. 521, disallowing objections to arbitration awards. The decree of the learned Judge of the lower appellate Court is, therefore, a decree which is in conformity with the award, because the judgment, of which it is the result, rejects the objections which were raised against such award under s. 521 of the Code. The decree is, therefore, final, and cannot be made

(1) 12 W.R. 93. (2) 12 C.L.R. 564.

the subject of second appeal any more than the decree of the first Court could have been made the subject of the first appeal if it had rejected the objections against the arbitration award and conformed with the requirements of s. 522 of the Civil Procedure Code.

The Code throughout gives to the Court of appeal all the powers that the Court of first instance has in connection with litigation; and if the question did arise as to the questions of minor detail, I should probably hold that the Court of first appeal has all the powers of a Court of first instance in dealing with references to arbitration, and disposing of objections to arbitration awards.

For these reasons I hold that the decree from which this appeal has been preferred is a final decree, and could not be appealed from ; and this view, dissenting as it is from the ruling cited by Mr. *Spankie*, renders it unnecessary for me to consider the question whether, under the circumstances of this case, the lower Courts acted rightly in not allowing to the defendants-appellants further time for producing evidence to substantiate the objections contained in the application of the 18th February, 1885, in respect of the corruption or misconduct of the arbitrators. I dismiss this appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

[13] *Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell.*

SHITAB DEI AND OTHERS (*Plaintiffs*) *v.* AJUDHIA PRASAD AND OTHERS (*Defendants*).* [27th June, 1887.]

Landholder and tenant—Notice of ejectment—Determination of tenancy—Act XII of 1881 (N.-W.P. Rent Act.) ss. 36, 39 (c), 40—Suit for ejectment and mesne profits—Payments by wrong doer in possession not to be deducted from such profits.

S. 39 (c) and s. 40 of the N-W.P. Rent Act (XII of 1881) imply that if a landholder has failed to give his tenant the written notice of ejectment required by s. 36, the tenancy is not to be treated in law as having caused on determination of the term provided, but is to be treated as still subsisting.

Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 36 of the Act having been given by the lessor, possession was taken and rents collected by persons, claiming under a subsequent lease—*held* that the tenancy of the first lessees did not cease upon the determination of the term of their lease, that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits, after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents.

[Doubted., 23 A. 252; R., 17 M. 251 ; D., 16 A. 318 (321) (F.B.).]

THE plaintiffs in this suit held certain lands under a lease which determined in 1289 fasli. Their lessor granted a lease to the defendants for a term commencing in 1290 fasli, and on the 15th October, 1882, the defendants took possession, demanded rents from the sub-tenants and received the rents and profits. The lessor had not given to the plaintiffs the written notice of ejectment required by s. 36 of the N.-W.P. Rent Act (XII of 1881). The plaintiffs subsequently obtained from the Revenue

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* Second Appeal, No. 984 of 1886, from a decree of W. C. Watts, Esq., District Judge of Moradabad, dated the 3rd March 1886, confirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 12th July, 1886.

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Court an order putting them in possession, to which the defendants and the lessor were parties. The plaintiffs then brought the present suit for mesne profits in respect of rents and profits received by the defendants subsequently to 15th October, 1882.

The Courts below (Subordinate Judge and District Judge of Moradabad, dismissed the claim, on the ground that the plaintiffs' lease had determined prior to the period for which mesne profits were claimed, and that the omission to issue notice of ejectment under s. 36 of the Rent Act was under the circumstances immaterial. The plaintiffs appealed to the High Court.

[14] The Hon. Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellants.

Munshi *Hanuman Prasad*, Pandit *Sunder Lal*, and Lala *Lalta Prasad*, for the respondents.

EDGE, C. J., (after stating the facts as above, continued) :—It is contended that on the determination of the term in 1289 fasli the tenancy also determined. The rent Act must be looked at to see if this contention is well founded. S. 36 of the Rent Act enacts that if the landholder desires to eject a tenant holding only for a limited period after the determination of his tenancy, he shall cause a written notice of ejectment to be served on the tenant under the provisions of the Act. Ss. 37 and 38 provide for the contents and method of serving such notice, and s. 39 gives the tenant a right within thirty days after the service of notice to contest his liability to be ejected, and provides the tribunal to determine such questions. Sub-clause (*c*) of s. 39 enacts that upon the determination of such questions adversely to the tenant or where no application under that section has been made, the "tenancy of the land in respect of which notice has been served shall cease." The only construction I can put on the section is that if the landlord has failed to give the notice required by s. 36, the tenancy is not to be treated in law as determined on the determination of the term provided by the lease but is to be treated as subsisting. S. 40, I think, also leads to the same conclusion. Under these circumstances I am of opinion that the tenancy did not determine on the determination of the term granted by the lease, and the defendants were wrong-doers in usurping possession and taking the rents and profits of the lands. The only question remaining is as to damages. It is admitted that the defendants have received Rs. 3,126. It is also admitted on both sides that Government Revenue, Rs. 1,147-13-10, has been paid, leaving a balance of Rs. 1,978-2-2. The defendants say that they have paid the landlord Rs. 875 and have incurred costs of collection of the rents. The Rs. 875 were not paid at the request of, or on behalf of the plaintiffs ; they were paid by the defendants on their own behalf wrongly out of the moneys with which the defendants had no legal or equitable right to intermeddle. The payment, if made, is no answer to the plaintiff's claim. The plaintiffs say : You have wrongfully and in violation of my right [15] received Rs. 3,126. The defendants cannot claim being tort-feasors, to deduct the costs of the collection of money they have wrongfully collected. I am of opinion that the plaintiffs-appellants are entitled to a decree for Rs. 1,978-2-2 *plus* interest thereon at the rate of 12 per cent. per annum from the 17th February, 1883, to the date of this decree, and with costs here, and below, and 6 per cent. on the amount of this decree and costs until realization.

TYRRELL, J.—I entirely concur.

Appeal allowed.

10 A. 15=7 A.W.N. (1887) 242.

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APPELLATE CIVIL.

Before Mr. Justice Mahmood.

MATUK DHARI SINGH (*Judgment-debtor*) v. ALI NAQI AND OTHERS (*Decree-holders*).* [5th July, 1887.]

Occupancy tenancy—Sale by occupancy-tenant—Decree in favour of Zamindar against purchaser for mesne profits—Mesne profits how to be assessed.

Where in a suit against an occupancy-tenant and his vendee, the zamindar obtained a decree for cancelment of the deed of sale for possession of the land by ejectment, and for mesne profits from the date of suit to the date of recovery of possession,—*held* that the mesne profits awarded must be assessed as damages against the vendee as a trespasser, and that the proper measure of such damages was not the rent which was payable by the vendor, but the actual market-value of the land for the purpose of letting.

THE facts of this case are sufficiently stated in the judgment of the Court.

Kunwar *Shivanath Sinha* and Munshi *Kashi Prasad* for the appellant.

Mr. *Niblett* for the respondents.

MAHMOOD, J.—In arguing this appeal Mr. *Kashi Prasad*, who has appeared on behalf of Mr. *Shivanath Sinha*, has not pressed the second, third and the fourth grounds of appeal, and has confined his argument to the first and fifth grounds of appeal. I need not, therefore, deal with the case beyond the scope of these grounds in the memorandum of appeal.

The facts necessary to elucidate the questions raised are that one Jageshare and Musammat Abhlakhi were occupancy-tenants of the land to which this suit relates, and on the 20th February, 1882, [16] they executed a sale-deed whereby they conveyed their occupancy tenure to Matuk Dhari Singh, the present appellant before me. Thereupon the present respondents, who are zamindars of the village, sued the vendors and the vendee for the cancellation of the deed of sale, and also for possession of the land, but the prayer for ousting was limited to the ejectment of the vendee on the ground that the sale-deed under which he had purchased the tenure was illegal, by reason of the prohibition contained in s. 9 of the Rent Act. The suit was instituted on the 26th May, 1883, and the plaint included a prayer that the future mesne profits might be awarded as against the defendant-vendee, who was, according to the contention in the plaint, a trespasser upon the land by reason of the invalidity of the sale-deed under which he had entered into possession. The suit was decreed on the 17th January, 1884, but the decree by some oversight did not contain any award as to the future mesne profits claimed in the suit. This circumstance led to an application for amendment of the decree, and the application was granted on 15th January, 1886, whereby, in awarding the remedy, the decree specified that the plaintiffs who had succeeded were also to realize future mesne profits in respect of the land to which the suit related.

The decree having been so amended, the plaintiffs, decree-holders-respondents, before me obtained possession of the land, and on the 28th May, 1886, they presented the present application for execution of their

*Second Appeal, No. 143 of 1887, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 10th January, 1887, modifying a decree of Munshi Shanker Lal, Munsif of Mirzapur, dated the 24th September, 1886.

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decree for the purpose of realizing future mesne profits as the amended decree awarded.

The application was resisted upon the grounds, *inter alia*, that the future mesne profits to which the decree related referred only to a period subsequent to the date of the decree, and not to the period intervening between the institution of the suit and the passing of the decree; and in the next place, that the amount of mesne profits claimed by the decree-holder was excessive.

The decree-holders had claimed in the application for execution Rs. 369-6-0 as mesne profits for the year 1291 fasli; but the lower appellate court has found that the sum was extravagant, and that the real letting market value of the land would be Rs. 148-8-0, and this sum that Court has allowed as the proper amount [17] of mesne profits to which the respondents-decree-holders were entitled under the decree. The lower appellate Court has also held that the period to which such mesne profits related was the period from the date of the institution of the original suit up to the date when the decree-holders obtained possession of the land under the decree. The order of the lower appellate Court gives effect to these views, and it is from that order that this second appeal has been preferred to this Court.

The contention of the parties before me raises two questions for determination:—

1. Whether the future mesne profits awarded by the decree of the 17th January, 1884, as amended on the 15th January, 1886, are to be calculated for the period between the date of the suit up to the actual possession, or is limited to the interval between the passing of that decree and the date of possession of the decree-holders under that decree.

2. Whether in the assessment of mesne profits as damages for the purposes of ss. 211 and 212 of the Code, the mesne profits to be awarded are to be represented by such rents as the occupancy tenants, Jageshar and Musammat Abhlakhi, paid to the zamindars, decree-holders, before the sale-deed of the 20th February, 1882, or by the actual market value of the land for the purposes of letting.

Upon the first point, having considered the matter, I am of opinion that the future mesne profits, which the decree awarded, relate to the whole period intervening between the date of the suit and the date of possession. This view is the same as that taken by the learned Judge of the lower appellate Court. But upon this point it is ingeniously argued by Mr. *Kashi Prasad* on behalf of the appellant, that the application of the 28th May, 1886, which prayed for execution of the decree and mesne profits claimed, contained the Hindustani words " *zar kharcha wa wasilat mobad digri* , " that is to say, the costs and mesne profits subsequent to the passing of the decree of the 17th January, 1884. The original application, which is now before me, contains some words of amendment which seem to have been hurriedly made by the decree-holders' pleader, and which may possibly bear the interpre-[18]tation upon which Mr. *Kashi Prasad* insists. But having considered the matter, I think that the Hindustani words may be so read as to render the expression applicable to future mesne profits, calculated, not from the date of the decree, but from the date of the institution of the suit, namely, 26th May, 1883.

As to the second point, I confess I have had some difficulty in deciding the question because of a *dictum* in an unreported case decided by a Division Bench of this Court. But that case is not on all fours with the present, and I do not think it precludes me from expressing

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my own views as to the matter of the assessment of mesne profits. What is contended is, that according to law in a case of this kind the measure of damages when claimed as mesne profits is the rent which the zamindars could have realized from the occupancy-tenants who have, by reason of an illegal sale, placed the vendee in possession, and that the amount of such damages should not be assessed upon any other principle. It is perfectly true that if the vendors of the deed of the 20th February, 1882, had never executed that deed, and had continued in possession of their occupancy holding, tha plaintiffs-zamindars could not realize more than the rent due by those occupancy-tenants ; but it does not follow therefrom that such rent is the measure of damages. When such damages are claimed against a person who, by taking an illegal sale from such occupancy-tenants, acquires possession of the land, and, as such, holds possession, his position is no better than that of a trespasser. In this case the question has been pressed, because, whilst the decree-holders claimed no less than Rs. 369-6-0 as the amount of mesne profits, the learned Judge of the lower appellate Court has fixed such mesne profits to amount only to Rs. 148-8-0 and the rent payable by the occupancy-tenants-vendors is only Rs. 37-3-0.

It has been ruled by me in the case of *Debi Prasad* v. *Har Dyal* (1) that the act of an occupancy-tenant in making a transfer which would be void under the law as contained in s. 9 of the rent Act, is not such an act as would involve forfeiture of the tenure and ejectment of the occupancy-tenant under cl. (*b*) of s. 93 of the rent Act. The view there expressed has been approved by the present learned Chief Justice of this Court in the case of *Fatima* [19] *Begam* v. *Hansi* (2), and has since been adhered to by me in the more recent case of *Mul Chand* v. *Pitam* (3) : but those views relate more to a case in which the zamindar, in consequence of an invalid transfer made by an occupancy-tenant, seeks to oust such tenant by process of the Rent Court, than to a case of this kind, where a decree has already been made, rightly or wrongly, in a regular suit awarding possession to the zamindars of the holding of an occupancy-tenant, which holding such tenant had invalidly sold. As a Court executing the decree cannot go behind the decree itself, I must take it that the decree now sought to be executed was a decree properly passed, though I am not prepared to express any opinion as to whether the effect of that decree is to terminate the occupancy tenure of Jageshar and Musammat Abhlakhi. So far as the immediate question now under consideration is concerned, it seems to me that the mesne profits awarded must be assessed as damages against the present appellant with reference to his character of having been in possession under an invalid sale-deed, and thus a trespasser upon the land. It seems to me that the proper measure of damages is not the rent which was payable by the occupancy-tenant to the zamindar, a rent subject to its own peculiar statutory limitations, but the proper market value of the land for the purposes of leasing. That value has been found to be Rs. 148-8 per annum ; and this sum, therefore, represents the loss occasioned by the wrongful act of the present appellant in getting into possession of the land under an invalid sale-deed from the occupancy-tenants.

For these reasons, agreeing with the conclusions at which the learned Judge of the lower appellate Court has arrived, I dismiss this appeal with costs.

Appeal dismissed.

(1) 7 A. 691. (2) 9 A. 244.
(3) S.A. No. 1151 of 1886, decided on the 28th June 1887.

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APPELLATE CIVIL.

[20] *Before Mr. Justice Mahmood.*

KALKA PRASAD (*Plaintiff*) *v.* CHANDAN SINGH AND OTHERS (*Defendants.*)* [9th July, 1887.]

Hypothecation—Registration—"Moveable Property"—Act I of 1868 (*General Clauses Act*) s. 2 (6)—*Act III of* 1877 (*Registration Act*), ss. 2, 17—*Act IV of* 1882 (*Transfer of Property Act*), ss. 3, 54—*Small Cause Court suit—Suit for enforcement of hypothecation against moveable property—Act XI of* 1865 (*Small Cause Courts Act*) s. 6—*Transfer of debt—Act IV of* 1882, s. 131—*Notice to debtor.*

Held that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882); and that a suit by the assignee to enforce the hypothecation was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir* (1) followed. *Ram Gopal Shah* v. *Ram Gopal Shah* (2) and *Appavu Pillai* v. *Subraya Muppen* (3) referred to.

Held also that the assignment was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effect of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time when such a notice was received; that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit; and that if he had prior notice, and sold the property to *bona fide* transferees for value without notice either of the charge created by the bond or of the assignment, such transferees would be protected from liability. *Lala Jugdeo Sahai* v. *Brij Behari Lal* (4) referred to.

[R. 16 A 315 (317); 21 B. 60; 9 C.W.N. 14; 13 C.L.J. 641 (644); 7 C.P.L.R. 82; 82 P.R. (1906)=106 P.L.R. 1907.]

THE facts of this case were as follows:—Chandan Singh, defendant No. 1, executed a deed in lieu of Rs. 100 in favour of Muhammad Husain Khan, defendant No. 2, on the 17th July, 1885, and as collateral security hypothecated certain property described in the deed as "*Khet-naishakar*" (literally, "a field of sugarcane"). The deed was duly registered, and subsequently, on the 13th October, 1885, the obligee of the bond, Muhammad Husain Khan, defendant No. 2, made an endorsement on the deed purporting to sell or assign the bond to Kalka Prasad, the plaintiff appellant in this case. The endorsement was, however, neither stamped nor registered. [21] In the meantime Chandan Singh cut down the crops of sugarcane and sold the same to Mendu Khan, defendant No. 3, and Imam Ali, defendant No. 4.

The present suit was commenced by the plaintiff on the 2nd March, 1886, having for its object the recovery of the money due upon the bond of the 17th July, 1885, either from Chandan Singh, defendant No. 1, or his vendees, defendants Nos. 3 and 4, who had purchased the sugarcane. The suit was met by the plea that the endorsement of the 13th October, 1885, being unregistered, could not have transferred the bond to the plaintiff, and this view having been accepted by the Court of first instance (Munsif of Shahjahanpur), the suit was dismissed by that Court without

* Second Appeal, No. 1429 of 1886, from a decree of Maulvi Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated 30th June, 1886, confirming a decree of Maulvi Muhammed Shafi, Munsif of Shajahanpur, dated the 8th April, 1886.

(1) 7 A. 855. (2) 9 W.R. 136. (3) 2 M. H. C. R. 474. (4) 12 C. 505.

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going into the evidence. That Court regarded the bond of the 17th July, 1885, as one hypothecating immoveable property, and, as such, requiring registration under s. 17 of the Registration Act (III of 1877), the absence of such registration vitiating the sale itself under s. 54 of the Transfer of Property Act (IV of 1882). On appeal, the lower appellate Court (District Judge of Shahjahanpur) not only upheld this view, but held that the sale was in itself invalid by reason of the fact that the obligee of the bond of the 17th July, 1885, Muhammad Husain, in transferring it to the plaintiff, Kalka Prasad, never gave notice to the obligor, Chandan Sing, and that therefore the transfer was bad with reference to the provisions of s. 131 of the Transfer of Property Act.

The plaintiff appealed to the High Court. The further facts of the case, and the arguments on both sides, sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Lala *Lalta Prasad*, for the respondents.

MAHMOOD, J. (after stating the facts as above, continued) :—Pandit *Sundar Lal*, in supporting this second appeal, has contended in an able argument, that the judgments of both the lower Courts are erroneous because, in the first place, what was hypothecated in the bond of the 17th July, 1885, was not the land, but only the sugarcane crop of the field, and the hypothecation therefore related only to moveable property within the meaning of cl. (6) of s. 2 of the General Clauses Act (I of 1868), and s. 3 of the Registration [22] Act (III of 1877), and s. 2 of the Transfer of Property Act (IV of 1882), and that therefore no registration of the document was required either by s. 17 of the Registration Act, or s. 54 of the Transfer of Property Act, so far as the endorsement of the 13th October, 1885, transferring the bond to the plaintiff, was concerned.

Before proceeding further, I may at once say that no question arises as to the absence of stamp upon that endorsement, because a penalty thereon has already been taken under s. 34 of the Stamp Act, and the validity of such penalty cannot be questioned in appeal at this stage under the same section.

A preliminary objection has been taken by Mr. *Lalta Prasad*, on behalf of the respondents, to the hearing of this appeal, upon the ground that even if the appellant's contention in this Court be valid and the property hypothecated in the bond now sued upon be taken to be only the crops, and, as such, moveable property, no such suit can be made the subject of second appeal, as it is of the nature of a Small Cause Court suit within the meaning of s. 586 of the Civil Procedure Code; and, in support of this contention, the learned pleader relies upon a ruling of the Madras High Court in *Appavu Pillai* v. *Subroya Muppen* (1), where Scotland, C.J., and Holloway, J., said :—" There is nothing, in our opinion, in the Small Cause Courts Act to prevent the pledgee enforcing his security on moveable property. The Court, having jurisdiction in a suit for the recovery of such property, has clearly jurisdiction to enforce a contract pledging such property." On the other hand, Pandit *Sundar Lal* contends that the suit is not of the nature of the Small Cause Court suit contemplated by s. 6 of Act XI of 1865, and in support of this view he cites the case of *Ram Gopal Shah* v. *Ram Gopal Shah* (2) and also a recent ruling of this Court in *Surajpal Singh* v. *Jairamgir* (3), where my brethren Straight and Tyrrell concurred in holding that a suit which sought to recover

(1) 2 M.H.C.R. 474. (2) 9 W.R. 136. (3) 7 A. 855.

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a sum of money by enforcement of hypothecation of certain cattle by their attachment and sale was a suit not cognizable by the Small Cause Court, and, as such, could be made the subject of an appeal.

[23] In this state of authority, before I can consider the remaining part of the case, I have to determine first—Whether the bond of the 17th July 1885, hypothecated the sugarcane crops only or also the land; secondly—If the hypothecation related only to the crops, whether the present appeal is maintainable at all as a second appeal, within the meaning of s. 586 of the Civil Procedure Code, considering that the amount claimed is below Rs. 500.

Upon the first of these questions I am of opinion, having read the original deed, that what was intended to be hypothecated was not the field itself, but only the crops of that field, and Pandit *Sundar Lal's* contention is sound that such crops are moveable property, and that the deed, therefore, did not require registration. It seems to me that in the expression "*khet-naishakar*," the word *khet*, which means field, was intended to indicate simply a measure, such as in the expression "a pint of milk;" the pint is used simply as a measure, and not as a physical pint by which such measurement is made. "*Khet-naishakar*" means the particular field specified in the deed whereon the *naishakar* or sugarcane which was hypothecated under the bond was standing.

This conclusion is supported by the circumstance that Chandan Singh is only a tenant in the village, the present plaintiff is representing the zamindar in that same village, and the executant of the bond was not to be expected to be dealing with the field or hypothecating the land. This being so, the hypothecation was of moveable property and not of immoveable property.

As to the second question, I have already cited the somewhat conflicting rulings upon which the learned pleaders for the parties have relied, and without expressing any personal opinion of my own upon the particular question, I need only say that, sitting here as a single Judge, I do not think I should, without very strong reasons to the contrary, depart from a Division Bench ruling of this Court, such as that of my brothers Straight and Tyrrell, in *Surajpal Singh* v. *Jairamgir* (1), and I therefore follow it and hold that this was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, and that, therefore, this second appeal did lie to this Court, notwithstanding the provisions of s. 586 of the Civil Procedure Code.

[24] I now proceed to deal with the case itself, having taken cognizance of it in second appeal. In doing so I have to consider the provisions of chapter VIII of the Transfer of Property Act (IV of 1882). I have already shown that the Court of first instance was wrong in dismissing the suit simply for want of registration of the endorsement of the 13th October, 1885, whereby the bond of the 17th July, 1885, was sold to the present plaintiff. The lower appellate Court's view virtually amounts to holding that the plaintiff, not having proved that he or his vendor gave notice of the transfer to the debtor, Chandan, the transfer itself was void. This view seems to me to be erroneous in law. In the Common Law of England the assignee of a debt was in old days bound to sue in the name of his assignor, a procedure which was inconsistent with the fact of the transfer, and inconsistent also with the rules of equity applicable to such matters.

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(1) 7 A. 855.

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What the doctrines of equity required was that a debtor, when the obligation which he owed to his obligee had been transferred by the latter to another person, should be entitled to a notice of such transfer in order to be protected from having to pay the money in fulfilment of the obligation over again to the assignee, after having paid to the original assignor. That rule has found formulation in our statute law in s. 131 of the Transfer of Property Act, which says:—"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to, or otherwise aware of, such transfer, and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of a transfer, with the debt or property, shall be valid as against such transfer."

This is the quintessence of what Courts of Equity in England have repeatedly held, and the effect of this section is clear enough, and it would govern the transfer of the bond of the 17th July, 1885, under the endorsement of the 13th October, 1885, purporting to sell the same bond to the present plaintiff. It is necessary to bear in mind, in the first place, that although this section expressly renders necessary the giving of express notice to the debtor, and although it suspends [25] the operation of such a transfer as against such a debtor up to the time when such notice is given to the debtor, it contains no provisions invalidating such transfer when no such notice is given. That is to say, in other words, there is nothing in this section which would justify the contention that the transfer is *ab initio* void for want of such notice as that section contemplates.

All that the section requires is that when an obligation is transferred by the obligee to another person, the obligor who has to fulfil such obligation is not to be subject to any liability thereunder at the instance of the transferee without such debtor having received notice of the transfer. As to the notice itself, the section does not limit that to "express notice," but to the broader doctrine of notice as understood in equity, because the words of the section are—"unless he is a party to or otherwise aware of such transfer." The last phrase is broad enough to bring under the purview of the section all cases in which the knowledge of the transfer in an ascertainable form has reached the debtor. The latter part of the section is, of course, intended to protect a debtor who, without knowledge of the transfer of the obligation by the obligee to another person, fulfils the obligation, and is subsequently sued by the assignee of such an obligee as fraudulently accepts the fulfilment notwithstanding such assignment; and the same rule is also applied to persons, other than the debtor himself, and those who, being *bona fide* persons, acquire rights or any beneficial interest in moveable property in the absence of any kind of notice of the transfer of the debt by the original obligee to another person.

These views are applicable to the present case; because the mere absence of any express notice to Chandan on the one hand would not vitiate the endorsement of the 13th October, 1885, whereby the bond was sold to the present plaintiff, Kalka Prasad, although the operation of such transfer, as against Chandan, would be regulated in accordance with the time when the said Chandan obtained knowledge as to such transfer. Similarly, even if Chandan had notice of the transfer, and sold the moveable property subject to the plaintiff's bond to Mendu Khan, defendant No. 3, and Imam Ali, defendant No. 4, these two persons in the position of *bona fide* transferees for value without notice either of the charge

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[26] which the bond of the 17th July, 1885, may have created upon the crops or of the transfer of that bond in favour of the plaintiff, would undoubtedly be protected from any liability arising out of the action of Chandan in selling the sugarcane to them under such circumstances.

But the pleadings of the parties in this case raised questions of fact which required determination before the case could have been finally disposed of. First of all it was pleaded by Chandan Singh, the original obligor of the bond of the 17th July, 1885, that he had paid up the amount due under the bond to the original obligee, Muhammad Husain, and that the transfer of the 13th October, 1885, was not real but simply a colourable transaction in which no consideration passed, and that Kalka Prasad was not the real purchaser of the bond, and, as such, not entitled to maintain the action. There was no allegation as to any information having been given to Chandan Singh in respect of the alleged transfer, and the suit appears to have been brought without any kind of notice having been issued as required by s. 131 of the Transfer of Property Act.

The lower Courts, however, taking the erroneous view of law which they have done in the case, have not gone into the merits. The view of the lower appellate Court as to the absence of notice is itself based upon a misapprehension of the interpretation of s. 131 of the Transfer of Property Act. I have already said that that section does not vitiate the transfer of a debt, but that it only postpones its operation in accordance with the date of the knowledge of such transfer reaching the debtor. In a recent case, *Lala Jugdeo Sahai* v. *Brij Behari Lal* (1), a Division Bench of the Calcutta High Court had to consider the exact effect of that section, and the learned Judges there held, in conformity with the cases cited in White and Tudor's Leading Cases, 4th edition, Vol. II, pp. 776-777, as notes to the leading case of *Ryall* v. *Rowles*, that whilst notice is not a condition precedent to the validity of a transfer of a debt such as contemplated by s. 131 of the Transfer of Property Act, the section only fixes the time with reference to notice when such transfer would come into operation as against [27] the debtor. The case before the learned Judges was one where an assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee, and no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act. The learned Judges held that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it. I agree in this view of the law, and I hold that in the present case the mere absence of an express notice having been served by the plaintiff would not render the action unmaintainable.

Under these circumstances, I hold that neither of the Courts below has tried the case upon the merits, and in my opinion the proper course is to decree this appeal, to set aside the decrees of both the lower Courts, and to remand the case for trial *de novo* on the merits, with reference to the observations which I have made. The remand will be under s. 562 of the Civil Procedure Code, and under the last part of that section I may point out that the Court should try, in the first place, whether the assignment of the 13th October, 1885, was a real and genuine assignment or not; and in the second place, whether Chandan Singh actually had paid the money due on the bond of the 17th July, 1885, to Muhammad Husain, either before such assignment or thereafter at a time when he had

(1) 12 C. 505.

no notice of the assignment. Thirdly, whether the defendants Mendu Khan and Imam Ali, Nos. 3 and 4, had no notice either of the sugarcane crops being hypothecated under the bond of the 17th July, 1885, or of that bond having been transferred by Muhammad Husain to the present plaintiff, and whether their action in purchasing the crops was *bona fide* or not.

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The costs will abide the result. *Issues remitted.*

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10 A. 28 = 7 A.W.N. (1887) 234.

APPELLATE CIVIL.

[28] *Before Mr. Justice Mahmood.*

MUHAMMAD ABDUL HAI AND ANOTHER (*Plaintiffs*) v. SHEO BISHAL RAI (*Defendant*).* [12th July, 1887.]

Practice—Remand by lower appellate Court under Civil Procedure Code. s. 566—No objections filed by plaintiffs under s. 567—Objections raised for the first time in second appeal by plaintiffs—Such objections not entertainable.

Objections which might have been, but were not, made under s. 567 of the Civil Procedure Code in a lower appellate Court to the findings on remand of the Court of first instance, cannot be raised for the first time as grounds of second appeal from the lower appellate Court's decree.

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Shah *Asad Ali*, for the appellants.

Lala *Juala Prasad*, for the respondent.

MAHMOOD, J.—This was an action for recovery of rent, and was dealt with by the Court of first instance in a judgment, dated the 16th February, 1885, the effect of which was to decree the claim in part. From that decree the plaintiffs appealed to the lower appellate Court, and that Court, by an order dated the 4th September, 1885, remanded the case under s. 566 for findings on no less then nine issues. The Court of first instance, in an elaborote order of the 8th January, 1886, recorded findings upon these issues, and re-submitted these to the lower appellate Court. To these findings no objection was taken by the present plaintiffs-appellants, but the defendant-respondent before me took objections, and the learned Judge of the lower appellate Court, in dealing with them, disallowed them for the reasons stated in his judgment, and upholding the findings of the Court of first instance, dismissed the appeal on the 29th May, 1886.

This appeal has been preferred, not by the defendants, whose objections to the findings of the first Court were disallowed by the Judge of the lower appellate Court, but by the plaintiffs, who never took any objections at all to the findings of the first Court upon remand. The grounds now urged are such as might have been taken as objections, s. 567 of the Code, to the findings of the [29] Court of first instance, upon remand. These objections never having been urged before the lower appellate Court, the Court has naturally not dealt with these points, taking it for granted that the present (plaintiffs-appellants) had no objections to urge.

Under these circumstances, I do not think that, hearing this appeal as a second appeal, I can for the first time allow those objections to be taken here as grounds of second appeal.

The appeal is dismissed with costs. *Appeal dismissed.*

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* Second Appeal, No. 1691, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 4th September, 1885, confirming a decree of J. E. Gill, Esq., Assistant Collector of Ghazipur, dated the 16th February, 1885.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

LACHMAN DAS (*Plaintiff*) v. CHATER AND ANOTHER (*Defendants*).*
[21st July, 1887.]

Administration bond—Breach of condition—Compensation—Act X of 1865 (*Succession Act*), ss. 256, 257—*Act IX of* 1872 (*Contract Act*), s. 74, *exception.*

An administration-bond executed by an administrator in accordance with s. 256 of the Succession Act is not an instrument of the kind referred to in the exception to s. 74 of the Contract Act, so as to make the obligor liable, upon breach of the condition thereof to pay the whole amount mentioned therein ; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond.

Held, therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach.

[R., 16 M. 474.]

THE facts of this case were as follows :—On the 23rd January, 1883, one Marcar Chater took out letters of administration to the estate of one J. R. Shircore, and on the same date executed an administration-bond in favour of the District Judge of Agra, in accordance with the provisions of s. 256 of the Succession Act (X of 1865). One John Owen joined in the execution of the bond as surety. The amount of the bond was Rs. 7,000 ; and the executants made themselves jointly and severally liable to the District Judge of Agra for the time being, engaging for the due collection and administration of the estate according to law, and to make a true inventory of the estate and to exhibit the same in the District Court on or before the 22nd January, 1884.

[30] Application was subsequently made to the District Judge by certain creditors of the estate, namely, the plaintiff, Seth Lachman Das, Chhotay Lal, Nand Ram, and Hardwar Nath, under s. 257 of the Succession Act, representing that the engagement to file the inventory on or before the 22nd January, 1885, had not been kept ; and by an order dated the 15th June, 1885, the Judge assigned the bond to the plaintiff, Seth Lachman Das, on the ground that the conditions of the bond had been broken in the following respects :—(i) that the inventory had not been exhibited within the time prescribed, (ii) that accounts had not been properly presented, (iii) that the assets had not been applied within a reasonable time to the satisfaction of the claims of creditors. The plaintiff then brought the present suit against Chater and Owen, to recover " for himself and as trustee for all persons interested in the estate of the deceased," Rs. 7,000, the amount of the bond. The suit was instituted in the Court of the Subordinate Judge of Agra on the 5th December, 1885. Meanwhile, on the 4th February, 1885, the defendants had filed tke inventory of the estate in the Court of the District Judge.

The defence was in effect that the engagements of the bond had been substantially fulfilled, that the estate had been duly administered and all the debts paid except that of the plaintiff and one other creditor who had refused to accept the dividends offered to them, that the entire assets

* First Appeal No. 106 of 1886, from a decree of Babu Promoda Churn Banerji, Subordinate Judge of Agra, dated the 17th March, 1886.

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were Rs. 3,300, and that the plaintiff could not in any event recover more than that amount.

The substantial portion of the Subordinate Judge's judgment was as follows :—

"There can be no doubt that an inventory was not exhibited on or before the 22nd January, 1884, as required by the bond, or within six months from the grant, as required by s. 277 of the Indian Succession Act. And it is also an undisputed fact that the accounts were not presented in proper form. It was not until the 4th February, 1885, that the administrator, Mr. Chater, submitted an inventory and an account to the District Judge through the post. The requirements of the rules prescribed by the High Court for the presentation of inventories and accounts (Civil Rules and Orders, p. 146) were not fulfilled in any respect.

[31] "It is contended that mere failure to submit an inventory and accounts in time was not sufficient to pronounce the bond forfeited, and this intention seems to be valid. In matters like these, the practice of the Courts in England should be the best guide. It was held in *Crowley* v. *Chipp* (1), quoted in Williams on Executors and Administrators, p. 511, that 'the Court might, in its discretion, decline to make any order, notwithstanding it was clear that there had been a breach of the bond. On that occasion an administratrix had not exhibited an inventory and accounts within the time assigned by her administration-bond, but no proceedings had been instituted against her for the purpose of calling for an inventory. An application was made to the Ecclesiastical Court by a creditor of the deceased, for an order that the bond might be 'attended with,' for the purpose of being sued upon at law; and it was contended that since the non-delivery of the inventory at or before the day specified in the bond clearly constituted a breach of the condition, the Court ought to order the bond to be delivered out. But Sir H. Jenner Fust said that he should be extremely unwilling in any case upon the mere non-delivery of an inventory to allow the bond to be, attended with,' and he refused to make any order until the parties should have cited the administratrix to bring in an inventory. She afterwards brought one in, whereupon the Court dismissed the parties. In another case, cited at page 518, the Court refused to permit the bond to be put in suit, on the ground that an inventory and account had not been called for from the administrator. These cases are clear authorities in support of the defendants' contention that the mere non-delivery of an inventory and account do not justify the forfeiture of the bond. The reasons which would induce a forfeiture appear to be that' the administrator has not delivered a true and perfect inventory, or that he has not made a just and true account.' (Williams, page 546.) In this case, when the administrator omitted to submit his inventory and account, the proper course would have been, as was done in the case cited above, to call upon him to file an inventory. But this was not done. He did subsequently file an inventory and accounts. They were not, it is true, verified before a Zilla Judge or Justice of the Peace, but the defendant, Mr. Chater, has, in this suit sworn to their correctness. He has [32] pledged his oath, that the inventory is true and complete, and that the account is true and correct. The plaintiff has not attempted to show that the defendant's allegations are untrue in regard to any item except one, namely, Mr. Shircore's law books. It is said that the books were valuable, and were removed to Calcutta in order that they might fetch a

(1) 1. Curt., 458.

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higher price. Mr. Chater has sworn that he sent the books to Mackenzie Lyall and Co., a well-known firm of auctioneers in Calcutta, for sale, and that he has entered in his accounts the amount which was received by him as the proceeds of the sale. There is nothing to contradict his sworn statement; and although the books may have been sold for less than their proper value, it cannot be said that he was at all to blame in the matter. The correctness of no other item has been impugned. I accordingly hold that the inventory and accounts submitted by the defendants are true and correct, and that there has been no breach of the conditions of the bond in respect of inventory and accounts such as to induce a forfeiture of it.

"The only other ground on which the bond has been pronounced forfeited is that the assets have not been applied to the payment of debts within a reasonable time. This breach is not, it seems, a valid ground for forfeiture. It is laid down in Williams on Executors and Administrators, page 547, that "it is no ground of forfeiture that the administrator has not paid the debts of the intestate, and therefore a creditor could not sue upon the bond and assign for breach the non-payment of a debt to him. There has not, it appears, been any culpable negligence on the part of the defendant in regard to the payment of debts. The defendant swears that, shortly after the death of Mr. Shircore, his household effects were sold in Agra. An advertisement was published in the *Pioneer*, and the claims of some of the creditors were received. In 1884, the defendant states he was in bad health and was obliged to go to Darjeeling, and therefore nothing was done. That he did actually go to Darjeeling also appears from the plaintiff's application to the District Judge, dated 4th November, 1884. In February, 1885, the defendant published a second advertisement in the *Pioneer*, and several claimants appeared. Among these were the plaintiffs Seth Lachhman Das and Hira Lal, proprietor of the firm of Chhotay Lal, Nand Ram, who sent to the defendant affida-[33]vits in support of their claims in March, 1885. In August, 1885, the defendant gave notice to all the creditors whose claims had been admitted, and among the persons to whom notices were given were the plaintiffs, Seth Luchman Das, Chhotay Lal, Nand Ram and Hardwar Nath, the three persons who had moved the District Judge to assign the bond. All the registered creditors, including Hardwar Nath, have received dividends and granted receipts......The only persons who refused to do so were the plaintiff and Hira Lal, proprietor of the firm Chhotay Lal, Nand Ram. So that, except two of the creditors, the rest have been paid. The non-payment to these creditors is owing to their own laches. They themselves neglected to send in their claims, although all creditors had been called upon to do so, and it is therefore their own fault that they have not been paid. Besides, 'a bond could only be enforced for the general benefit of persons interested in the estate of the intestate, and not for the non-payment of a particular debt.' (William on Executors, p. 549.) As all the persons interested in the estate except two have been paid, the bond cannot be enforced on the ground that these two persons have not been paid. For the above reasons, the grounds for which the bond was forfeited were not such as could induce its forfeiture."

The Court accordingly dismissed the suit. The plaintiff appealed to the High Court.

Mr. *G.T. Spankie* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *J.E. Howard*, for the respondents.

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EDGE, C. J.—This is an action on an administration-bond. The defendants are the administrators; the bond was for Rs. 7,000, and one of the conditions was that the administrators should make a true inventory of the estate and exhibit the same at the Court of the Judge of Agra on or before the 22nd January, 1884. The condition to which I have referred is the one relied on in this appeal. As a matter of fact the administrator did not exhibit his inventory in the Court of Agra until February, 1885. The bond was a bond given in accordance with s. 256 of the Indian Succession Act. It was assigned to the plaintiff under s. 257 of the Act. The case came on for trial before the Subordinate Judge of Agra. He [34] dismissed the suit, thinking that no substantial breach of the bond had been proved. I am of opinion that the failure to exhibit the inventory was a breach of a condition of the bond. It is an important matter in the administration of an estate that the administrator should file his account in proper time. It is contended that as there had been a breach which has been admitted, of the bond, the amount recoverable was the sum of Rs. 7,000 mentioned in the bond. It is said that the bond in question was one which came within the exception of s. 74 of the Contract Act, and consequently the whole sum mentioned in the bond became payable on the breach. I think the bond referred to in that exception is of the class of which an illustration is given in the illustrations to the section, and that the bond in question does not come within that exception. If an administration-bond came within that exception, and on breach of any of the conditions of the bond the whole amount of the bond became payable, the result might be that the creditors and heirs of an intestate might receive more, so far as the creditors were concerned, than their debts, and so far as the heirs were concerned, than the balance of the estate in the hands of the administrators. To take a case, assume that an administrator having given a bond like that in this case has fully administered the estate and paid all the creditors the utmost farthing owing to them and has handed over to the legal representatives the balance which remained in his hands after deduction of the debts of the intestate. There would be in that case no creditors interested in the performance of the conditions of the bond. By interested I mean pecuniarily interested, and the only person who could be interested would be the heir; but neither the creditor nor the heir would have suffered loss by breach of the conditions. If under such circumstances the assignee of the bond would be entitled to recover the full amount mentioned in the bond, what was to become of it? It could not be paid to the creditors, who had no longer any interest and had suffered no loss. The plaintiff could not retain it himself, unless he could show that he had been damnified. The heir could not be entitled in justice or common sense to be paid money recovered as compensation for a damage he had not suffered. It appears to me that in an action brought on the breach of a bond of this description the plaintiff [35] cannot recover more damage than he has proved to have resulted to himself or those interested in the bond on which he relies. In this case the plaintiff has not, nor has any one else, suffered any damage whatever. The inconvenience which the plaintiff and the others may have suffered was not caused by the breach complained of, but by reason of their having failed to send in their claims and accept the dividends which were offered to them. I am of opinion that the appeal must be dismissed with costs, and I think it is a case that should never have been brought. It is not contended that the inventory when filed was other than true and complete, nor is it contended that the account

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was not correct. This being so, the delay in exhibiting the inventory in the District Judge's office, though it would be reprehensible if it could have been avoided, would not, I think, by itself entitle the appellant to succeed in a case like the present to recover the penalty of the administration-bond.

TYRRELL, J.—I concur.

Appeal dismissed.

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10 A. 35 = 7 A.W.N. (1887) 262.

APPELLATE CIVIL.

Before Sir John Edge, Kt. Chief Justice, and Mr. Justice Mahmood.

THE DELHI AND LONDON BANK (*Plaintiff*) v. THE UNCOVENANTED SERVICE BANK BAREILLY (*Defendant*).* [16th July, 1887.]

Execution of decree—Sale in execution—Rateable distribution among decree-holders—Civil Procedure Code s. 295—"Decrees for money"—"Same judgment-debtor"—Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.

U held a money-decree against *B*, *P* and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R* and *S*, which so far as *P*, *R*, and *S* were concerned, was a decree against enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U's* execution was rejected.

Held that there being no question of fraud in the case *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code because it directed sale of the property of the other judgment debtors; and that [36] the fact that there were four judgment-debtors in *D's* decree and only three in *U's* would not deprive *D* of the right to share rateably. *Shumbhoo Nath Poddar* v. *Lucky Nath Dey* (1) referred to. *Deboki Nundun Sen* v. *Hart* (2), *Jagat Narain Pal* v. *Dhundhey Rai* (3), and *Hart* v. *Tara Prasanno Mukerji* (4), distinguished.

[R., 8 O.C. 86 (89).]

This was a suit to recover a proportionate share of the assets realized in execution of a decree held by the defendants, the plaintiffs having previously made an application in the execution department to the same effect under s. 295 of the Civil Procedure Code, and the application having been rejected. The facts of the case are sufficiently stated in the judgment of Edge, C.J.

Mr. *G.T. Spankie* and Mr. *W.M. Colvin*, for the appellants.

The Hon. *T. Conlan* and Maulvi *Abdul Majid*, for respondents.

EDGE, C.J.—In this action the plaintiffs claim under s. 295 of the Civil Procedure Code to share rateably in the proceeds of a sale effected in the execution of decrees of the defendants. The facts are shortly these:—On the 9th August, 1884, the defendants obtained two money decrees against Balmukand, Ram Sarup and Piare Lal. On the 19th January, 1885, the plaintiffs obtained two decrees against the same persons and one Rao Sahib Singh.

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* Second appeal, No. 617 of 1886, from a decree of J. Sladen, Esq., District Judge of Bareilly, dated the 31st March, 1886, reversing a decree of Maulvi Muhammad Qayum, Subordinate Judge of Bareilly, dated the 27th November, 1885.

(1) 9 C. 920. (2) 12 C. 298. (3) 5 A. 566. (4) 11 C. 718.

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The defendants obtained an attachment under their decrees against the property of Balmukand and obtained an order that the property should be brought to sale on the 20th April, 1885. On the 10th April, 1885, the plaintiff applied for an attachment under the decrees against the property of Balmukand, and on the 16th April following they applied for an order to enable them to share rateably in the proceeds of the defendants' execution.

The Subordinate Judge decreed the plaintiffs' claim. On appeal, the District Judge of Bareilly dismissed the plaintiffs' suit. From that dismissal the present appeal is brought. The decrees of the plaintiffs, obtained on the 19th January, 1885, did not specifically decree that any property of Balmukand should be brought to sale. It is not necessary to consider the nature of those decrees as affecting the other judgment-debtors or their property, further than to say that the plaintiffs could have executed, if they had chosen, their decrees against the property of the other people affected directly by [37] the decrees, that is to say, against the property of other judgment-debtors specifically ordered to be sold by those decrees.

On behalf of the defendants it has been contended that the decrees in question of the plaintiffs were not decrees for money within the meaning of s. 295 of the Civil Procedure Code, even against Balmukand, because under them the lien of the plaintiffs could have been enforced against the judgment-debtors, other than Balmukand.

It was also contended that the decrees in question were not against the same judgment-debtor, because there was a fourth judgment-debtor, Rao Sahib Singh, affected by the plaintiffs' decrees, who was not affected by the decrees of the defendants.

It was also contended that the plaintiffs were bound in law before having recourse against the property of Balmukand to proceed against the hypothecated property of the other judgment-debtors. It was also urged on behalf of the defendants that the plaintiffs sold and purchased some of the property of the other judgment-debtors decreed to be sold by their decrees. The latter point is one as to which there has been no evidence brought to our attention. Apparently there is no evidence as to when or for what amount, whether reasonable or otherwise, these alleged sales and purchases took place. In fact, we have got no information on which we can act as to the sales. The question was not raised in the written statement, and is one which, even if there had been any evidence in support of it, would merely relate to the amount in respect of which the plaintiffs could claim to share rateably. In support of the contention that the plaintiffs were bound in law to have recourse first to the property of the other judgment-debtors directed to be sold under their decrees, the defendants rely on the case of *Wali Muhammad* v. *Turab Ali* (1) decided by my brother Mahmood and Mr. Justice Straight. We need not discuss that case. It has no bearing on this case. We have in *Johari Mal* v. *Sant Lal* (2) explained that case. It was obviously one of fraud, which required the interference of the equitable jurisdiction of this Court.

No question of fraud arises in this case ; therefore there is nothing in law or in equity to prevent the plaintiffs from enforcing their decrees in the first instance against the property of Balmukand. [38] It is obvious that as far as Balmukand was concerned the plaintiffs' decrees were money-decrees. Those decrees did not lose their character as money-

(1) 4 A. 497. (2) 9 A. 484.

1887 JULY 16. — APPELLATE CIVIL. — 10 A. 35 = 7 A.W.N. (1887) 262.

decrees against Balmukand because by them a sale of the property of the other judgment-debtors was decreed. We are of opinion that the plaintiffs' decrees, so far as Balmukand was concerned, were decrees for money within the meaning of s. 295 of the Code of Civil Procedure. We express no opinion as to whether there were or were not as against the other judgment-debtors decrees for money within the meaning of that section. That is a question which we need not decide here, as it is not necessary for the decision of this appeal.

The remaining question is whether the fact that there are four judgment-debtors in the plaintiffs' decrees and only three judgment-debtors in the defendants' decrees would deprive the plaintiffs of their right to share rateably.

A precisely similar question was decided by *Shumbhoo Nath Podder* v. *Lucky Nath Dey* (1). I agree with that decision, and am of opinion that the plaintiffs are entitled to share rateably in the proceeds of the defendants' decrees. The case of *Deboki Nunden Sun* v. *Hart* (2) is not in point and does not conflict with the view of the law which I have expressed. That was a case, to put it shortly, in which the property sold was the joint property of two judgment-debtors, whereas the decree in respect of which the right to claim rateably was made, was a decree against one of the judgment-debtors only. The case of *Jagat Narain Pal* v. *Dhundhey Rai* (3) has been pressed upon us. The facts there are not similar to those of this case, consequently that case does not affect our judgment in this.

The case of *Hart* v. *Tara Prasanna Mukerji* (4) has been relied on by each side. We do not think that, looking at the facts of the case, it is in point. In the result the appeal must be allowed with costs. The decree of the lower appellate Court is set aside and the case remanded under s. 562 of the Civil Procedure Code, to be disposed of by the Judge of Bareilly with reference to the observations made in this judgment. The costs will abide the result.

MAHMOOD, J.—I concur.

Cause remanded.

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10 A. 39 = 7 A.W.N. (1887) 264.

[39] CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* DEOKINANDAN. [18th July, 1887.]

Criminal Procedure Code, s. 198—" Complaint "—Criminal Procedure Code, ss. 4, 200—Charge of defamation not made in complaint, but added in subsequent examination.

A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal " complaint " made by an aggrieved person within the meaning of ss. 4 (*a*) and 192, so as to enable the Magistrate to take cognizance of the offence. *Queen-Empress* v. *Kallu* (5) referred to.

[R., Rat. Unrep. Crim. Cas. 584 (585).]

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(1) 9 C. 920. (2) 12 C. 298. (3) 5 A. 566. (4) 11 C. 718. (5) 5 A. 233.

1887 JULY 18 — CRIMINAL REVISIONAL. — 10 A. 39= 7 A.W.N. (1887) 264.

THE petitioner in this case was convicted and sentenced by the Joint Magistrate of Allahabad, for defamation (s. 500 of the Penal Code), under the following circumstances:—On the 27th January, 1887, one Baijnath filed a written complaint in the Court of the Joint Magistrate against the petitioner, who was the editor of the *Prag Shamachar* newspaper, and between whom and the complainant enmity existed owing to the fact that each had started a school in Allahabad and regarded the other as a rival. The complaint as committed to writing by the Magistrate was headed "charge under ss. 352 and 504 of the Penal Code." It was to the effect that the accused was "in the habit of publishing various kinds of false and libellous matters in respect of the complainant in his paper;" that in particular on the 22nd January, he had falsely accused the complainant of an assault; that on the 26th, the parties having met, a dispute began, in the course of which the complainant said, "If you will write more libellous matter, I will bring an action against you," and that the accused (with two other persons) then used insulting language and tried to strike him.

On the following day, the Joint Magistrate having examined the complainant on oath, passed the following order:—"Let summons issue under ss. 506 and 500 of the Penal Code."

The accused having been convicted and sentenced as above stated, appealed to the Sessions Judge of Allahabad, the principal ground of appeal being that there having been no legal complaint [40] of an offence punishable under s. 500 of the Penal Code, there could be no trial and conviction under that section, with reference to s. 298 of the Criminal Procedure Code. Upon this point, the Sessions Judge in his judgment made the following remarks:—

"The first contention in appeal is that the Magistrate had no jurisdiction, because, as the offence of which the appellant has been convicted falls under chapter XXI of the Penal Code, it was essential that a complaint should be made by the person aggrieved, and it is alleged that no such offence was made. The charge was brought in the petition of complaint under ss. 352 and 504 of the Penal Code (assault and insult calculated to provoke a breach of the peace), but after examining the complainant on oath, as required by s. 200 of the Criminal Procedure Code, the Magistrate considered that the facts alleged disclosed a libel, and that the libel was what the prosecutor really wished to complain of. The accused was therefore charged under ss. 500 and 504 of the Penal Code. It is argued for the appellant that the prosecutor's original intention to complain only of assault and insult is evidenced by his saying (see petition of complaint) that if he *continued* to publish defamatory matter against him he would proceed against him, and by his calling witnesses only to prove the assault, in the first instance. But whatever the original intention may have been, it is enough that before the Magistrate the prosecutor distinctly declared his desire to prosecute the accused for defamation. It is further argued that the statement on oath under s. 200 of the Criminal Procedure Code is not "a complaint" in the sense of s. 4 of the Act, and reference is made to the ruling in *Queen Empress* v. *Kallu* (1). It appears to me that the statement on oath is in elucidation and confirmation of the opening petition, and is a part of the "complaint" laid in the latter. In the case quoted it does not appear who made the first report to the police: possibly the chaukidar and not the husband. But, however, this may be there is a difference between

(1) 5 A. 233.

1887 JULY 18. — CRIMINAL, REVISIONAL. — 10 A. 39 = 7 A.W.N. (1887) 264.

proceedings initiated in Court by the aggrieved person himself and a case sent up for trial by the police, in which the person whose complaint in Court was necessary to legalize the prosecution appears only as a witness. I am theefore of opinion that the provisions of s. 198 of the Criminal Proce- [41] dure Code have been observed." In the result, the Sessions Judge affirmed the conviction, but reduced the sentence from two months' rigorous imprisonment and Rs. 250 fine to one month's simple imprisonment and Rs. 100 fine.

The accused applied to the High Court for revision of the Sessions Judge's order.

Babu *Dwarka Nath Banerji* and Babu *Durga Charan Benerji*, for the petitioner.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

BRODHURST, J.—This is an application for revision of the order of the Sessions Judge of Allahabad, dated the 3rd June, 1887, by which he, on an appeal against the order of the Joint Magistrate of Allahabad, dated the 28th March, 1887, affirmed the conviction of the present petitioner under s. 500 of the Indian Penal Code, but reduced his sentence from two months' simple imprisonment and fine of Rs. 250, or in default two months' further simple imprisonment, to one month's simple imprisonment and a fine of Rs. 100, or in default to one month's further simple imprisonment.

Three grounds for revision have been taken. The first of these is, "Because there having been no legal complaint there could be no trial and conviction under s. 500." It is pointed out by Mr. *Banerji*, counsel for the petitioner, that the offence of defamation punishable under s. 500 of the Indian Penal Code is one of the offences mentioned in s. 345 of the Criminal Procedure Code as compoundable; that s. 500 of the Penal Code is in chapter XXI of that Code; that it is enacted in s. 198 of the Criminal Procedure Code, that "no Court shall take cognizance of an offence falling under chapter XIX or chapter XXI of the Indian Penal Code or under ss. 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence;" that "complaint," as defined in s. 4 of the Criminal Procedure Code, "means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but does not include the report of a Police officer;" that in this case the complaint was made in writing, but that it does not contain a charge under s. 500 of the Penal Code, and [42] that the allusion made in it to "libellous matter" is merely in support of the charges under ss. 352 and 504 of the Penal Code that were there actually made, and Mr. *Banerji* referred to the judgment of my brother Straight in the case of *Queen-Empress* v. *Kallu* (1) as sustaining his plea.

I think Mr. *Banerji's* argument is sound. The libellous matters referred to were published in the *Prag Samachar* of the 22nd January, 1887. The complainant did not on the publication of the paragraph take immediate action. He did not make any objection until he happened to meet the accused in the street. His complaint is, dated the 27th January, 1887; the charges preferred in it are of offences under ss. 352 and 504 of the Penal Code, and these offences are alleged to have been committed on the 26th January, 1887, by Pandit Deokinandan, Brahmin, Editor of the *Prag Samachar*, Jagrup Brahmin and Ram Bakhsh, Sonar.

(1) 5 A. 233.

In the complaint there is this passage :—" On the 26th January, 1887, all of the accused met the complainant in muhalia Atarsua ; the complainant asked the accused No. 1 why he was publishing libellous matters in respect of him, and told him that he should not do so. Thereupon the said accused observed that unless he, the complainant, closed his school he would publish still more defamatory matter in respect of him ; that he, complainant, replied. 'If you write still more libellous matters against me, I will bring an action against you.' Thereupon all of the accused became angry and used abusive language towards him, and when he remonstrated they raised sticks with the intention of assaulting him and approached near to him calling out 'Strike ! Strike !' If the complainant had not moved away and the witnesses had not interfered, all of the accused would undoubtedly have assaulted him."

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The cause of enmity is then alluded to, and the petition concludes as follows :—" The complainant therefore prays that after enquiry the accused persons may be punished."

From the abovementioned passage in the complaint, it is, I think, quite clear that the complainant did not in the first instance prefer a charge of defamation, an offence punishable under s. 500 of the Indian Penal Code, against Pandit Deokinandan, the present **[43]** petitioner, but merely charged him and the other two accused persons with offences under ss. 352 and 504 of the Penal Code, and prayed that all of them might be punished for those offences. Summonses were issued, not under ss. 352 and 504, but under ss. 500 and 506 of the Penal Code.

In my opinion, the complainant at the time that he presented his petition of the 27th January last had no intention whatever of prosecuting all or any of the three accused persons on account of the paragraph alluded to as having been published in the *Prag Samachar* of the 2nd *idem*. The ruling referred to is in point, and the evidence of the complainant, which was given on a date subsequent to that on which the petition was filed, does not, I think, cure the defect in the complaint.

The Joint Magistrate has in is judgment observed :—" The mere omission to include in the complaint a charge under s. 500 of the Code could not invalidate the procedure of the Court. It very frequently happens that the actual offences complained of are not correctly stated in complaints, due on the one hand to the want of acquaintance petition-writers and pleaders' clerks have with the law, and on the other to the inaccurate way in which complainants state their grievances. Along with his complaint the prosecutor filed a copy of the *Prag Samachar* of the 22nd January, 1887, complaining of the libel complained of. The Court by its action was therefore only taking up the actual complaint, and on these grounds I overrule the legal objection raised."

I do not concur in these remarks. If a charge of defamation can, subsequent to the presentation of the complaint, be added by the Magistrate on statements made by the complainant in his evidence, whether of his own accord or with reference to suggestions made by the Magistrate, I fail to see what difference of procedure there can be between the classes of cases referred to in ss. 198 and 199 of the Criminal Procedure Code and other cases not included in those sections.

I think that the first ground for revision is valid, and I am therefore constrained to set aside the conviction and sentence, and to direct that the fine, if realized, be refunded.

Conviction set aside.

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7 A W.N.
(1887) 232.

10 A. 44=7 A.W.N. (1887) 232.

[44] CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* ZAKIUDDIN AND ANOTHER. [22nd June, 1887.]

Public nuisance—Slaughter of kine by Muhammadans on their own property—Act XLV of 1860 (*Penal Code*), *ss.* 268, 290.

A person wilfully slaughtering cattle in a public street, so that the slaughter could be heard and seen by the passers-by, would commit an offence punishable under s. 290 of Penal Code.

But where certain Muhammadans, for a religious purpose, killed and cut up two cows before sunrise in a private compound, partly visible from a public road, and the killing of one of the cows only was witnessed by one Hindu—*held* that the circumstances proved did not amount to the commission of a public nuisance as defined in section 268 of the Code.

Muttumira v. *Queen-Empress* (1) referred to.

[R., 30 A. 181=5 A.L.J. 147 (152)=A.W.N. (1908) 64=7 Cr. L.J. 381.]

THE facts of this case are sufficiently stated in the judgment of Brodhurst, J.

Mr. *Amiruddin*, for the petitioners.

Babu *Jogindro Nath* and Munshi *Ram Prasad*, for the complainants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

BRODHURST, J.—The two applicants have applied for revision of an order of the officiating Magistrate of Pilibhit, by which he convicted them under s. 290 of the Indian Penal Code, and sentenced them each to pay a fine of Rs. 2.

The Magistrate found that the applicants had killed two cows in their compound, and had there cut up and disposed of the carcasses, and had thus committed a public nuisance punishable under s. 290 of the Indian Penal Code.

The Magistrate observes:—" The place in which the slaughter occurred was a compound by the house of the defendants. The wall of the compound has fallen into ruin, and the compound is visible from a high road which passes it. Only one person for the prosecution says he saw the actual slaughter, and he professes to have been on a visit to the defendants. His evidence, at least, is of no use to prove a public nuisance. The case against the accused can only be based on more general grounds, namely, that the slaughter was committed, and that such an event would neces- [45] sarily cause annoyance to Hindu passers-by. If this were the result, the case would arise under s. 290 of the Indian Penal Code. I assume that the carcasses were cut up at the place indicated by the defendants, and that if they were about a foot high, they would not be visible from the road. At such a place they would not, when merely laid out, annoy passers-by. At the same time the previous felling for slaughter, if there were any passers-by at the time, would be visible; and the stir and moving about of the persons cutting up the carcasses would, in the ordinary course of things, be noticed by persons on the road, even if they could not see the carcasses or cut-up meat. I do not understand it to be pleaded that these occurrences could be hidden from the road."

The Magistrate finds that the slaughter took place "at quite early morning," and remarks, " as to the witnesses, I have already expressed my

(1) 7 M. 590.

doubts about them and their way of representing the occurrences and their recourse to the spot. The accused pleaded that they killed only two cows; that they killed them on the 11th September, 1886, merely with a religious object and without any intention of annoying the Hindus: that they killed them in their own compound, where they had on former occasions sacrificed kine, and that a similar charge, preferred by the Hindus in 1865, was dismissed."

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The Magistrate observes :—"The defence which seems to me to deserve most consideration is this, that there must be taken to have been a refusal to interfere in this matter in 1865 and a certain measure of uncertainty about the matter since."

It appears that, on the 11th September, 1886, two cows were killed with a religious object in the compound of the accused; that they were killed before sunrise; that at the most, the killing of one cow was witnessed by merely one Hindu, and by him only because he unfortunately chose that day and an unusually early hour to pay a visit to his Muhammadan acquaintances. No one else is found to have seen the killing of the cows or the carcasses or the cut-up meat. If a few Hindus passing by a private compound can have the occupants of that compound punished for a public nuisance merely because they have seen the occupants moving about in their compound, and imagine that they are engaged [46] in cutting up the carcasses of cows, much more could the butchers, who, in the exercise of their trade, carry beef for sale through the streets of almost every station in British India, be punished for a public nuisance.

Sir Charles Turner, in his judgment in *Muttumira* v. *Queen-Empress* (1), observed :—" A public nuisance is defined in the Penal Code as an act or omission which causes any common injury, danger, or annoyance to the public or people in general, who dwell or occupy property in the vicinity, or which must necessarily cause obstruction, danger, or annoyance to persons who may have occasion to use any public right. It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The scope of the provision we are considering is to protect the public or people in general, as distinguished from the members of a sect, from injury, danger, or annoyance in the neighbourhood of places where they dwell or occupy property, or when they have occasion to use a public right."

I am by no means prepared to hold that a slaughterer of cattle could under no circumstances be convicted of a public nuisance as defined in s. 268 of the Indian Penal Code; for, if a person wilfully slaughtered cattle in a public street so that the groans and blood of the poor beasts were heard and seen by the passers-by, he would commit acts that would necessarily cause annoyance to every one of them, Hindu, European, Muhammadan or other, who was not utterly devoid, not merely of refinement, but also of all proper feeling: and he undoubtedly would, in my opinion, be punishable under s. 290 of the Indian Penal Code.

As regards the petitioners, however, I consider that, under the circumstances I have abovementioned, they have been wrongly convicted. I

(1) 7 M. 590.

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therefore set aside their convictions and direct that the fines, if realized, be refunded.

In conclusion, I may add that I think the Muhammadans of Pilibhit are entitled to know whether or not they may on special [47] occasions, for religious purposes and under certain restrictions, be permitted, as Muhammadans are, I believe, in many other places in British India, permitted, to sacrifice kine on their own premises. If they are allowed to do so, a clear municipal rule should be framed so as to ensure that cattle killed under such circumstances should be slaughtered, and the carcasses disposed of, in such a way as to cause the least possible annoyance to Hindus and other persons.

Conviction set aside.

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10 A. 47=7 A.W.N. (1887) 252.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANESH SINGH (*Plaintiff*) *v.* SUJHARI KUAR (*Defendant*).*
[5th August, 1887.]

Mortgage—Mortgagee of non-transferable property—Right to sue for mortgage money—Act IV of 1882 *(Transfer of Property Act), s.* 68 *(b), (c).*

Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession, and brought a suit against the mortgagor to recover the mortgage-money,—*held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of s. 68 (*b*) of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to succeed.

THE facts of this case were as follows:—On the 16th February, 1885, the defendant, Musammat Sujhari Kuar, executed in favour of the plaintiff, Ganesh Singh, a deed whereby she mortgaged a cultivatory holding of 26 bighas 19 biswas 4 dhurs in consideration of Rs. 599. Under this deed the plaintiff was entitled to possession of the mortgaged property. Shortly after execution of the deed, however, a suit was brought by Madoo Prasad, one of the zamindars of the village, for cancelment of the deed, on the ground that the defendant was his occupancy tenant of the mortgaged property, and that the mortgage was, therefore, contrary to the provisions of s. 9 of the N. W. P. Rent Act (XII of 1881). On the 8th June, 1885, the zamindar obtained a decree in that suit. Being unable, [48] consequently, to obtain possession under the mortgage deed, the plaintiff brought the present suit to recover the money which he had advanced to the defendant, with interest.

The Court of first instance (Munsif of Azamgarh) dismissed the suit upon grounds not material to this report. On appeal by the plaintiff, the lower appellate Court dismissed the appeal, on the ground that, "before bringing the suit, the plaintiff should have asked the defendant if she could mortgage other property or give him other security for his money; Act IV of 1882, s. 68, cl. (*c*). If the defendant should be unable to give

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* Second Appeal, No. 1101 of 1886, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 11th March, 1886, confirming a decree of Babu Nihal Chandra, Munsif of Azamgarh dated the 9th November 1885.

the plaintiff other security, then the plaintiff might bring a suit to recover his money." 1887 AUG. 5.

The plaintiff appealed to the High Court.

The Hon. *T. Conlan* and *W. M. Colvin*, for the appellant. APPELLATE CIVIL.

Mr. *C. Ross Alston*, Munshi *Hanuman Prasad*, and Munshi *Kashi Prasad*, for the respondent.

BRODHURST and TYRRELL, JJ.—The respondent in this case gave the appellant a mortgage upon a cultivatory holding. It turned out that that cultivatory holding was of the non-transferable kind referred to in s. 9 of the N. W. P. Rent Act. The respondent was in consequence unable to give possession to the appellant, and he has therefore brought this suit to recover his money. He has been defeated upon the ground that s. 68, of cl. (*c*), of Act IV of 1882, made it obligatory upon him to require the respondent to give him another sufficient security for his debt, a step which admittedly he has not taken. The Courts below accordingly dismissed the appellant's claim. 10 A. 47= 7 A.W.N. (1887) 252.

In second appeal it is argued that clause (*b*) of the above section contains the law applicable to the circumstances of this case, because the mortgagee has been deprived of the whole of his security in consequence of the default of the mortgagor. This contention must prevail. It is unquestionable that the mortgagor is in default, and the only plea urged here against the appellant is that he knew the law and was aware that the security he was taking was not transferable to him. Even if this consideration was sufficient to defeat his present claim, it is to be observed that it is not proved, or even asserted, that the appellant had this knowledge. While it [49] is certain that the respondent must have known that she was mortgaging an estate which was by law not transferable, the appellant may well have believed that her tenure was of a transferable character. The appeal is decreed, and the appellant's claim is decreed with costs in all the Courts. *Appeal allowed.*

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10 A. 49=7 A.W.N. (1887) 268.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

JIWA RAM SINGH (*Plaintiff*) *v.* BHOLA AND ANOTHER (*Defendants*).*
[6th August, 1887.]

Small Cause Court suit—Suit for damages—Personal injury—Actual pecuniary damage—Act IX of 1865 (Small Cause Courts Act), s. 6—Suit instituted before commencement of Act IX of 1887 (*Small Cause Courts Act*)—*Act IX of* 1887, s. 3 (*a*).

The plaintiff in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings.

Held that inasmuch as part of the claim related to alleged actual pecuniary damages resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mufussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Moytro* v. *Gudadhar Chowdhry* (1) referred to.

[F., 15 M.C.C.R. 154.]

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* Second Appeal No. 1244 of 1886, from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated the 27th April, 1886, modifying a decree of Maulvi Syed Ahmad Ali, Munsif of Bulandshahr, dated the 27th February, 1886.

(1) 13 W. R. 434.

1887 AUG 6. —— APPELLATE CIVIL. —— 10 A. 49 = 7 A.W.N. (1887) 268.

THE plaintiff in this suit claimed Rs. 200 as damages upon the following statement:—He alleged that he had been assaulted by the defendants, who were his tenants; that his injuries had involved him in expenditure on account of medical treatment in hospital to the extent of Rs. 50; that he had also been put to the expense of a criminal prosecution against the defendants which had cost him Rs. 50, and he claimed another Rs. 100 an account of injury to his reputation and his feelings.

The Court of first instance (Munsif of Bulandshahr) decreed the claim on the first head to the extent of Rs. 10; on the second head to the full extent of Rs. 50; on the third head to the extent of Re. 1. On appeal by the defendants, the lower appellate Court disallowed the claims under the first two heads and gave the plaintiff [50] a decree for Re. 1 on the third head only. He appealed to the High Court.

Pandit *Moti Lal*, for the appellant.

Lala *Jokhu Lal*, for the respondents.

A preliminary objection was raised on behalf of the respondents to the hearing of the appeal, on the ground that it was barred by s. 586 of the Civil Procedure Code.

MAHMOOD, J.—This appeal has arisen out of an action for recovery of Rs. 200 claimed as damages by the plaintiff for his bodily injury resulting from his having been assaulted by the defendants, and also for the consequent loss of reputation and hurt of feelings, and also in respect of the expenses incurred in the hospital, and in payment of fees to the legal practitioners who prosecuted the defendants in the criminal Court in respect of such assault. The first Court decreed the claim in part, but the lower appellate Court has modified the first Court's decree by assessing damages at only Re. 1, to which extent it upheld the first Court's decree.

The plaintiff has preferred this second appeal; but to the hearing of the appeal Mr. *Moti Lal*, who appears for Mr. *Howell* on behalf of the respondents, objects that, the suit being one cognizable by the Court of Small Causes, no second appeal lies to this Court under s. 586 of the Civil Procedure Code, and in support of this contention the learned pleader cites the case of *Gunga Narain Moytro* v. *Gudadhar Chowdhry* (1), in which Glover and Hobhouse, JJ., concurred in the opinion that to suits in which even a portion of the claim for damages was claimed as actual damages, the third proviso of s. 6 of the Mufussil Small Cause Courts Act (XI of 1865) did not apply, and that in such cases no second appeal would lie.

Having read the prayer for relief of the plaintiff in this case contained in para. 4 of the plaint, I have no doubt that this suit, so far as this preliminary objection is concerned, is on all fours with the case cited on behalf of the respondents. Because there, as here, the claim for damages referred to loss of reputation along with actual damages. In this case it cannot be doubted that the [51] hospital expenses and the fees paid to the lawyer for prosecuting the defendants were claimed as actual damages.

It is, of course, not necessary for me to decide whether such fees could be claimed; but considering the nature of the suit as set forth in the plaint and the ruling of the Calcutta High Court to which reference has been made, I am of opinion that the suit was one of the nature cognizable by the Small Cause Court, and that, therefore, no second appeal lay to this Court.

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(1) 13 W. R. 434.

Some suggestion was made that, in deciding this point, I should refer to the new Small Cause Courts Act (IX of 1887); but in this case the second appeal was instituted on the 2nd August, 1886, and the consideration of the new law would be unnecessary upon general principles of construing statutes, and indeed, those general principles have been duly given effect to in clause (3) to s. 3 of this enactment itself, which provides that the new enactment is not to affect any proceedings before or after decree in any suit instituted before the commencement of the Act. It is therefore clear that the new Act is not applicable, and, as I have already said under the old Act, this was a Small Cause Court suit, and, being of less value than Rs. 500, was not a fit one for being made the subject of second appeal under s. 586 of the Civil Procedure Code. The appeal is dismissed with costs (1). *Appeal dismissed.*

1887 AUG. 6. — APPELLATE CIVIL. — 10 A. 49 = 7 A.W.N. (1887) 268.

10 A. 51 = 7 A.W.N. (1887) 284.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

RAMSARAN AND ANOTHER (*Judgment-debtors*) v. PERSHIDHER RAI AND OTHERS (*Decree-holders*).* [10th August, 1887.]

Civil Procedure Code, s. 206—Power of lower Court to amend decree affirmed on appeal.

Where a decree for possession of immoveable property, passed by a lower appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower appellate Court subsequently, on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification—*Held* that inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect [52] property other than that actually claimed and decreed, the amendment was not contrary to law. *Shohrat Singh* v. *Bridgman* (2), *Gobardhan Das* v. *Gopal Ram* (3), *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (4), and *Sundra* v. *Subbanna* (5) referred to.

[R., 6 O.C. 44 (46); Cons., 11 A. 267.]

THE facts of this case were as follows:—Pershidher Rai and others sued Ram Saran and others for possession of certain plots of lands specified in the plaint, and their suit was dismissed by the first Court on the 28th April, 1883; but upon appeal that decree was reversed by the lower appellate Court on the 19th November, 1883, which decreed the claim, but omitted to enter in its decree the numbers and specifications of the plots which formed the subject-matter of the decree. That decree was upheld by the High Court on the 19th March, 1885, and the decree prepared in the High Court also gave no specification of the plots to which the suit related.

An application for execution of decree and recovery of possession of the plots aforesaid was made by the decree-holders on the 9th August, 1885, but it was opposed by the judgment-debtors upon the ground that the only decree capable of execution was the final decree of the High Court, and inasmuch as that decree did not contain a specification of the plots, it could not be executed.

* Second Appeal No. 448 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 14th December, 1886, confirming a decree of Munshi Syad Zain-ul-abdin, Munsif of Korantadih, dated 18th September, 1886.

(1) See also *Debi Singh* v. *Hanuman Upadhya*, 3 A. 747. (2) 4 A. 376. (3) 7 A. 366. (4) 14 M.I.A. 465. (5) 9 M. 354.

1887 AUG 10. — APPELLATE CIVIL. — 10 A. 51 = 7 A.W.N. (1887) 284.

These objections were disallowed by the Court of first instance, which, by its order of the 15th September, 1885, directed that the decree-holders should be placed in possession of the plots to which their suit related. Upon appeal to the lower appellate Court that Court held that so long as the decree of the High Court remained unamended and silent as to the numbers of the plots in suit, the decree could not be executed, and upon this ground it disallowed execution by its order of the 17th April, 1886. That order was not appealed from, and became final. Thereupon the judgment-debtors applied to the Munsif to regain possession of the land from which they had been ousted under the decree, and they were accordingly restored to such possession on the 9th August, 1886. In the meantime the decree-holders made an application to the lower appellate Court to amend its decree of the 19th November, 1883, by entering therein a specification of the plots [53] which formed the subject-matter of this suit, and their application was granted and the requisite amendment made on the 18th June, 1886. The decree having thus been amended, the present application for execution was made by the decree-holders on the 9th August, 1886, and it was allowed by the Court of first instance, and that order was upheld by the lower appellate Court. The judgment-debtors appealed to the High Court.*

Munshi *Sukh Ram*, for the appellants.

Mr. *G. T. Spankie* and *Lala Juala Prasad*, for the respondents.

MAHMOOD, J.—The arguments which Mr. *Sukh Ram* on behalf of the appellants and Mr. *Juala Prasad* on behalf of the respondents have addressed to me raise only two questions for determination :—

(1) Whether, with reference to the order of the 17th April, 1886, the present execution-proceedings were barred by the rule of *res judicata* under the ruling of the Privy Council in the case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Rup Kuari* v. *Ram Kirpal Shukul* (2).

(2) Whether the order made by the lower appellate Court on the 18th June, 1886, amending its decree of the 19th November, 1883, was legal, in view of the circumstance that the decree has been subjected to appeal to this Court, and the final decree in the case was passed by this Court on the 19th March, 1885.

Upon the first of these two points I do not think it is necessary to say anything beyond observing that the two cases relied upon do not apply, because the effect of the Judge's order of the 17th April, 1886, was to hold that the decree, so long as it remained unamended, was not capable of execution and that it needed amendment. The present application is not one in which the same unamended decree is sought to be executed, but it is an application which relates to the execution of the decree after amendment.

The second question, however, is the only real question in the case, and it is a question of law, because the language of s. 206, which enables the Court passing a decree to amend its decree, is silent as to whether such amendment can be made by such Court [54] after the decree sought to be amended has already become the subject of an appeal before a higher tribunal. Illustrations of how difficulties may arise in connection with the exercise of the power conferred by that section are to be found in

* This portion, though given in the statement of facts, forms part and parcel of the Judgment of Mahmood, J.

(1) 8 C. 51 = 8 I. A. 123.

(2) 6 A. 269.

some of the reported cases—in *Raghunath Das* v. *Raj Kumar* (1) and *Surta* v. *Ganga* (2), but this is the first time I have had specifically to deal with the question whether or not the exercise of these powers by a Court passing a decree is legal after the decree has been the subject of an appeal. Mr. *Sukh Ram* argues that under the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (3) it is the decree of the last Court only which can be executed; and inasmuch as here the decree of the last Court was that of the High Court, dated the 19th March, 1885, and such decree was silent as to the specification of the plots, therefore the amendment of the decree by the lower appellate Court was illegal, because it was not that decree that could be executed. In dealing with this contention, I think it is enough to say that the effect of that Full Bench ruling was explained by Oldfield, J., in *Gobardhan Das* v. *Gopal Ram* (4), in which it was held that in cases where a decree of the last Court only affirms the decree of the lower Court, the Court executing the final decree is at liberty to refer to the lower Court's decree for explanation and information. And this view was consistent with the ruling of the Privy Council in *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (5).

It is, therefore, clear, in the absence of statutory provision to the contrary, that in a case of this kind, this Court's decree having only upheld the decree of the lower Court, no practical injury can arise in execution, if the lower Court after the decree had been confirmed by this Court amended its decree, as was done in this case. There is, indeed, no contention here that the effect of the amendment made by the lower Court is such as to alter the effect of this Court's decree, or to render land other than that which was actually claimed and actually decreed liable to the decree.

Under these circumstances, I think that the amendment of the decree by the lower appellate Court was not opposed to any provision of the law, and that it has caused no injury to the present [55] appellant. In this view I am supported by a ruling of the Madras High Court in *Sundara* v. *Subbana* (6), where Collins, C. J., and Muttusami Ayyar, J., concurred in holding that, under s. 206 of the Civil Procedure Code, the Court has power to amend its decree by bringing it into conformity with the judgment after such decree has been confirmed on appeal. This view of the law was accepted by Oldfield and Brodhurst, JJ., in Misc. No. 213 of 1886, *Mohan Lal* v. *Lachmi Prasad* (7) decided on the 22nd December, 1886.

The amendment was, therefore, properly made and has caused no failure of justice.

I dismiss this appeal with costs.

Appeal dismissed.

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(1) 7 A. 276, 876. (2) 7 A. 411, 875. (3) 4 A. 376. (4) 7 A. 366.
(5) 14. M. I. A. 465. (6) 9 M. 354. (7) Not reported.

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CRIMINAL REVISIONAL.

10 A. 55 = 7 A.W.N. (1887) 280.

10 A. 55 = A.W.N. (1887) 280.

CRIMINAL REVISIONAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* JAGJIWAN AND OTHERS. [8th September, 1887.]

Summary trial—Complaint including Charge not summarily triable—Summary jurisdiction not necessarily ousted thereby—Criminal Procedure Code, s. 260.

The mere circumtance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s.260 of the Criminal Procedure Code. Whether a complaint affords sufficient ground for a summary trial, or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Ramchunder Chatterjee* v. *Kanhye Laha* (1), *Chunder Seekor Sookul* v. *Dhurm Nath Tewaree* (2) *Beputcolla* v. *Najim Sheikh* (3), and *Empress* v. *Abdool Karim* (4) referred to.

THE facts of this case, which was a reference under s. 438 of the Criminal Procedure Code, are stated in the judgment of Mahmood, J.

MAHMOOD, J.—In this case one Musammat Sheo Kumari, a Hindu widow, whose husband died in 1885, filed a complaint in the Court of the Joint Magistrate on the 25th March, 1887, alleging that certain acts were committed by the accused on the previous day, and that those acts amounted to offences under ss. 322, 448, [56] and 382 of the Indian Penal Code. In the petition of complaint no reference was made to any other offence, and the Joint Magistrate thereupon dealt with the case as falling under ss. 323 and 448 of the Indian Penal Code, and as such, he tried the case summarily under s. 260 of the Criminal Procedure Code, and, holding that the evidence for the prosecution was untrustworthy, dismissed the complaint. The offences to which those two sections of the Indian Penal Code relate are triable summarily under s. 260 of the Criminal Procedure Code, under clauses (*c*) and (*h*) respectively, and there can, therefore, be no question that the action of the Magistrate to this extent was not illegal. As to the remaining section 382 of the Indian Penal Code, under which the accused had been charged by the complainant, it seems to me enough to say that the facts as stated in the complainant's petition of the 25th March, 1887, themselves fell short of showing any such offence as is contemplated by that section, and the Magistrate was, therefore, right in not charging the accused under that section.

It then appears that the prosecutrix, Musammat Sheo Kumari, preferred an application for revision to the learned Sessions Judge on the 25th June, 1887, asking for interference under ss. 435 and 438 of the Criminal Procedure Code, and in that petition the main contention was that the complaint amounted to a charge of offences under ss. 147, 451, 452, and 382 of the Indian Pénal Code, and that the action of the Joint Magistrate in trying the case summarily was, therefore, illegal. This contention appears to have been accepted by the learned Sessions Judge, who, acting under s. 438 of the Criminal Procedure Code, has referred this case for the exercise of the revisional powers of this Court. It appears from the learned Judge's order of the 11th August, 1887, that he was labouring under a misapprehension in thinking that the prosecutrix's complaint of the 25th March, 1887, made any mention of ss. 147, 451 and 452 of the Indian Penal Code ; and although s. 382 of that Code was

(1) 25 W. R. Cr. 19. (2) 1 C. L. R. 434. (3) 2 C. L. R. 374. (4) 4 C. 18.

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mentioned in the complaint, it is clear to me that the facts stated in the petition of complaint itself would furnish no foundation for a charge under that section. The mistake as to the sections under which that charge was brought appears to be shared by the Joint Magistrate in the explanation which he has submitted in conformity with the rules of this Court, and he [57] seems to think that charges under ss. 147, 451, and 452 formed part of the original charge brought by the complainant against the accused.

All I have now to consider is whether the circumstances of the case require me to interfere in revision under the powers vested in this Court by s. 439 of the Criminal Procedure Code. In deciding this question, I have felt some difficulty at the outset as to whether the mere circumstance that the prosecutrix, in preferring her complaint of the 25th March, 1887, included a charge under s. 382 of the Indian Penal Code, is a circumstance which by itself ousts the summary jurisdiction of the Joint Magistrate under s. 260 of the Criminal Procedure Code. The learned Judge has expressed the view that the decision of the question whether a complaint is or is not summarily triable is to be regulated by the complaint itself. The learned Sessions Judge observes :—"The charge may be exaggerated, but the law does not allow the Magistrate to presuppose this in order that he may try the case summarily."

This view seems to be to some extent in accord with the rulings of the Calcutta High Court in *Ramchunder Chatterjee* v. *Kanhye Laha* (1), *Chunder Seekor Sookul* v. *Dhurn Nath Tewaree* (2), *Beputoolla* v. *Najim Sheikh* (3) and *Empress* v. *Abdool Karim* (4). The facts of those cases are, however, distinguishable from those of this case now before me. In the last-mentioned ruling the learned Judges in expressing their opinions laid down the rule that if a charge of an offence "not triable is laid and sworn to, the Magistrate must proceed with the case accordingly, *unless* he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggeration and not to be believed."

I agree in the rule so laid down, but I must say that I am not prepared to hold that the mere circumstance of a complaint charging an accused person of offences not summarity triable would oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. It is far from being an uncommon circumstance that complainants, either *bona fide* suffering from a grievance or out of ill-will towards the accused, exaggerate the heinous-[58] ness of the facts complained of ; and if I were to hold that the terms of the complaint are in themselves conclusive to decide the question as to whether the case might be summarily tried or not, I should virtually be holding that the summary jurisdiction can be evaded at the choice of the complainant. In this class of cases no hard-and-fast rule can be laid down, and much depends upon the facts and circumstances of each individual case. The Criminal Procedure Code has empowered Magistrates, under certain limitations, to decline to proceed with a complaint ; and even in cases not summarily triable, it is only when a Magistrate sees sufficient ground for proceeding against the accused that a charge is framed. This, speaking in general language, is the effect of ss. 210 and 254, Criminal Procedure Code, and I think that whether a complaint does or does not afford sufficient grounds for a summary trial, or requires a trial under the ordinary procedure, is a question which must be left in a great measure to the discretion of the Magistrate, which discretion of

(1) 25 W.R. Cr. 19. (2) 1 C.L.R. 434. (3) 2 C.L.R. 374. (4) 4 C. 18.

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course must be exercised with due care and caution according to judicial methods, with reference to the circumstances of each case. In this case, the facts as stated by the complainant might possibly have fallen under s. 147, 451, or 452 of the Indian Penal Code, none of which offences was summarily triable. But before the Magistrate could charge the accused under those sections, he would have to satisfy himself that there was ground for proceeding under any of those sections. The Magistrate, in the present case, does not appear to have rejected any evidence for the prosecution, and his judgment shows that he disbelieved the entire evidence adduced on behalf of the prosecution. Under these circumstances, I do not think that the case requires any interference in revision. I therefore decline to interfere. The record will be returned.

Application rejected.

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10 A. 58 = 7 A.W.N. (1887) 274.

APPELLATE CRIMINAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* WAZIR JAN. [16th September, 1887.]

Personating public servant—Extortion—Several offences—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Act XLV of 1860 (*Penal Code*), ss. 71, 170, 383—*Criminal Procedure Code*, ss. 35, 235.

Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether [59] s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction.

Under s. 35 of the Criminal Procedure Code sentences of imprisonment cannot be passed so as to run concurrently.

In a trial for offences under ss. 170 and 383 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of.

Held that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply, because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383; that in the present case the former offence was completed before the latter had begun; and that separate sentences for each offence, were, therefore, not illegal.

[F., 12 C. L. J. 346 (347) = 15 C.W.N. 732 = 10 Ind. Cas. 948; 15 C.W.N. 722 (732); R., Rat. Unrep. Crim. Cas. 369 (370); Rat. Unrep. Cr. Cas. 597 (598); 25 C. 557 (559); 1 A. L. J. 604 (605) = 27 A. 294 = A. W. N. (1904) 232.]

THE petitioner in this case, Wazir Jan, was convicted by the Joint Magistrate of Benares of personating a public servant (s. 170 of the Penal Code) and extortion (s. 384) under the following circumstances:—The complainant, Ram Charan, *teli*, in company with three other persons, on the 7th April, 1887, brought oil, upon which octroi duty was payable, into the city of Benares for sale. The *muharrir* at the octroi post gave the four men a single pass covering the imports of them all, and this pass was made out in the name of one of them only, Bhawani Prasad. After leaving the octroi post, the four men separated, Bhawani Prasad keeping the pass, and Ram Charan thus having nothing to show that he had paid

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the duty. Shortly afterwards, the accused, pretending to be a *girdawar* or patrol on the octroi establishment, came up, accused him of bringing oil into the city without paying duty, and finally extorted from him Re. 1 by threats of imprisonment, though the complainant obtained and showed the pass in proof of payment.

The accused was charged, in the first instance, with the offence punishable under s. 170 of the Penal Code only. In consequence, however, of a question being raised by his pleader as to whether an octroi patrol was a "public servant" within the meaning of ss. 21 and 170 of the Penal Code, the Joint Magistrate, after all the evidence had been taken, added a charge of extortion under s. 384. A conviction was recorded upon each charge, and the Joint Magistrate passed sentence in the following terms:—"I sentence him [60] under s. 170 of the Penal Code to nine months' rigorous imprisonment, and under s. 384 to nine months' rigorous imprisonment; the sentences will run concurrently."

The accused appealed to the Sessions Judge of Benares, who affirmed the convictions. With regard to the sentences, the Sessions Judge observed:—"I am not aware that "concurrent sentences" are mentioned in the Criminal Procedure Code. And if my recollection is correct, instances have occurred in which jail authorities have treated two "concurrent" as two independent sentences, and detained a prisioner twice the term that the Court intended, or, at all events, in excess of the real period of imprisonment adjudged. The order I pass is that both convictions are upheld, that the sentence of nine months' rigorous imprisonment be regarded as passed under s. 384 of the Penal Code, and that it is unnecessary to record any sentence in respect of the conviction under s. 170 of the said Code."

The prisoner applied to the High Court for revision of this order, the principal ground stated in the petition being that the Joint Magistrate had acted illegally in adding the charge under s. 384 of the Penal Code, and that the sentence passed in respect of that charge should, therefore, be set aside.

Mr. *J. D. Gordon*, for the petitioner.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

MAHMOOD, J.—The facts found by both the lower Courts on the evidence before them are sufficient to substantiate the offence of personating a public servant within the meaning of s. 170 of the Indian Penal Code, and also the offence of extortion punishable under s. 384 of that Code, and in respect of these findings I see no reason to differ with the Courts below. But Mr. *Gordon*, in supporting the petition, argues that the charge originally referred only to s. 170 of the Indian Penal Code, and that the charge under s. 384 was added so late that it has prejudiced the petitioner. I cannot accept this contention, because the terms of s. 227 of the Criminal Procedure Code, read even with the two following sections, are sufficiently wide to permit the Magistrate to amend the charge in the manner in which it was amended in this case. In this case the facts and the evidence on which the conviction [61] proceeded would not vary by reason of such alteration or addition, and there was, therefore, no prejudice to the petitioner by reason of the charge having been amended. I might almost go further and say that even if there had been an irregularity, under the circumstances of this case, I should have regarded it as one covered by s. 537 of the Criminal Procedure Code.

I agree with the learned Sessions Judge in the view that the evidence was sufficient to convict the petitioner under both s. 170 and s. 384 of

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the Indian Penal Code. But the learned Judge in convicting the prisoner under both sections has passed a sentence of nine months' rigorous imprisonment only under s. 384 of the Indian Penal Code, and he goes on to observe "that it is unnecessary to record any sentence in respect of the conviction under s. 170 of the said Code." The Court of first instance, that is, the Magistrate, had sentenced the accused to nine months' rigorous imprisonment for each of the two offences and directed the sentences to "run concurrently."

This state of things raises the following three questions of law which it is necessary for me to decide:—

(1) Whether the Magistrate was right in convicting the accused both under s. 170 and s. 384 of the Indian Penal Code.

(2) Whether the Magistrate was right in passing separate sentences with the direction that they were to "*run concurrently*."

(3) Whether the learned Sessions Judge was right in declining to pass any sentence in respect of the conviction under s. 170 of the Penal Code.

None of these questions is altogether free from difficulty, specially as the case-law upon these and other cognate questions does not seem to have put the matter at rest, and the decision of them requires consideration both of the substantive and the adjective rules of the criminal law, that is, of the provisions of the Indian Penal Code and of the Code of Criminal Procedure.

Viewed in this light, the first point as enunciated by me is a question of the rules of criminal procedure which must of course be considered with due regard to the behests of the substantive criminal law, that is, the Indian Penal Code. Now there is nothing [62]either in s. 170 or in s. 384 of that Code which can be understood to lay down the rule that a person guilty of one offence may not at the same time be guilty of the other, and both sections by using the word "*shall*" indicate the imperative mandate of the Legislature that persons guilty of those offences are to be punished, a direction of the law which is in keeping with the general principles of jurisprudence. There is,indeed, another section of the same Code which has a bearing upon such matters, and that section is s. 71, which governs the whole Code and regulates the limit of punishment in case in which the greater offence is made up of two or more minor offences. The section, however, is not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it cannot, therefore, affect the question of conviction, which relates to the province of procedure.

The Code of Criminal Procedure, therefore, is the law which must be referred to. S. 35 of that Code distinctly provides that separate sentences may be passed in cases of conviction for several offences at one trial, and the provisions of s. 235 of that Code are in keeping with the earlier section; and illustration (*g*) of the latter section shows that in one and the same trial there may be separate convictions for separate offences, though such convictions may arise from facts of the same transaction and proceed upon the same evidence. Indeed, para. III of s. 235 of the Criminal Procedure Code distinctly contemplates the trial of the accused for separate offences where the acts complained of, when combined, would constitute a different offence.

These provisions leave no doubt in my mind that in a case such as this the Magistrate was right in trying the accused both under s. 170 and s. 384 of the Indian Penal Code, and in convicting the accused for both offences. The question as to the measure of punishment is a

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different matter from the question of conviction and rests upon other considerations both of law and fact. There is, however, a note in Mr. Justice Prinsep's Commentary on the Code of Criminal Procedure (8th ed., p. 33), under s. 35, which states that the Calcutta High Court has held that when there are in an indictment two separate offences supported by distinct and separate evidence, a separate sentence should be passed [63] for each offence, the punishment under the second sentence to take effect on the expiry of the first, and that if, however, there are two or more offences supported by the same evidence, or very nearly so, a verdict of *guilty* should be entered on the offence covered by the greater portion of the evidence as the gravest in the eye of the law, and a verdict of *not guilty* on the other charges. The case in which this rule was laid down does not appear in the published reports, and the reasons on which the ruling proceeded are not, therefore, available to me. But I confess, with due respect, that I am unable to accept the rule so laid down. I have already said that the question of conviction is distinguishable from the question relating to the measure of punishment, that is, the sentence to be passed. The latter may, indeed, be affected by s. 71 of the Indian Penal Code, or by s. 35 of the Code of Criminal Procedure: in the former case by a rule of substantive law, in the latter by a rule of adjective law. But I am unable to see how the mere circumstance that a series of acts which constitute a minor as also a graver offence, when proved against an accused person who has been charged with and tried for both the offences, can result in a finding of "*not guilty*" of the minor offences any more than of the graver offence. So far as I am aware, there is nothing in the Code of Criminal Procedure to justify such a course, and s. 71 of the Indian Penal Code cannot be understood to regulate covictions, though of course it governs the question of sentence as a matter of substantive criminal law. The view expressed by the Madras High Court, in their proceedings of the 4th July, 1867 (Weir. p. 43), is that when a prisoner is tried on several heads of charge, the most convenient course, with reference to appeals, is to enter up findings on all the counts, though when the several heads of charge are all founded on one continuous transaction, punishment can only be awarded on one. It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of s. 71 of the Indian Penal Code, and the accused is charged and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those offences, though in awarding punishment the provisions of s. 71 of the Indian Penal Code and of s. 35 of the Code of Criminal Procedure [64] would of course have to be duly kept in view. I have already said that the question of conviction is a question of adjective law or procedure, and that when an offence provided for by the substantive law is proved, a conviction must follow in the absence of express provisions to the contrary in the law of procedure itself. I am not aware of any such provision in our Code of Criminal Procedure, and the nearest approximation to such a rule are the provisions of s. 240 of that Code, which lay down that when more charges than one are made against the same person and a conviction has been had on one or more of them, the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court may stay their trial. That section, however, does not apply to this case, and I hold that the Magistrate was right, upon the evidence before him, in convicting the accused both under s. 170 and s. 384 of the Indian Penal Code.

This leads me to the second question, namely, whether the Magistrate

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acted rightly in passing what he calls concurrent sentences of nine months' rigorous imprisonment. I am of opinion that there is no authority in the law to justify such a course. Indeed, the provisions of s. 35 of the Code of Criminal Procedure render such a course illegal. The first paragraph of that section provides that "when a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, *to commence the one after the expiration of the other in such order* as the Court may direct." In this case the sentences passed by the Magistrate consisted of imprisonment, and such sentences could not, therefore, be made to "*run concurrently*" as directed by the Magistrate, the phrase, "*in such order as the Court may direct,*" not being susceptible of such interpretation as the Magistrate has apparently placed upon it. I hold therefore, that the order of the Magistrate, so far as it directed that the two sentences were to run concurrently, was illegal.

I have now to consider the third question, namely, whether the learned Sessions Judge was right in law in declining to pass any sentence in respect of the conviction under s. 170 of the Indian [65] Penal Code. I am of opinion that such an omission was illegal. Just as the maxim *ubi jus ibi remedium*, is a rule of jurisprudence, so it is a principle of the criminal law that where there is an offence there must be a punishment, the general rule being in either case affected by exceptional provisions of the law, whether provided by statute or by some other legal authority, disturbing the uniformity of the application of general maxims. No such provision or authority is to be found in our criminal law, whether belonging to the domain of substantive law or of adjective law. Indeed, the provisions of s. 170 of the Indian Penal Code itself are imperative, and they leave no room for doubting that whoever commits the offence prescribed by that section must undergo punishment according to the behests of that section, read, of course, as it must be read, with the general rule, contained in s. 71 of that Code. Upon the point, I think, the ruling of the Madras High Court, in their proceedings of the 15th January, 1869 (1), is applicable in principle. There it was ruled by that Court that when a prisoner is convicted of several offences, a separate sentence should be passed in each case; and though there the trials seem to have been separate, the principle that there should be a separate sentence for each conviction was not disturbed. More to the point is the ruling of a Full Bench of the Bombay High Court in *Reg.* v. *Anvarkhan* (2), where it was held that it is competent to a Magistrate to pass a separate sentence in respect of each of the two charges of house-breaking in order to commit theft, and of theft in human dwelling, of which a prisioner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided, further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentence. This also is the effect of the ruling of Turner, J., in *Empress* v. *Budh Singh* (3), where that learned Judge pointed out that "the law does not prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe than [66] might have been awarded for any one of them, or for the

(1) 4 M.H.C.R. App. XXVII. (2) 9 B.H.C.R. 172. (3) 2 A. 101.

offence formed by their combination." Again, much to the same effect is the ruling of the Bombay Court in *Reg.* v. *Murar Trikam* (1), where it was held that when more than one offence is proved, it is not proper to convict only of one and to acquit of the other, although the offences may be cognate. This view of the law is much the same as that held in *Reg.* v. *Gulam Abbas* (2), and again, by the same Court, in a later case, *Reg* v. *Tukaya bin Tamana* (3), but the view is not altogether consistent with the ruling of the Madras Court in the case of *Noujan* (4) and of this Court in *Queen* v. *Mungroo* (5). The ruling of the Calcutta High Court in *Empress* v. *Jubdur Kazi* (6) appears to throw doubt on the view which I have taken, but that ruling, like the others, refers to the provisions of the old Criminal Procedure Code (Act X of 1872), which have been reproduced in s. 235 of the persent Criminal Procedure Code, with the omission of such provisions relating to the measure of punishment as were alien to procedure and properly belonged to the province of substantive law.

In *Empress* v. *Ajudhia* (7) my brother Straight, dealing with the Criminal Procedure Code of 1872, expressed the view that "where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet, in the interests of simplicity and convenience, it is best to concentrate the conviction and sentence on the graver offence proved." Proceeding upon this view, my learned brother, in dealing with that case, convicted the accused of house-breaking by night in order to commit theft under s. 457 and directed an acquittal upon the charge of theft in a dwelling-house under s. 380 of the Indian Penal Code. This view is no doubt in accord with the ruling of the Madras High Court in the case of *Noujan* (4) to which I have already referred, for there it was [67] held that the law forbids "two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other." Similar is the principle upon which my brother Straight's ruling proceeds in the case of *Queen-Empress* v. *Ram Partab* (8), where the two offences were those of being a member of an unlawful assembly causing riot, and inflicting grievous hurt. This ruling was, however, dissented from by my brother Brodhurst in *Queen-Empress* v. *Dunger Singh* (9), and by the learned Chief Justice and my brother Brodhurst in *Queen-Empress* v. *Bisheshar* (10), which, so far as I know, is the latest ruling of this Court on the subject.

Having considered the various cases to which I have referred, I cannot help thinking, with due respect, that the main reason why such conflict of decision has arisen is confusion between the rules of law regulating the conviction and those which regulate the measure of punishment. An act or a series of acts which in the eye of the substantive criminal law constitute an offence, punishment wherefor is imperatively demanded by the law, must, when duly proved against the accused, result in a conviction; and whenever there is conviction, it follows, as a natural sequence of legal thought, that there must be a punishment, for otherwise the definition of "*offence*" in s. 40 of the Indian Penal Code would be scarcely

(1) 5 B. H. C. R. 3 Crown Cases. (2) 12 B. H. C. R. 147. (3) 1 B. 214.
(4) 7 M. H. C. R. 375. (5) N. W. H. C. R. 1874. p. 293. (6) 6 C. 718.
(7) 2 A. 644. (8) 6 A. 121. (9) 7 A. 29. (10) 9 A. 645.

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intelligible. I am not aware of any rule of our law that an offence when charged and proved against the accused is to result either in a verdict of *not guilty* or to pass unpunished, whether such an offence is or is not accompanied by another offence, and whether such latter offence does or does not overlap or include the former. I have already said enough to indicate that, in my opinion, s. 71 of the Indian Penal Code has no bearing upon the question of convictions, but relates only to the measure of punishment for offences falling under the purview of that clause. I have also said enough to indicate that, according to my view of the law, neither s. 35 nor s. 235 of the Criminal Procedure Code stands in the way of separate convictions and separate sentences for each offence of which the accused is found guilty in the same trial, though, as a matter of substantive law, s. 71 of the Indian Penal Code affects, **[68]** the measure, or, rather the limit, of punishment, and, as a matter of adjective law, s. 35 of the Criminal Procedure Code has a bearing upon the same question with reference to the powers of the Court awarding the sentence, and with reference to the right of appeal.

Applying these views to the present case, I am of opinion that there is no rule of our criminal law which would enable the Court, after finding the accused guilty of an offence, to refrain from passing a sentence on him as punishment for such offence, and therefore the learned Sessions Judge was wrong in law in omitting in this case to pass a sentence upon the accused after having found him guilty under s. 170 of the Indian Penal Code.

It now remains for me to consider whether, in the exercise of the revisional powers of this Court, I should disturb the amount of sentence passed upon the accused. The decision of this question again is partly dependent upon considerations of law, though it relates only to the measure of the punishment to be awarded. The question of law is whether, under the circumstances of this case, the offence of personating a public servant under s. 170 was such as would be included in the offence of extortion as defined in s. 383 and made punishable under s. 384 of the Indian Penal Code. The first paragraph of s. 71 provides that "where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided." This rule is illustrated in the Code itself by illustration (*a*) to the section, and it is clear that it does not apply to the present case, because the offence of personating a public servant under s. 170 is not any part of the offence of extortion to which ss. 383 and 384 relate. Nor is the second paragraph of s. 71 applicable, because neither of the two offences with which this case is concerned falls under several definitions. The question, then, is whether the case falls under the third part of s. 71—in other words, whether the present case is one "where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence;" because in such cases the section provides that "the offender shall not be punished with a more severe punishment **[69]** than the Court which tries him could award for any one of such offences."

Now I am aware that it has been held in some cases that for the decision of this question the identity of the evidence produced in support of the prosecution is the criterion, but I confess I am unable to adopt this view. S. 71, as I have already said more than once, is a rule of substantive law, and, as such, must be understood to refer to substantive

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provisions and not to matters of evidence. The phrase "*constitute an offence*" as it occurs in the section must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved. In this view of the law, the offence of personating a public servant under s. 170 cannot be dealt with as a constituent element of the offence of extortion as defined in s. 383 of the Code, even though, as in this case, the evidence shows that but for the former offence the latter offence could not have been successfully committed. In other words, the evidence in this case shows that but for personating a public servant, the accused could not practically have had the means of putting any person in fear of injury, which is an essential element of extortion; but I hold that this circumstance does not bring the two offences within the purview of the latter part of s. 71 of the Indian Penal Code. The reason for this view is that the offence under s. 170 was complete as soon as the accused falsely pretended to be a public servant as an octroi officer, and in such an assumed character called upon Ram Charan, *teli*, to show proof of the payment of octroi duty, and threatened him with injury. The offence thus being complete in itself, it could not merge into the offence of extortion under s. 383, of which offence personation as a public servant forms no necessary ingredient. Indeed, the offence of extortion as defined in that section may be practised, and is often practised, by private individuals assuming no pretended authority as public servants, and the mere circumstance that in this case personating as a public servant was utilized as a means of extorting money, will not merge the two offences into one or entitle the accused to escape conviction under both offences. In other words, I hold that it is not to the identity or non-identity of the evidence, nor merely to the individual facts of each case as to [70] the practicability of the offence, but to the definitions of offences as to the elements of the *corpus delicti*, that we must look for deciding the question as to the applicability of the latter part of s. 71 of the Indian Penal Code for purposes of assessing punishment. And inasmuch as the accused in this case has been found guilty both under s. 170 and s. 384 of the Indian Penal Code, separate sentences should have been awarded, irrespective of the provisions of s. 71 of the Indian Penal Code, but with due regard to the provisions of s. 35 of the Criminal Procedure Code. The provisions of that section, however, do not affect this case, as the Magistrate who tried the accused was a Magistrate of the first class, and, as such, empowered to pass the sentences which he did.

For these reasons, I uphold both the convictions of the accused, that is, his convictions under s. 170 and s. 384 of the Indian Penal Code, and setting aside so much of the order of the learned Sessions Judge as omits to pass a sentence under s. 170 of the Indian Penal Code, I direct that the record be so amended as to sentence the accused to three months' rigorous imprisonment on the conviction under s. 170 of the Indian Penal Code, and to six months' rigorous imprisonment on the conviction under s. 384 of the Indian Penal Code, the latter sentence to commence after the expiration of the former. And I my add that I have so apportioned the punishment, because the former offence, though the original one, was subsidiary to the latter offence, and although but for the former offence the latter might on the facts of this case have been impracticable, the latter is the graver offence in the eye of the law.

The effect of this amendment of the record does not alter the extent of punishment awarded in this case, as I do not think that the two offences

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when combined in this manner require a severer punishment. And I have dwelt upon the questions of law at such length because if the two offences of which the accused has been convicted required severer sentences than the aggregate amount of nine months' rigorous imprisonment, I should have felt it my duty, in the exercise of the revisional powers of this Court to award such punishment on each of the two convictions as would in the aggregate exceed the limit of nine months' rigorous imprisonment.

[71] I wish to add that what I have said as to separate convictions requiring separate sentences must not be understood to lay down any rule as to cases in which the accused is charged with, tried for, and convicted of only one offence, and the facts proved might, if taken piecemeal, constitute minor offences forming ingredients of the graver offence of which the accused has been found guilty. In such cases only one sentence would, of course, be all that is required by the law.

Convictions affirmed; sentences altered.

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10 A. 71 = 8 A.W.N. (1888) 1.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SARJU PRASAD AND ANOTHER (*Judgment-debtors*) *v.* SITA RAM (*Decree-holder*).* [26th October, 1887.]

Limitation—Execution of decree—Application for execution withdrawn by decree-holder—Act XV of 1877 *(Limitation Act), sch. ii, No.* 179 (4)*—Civil Procedure Code,* ss. 373, 374, 647.

S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali* v. *Ram Singh* (1) and *Pirjade* v. *Pirjade* (2) followed. *Tarachand Megraj* v. *Kashinath Trimbag* (3) and *Ramanandan Chetti* v. *Periatumbi Shervai* (4), dissented from.

A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings.

Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree was barred by limitation, with reference to art. 179 of the Limitation Act.

[**Overruled.**—17 A. 106 (111, 112) (P.C.); **Not F.**—26 B. 76 (81) = 3 Bom. L.R. 431, 18 C. 635; 22 P.R. (1905) = 57 P.L.R. (1905); **F.**—11 A. 228; 12 A. 179; 12 A. 392 (395); **R.**—8 A.W.N. (1888). 295, 9 A.W.N. (1889), 204; **Cons.** 8 A.W.N. (1888) 253; **D.**—10 A.W.N. (1890), 9.]

THIS was a reference to a Division Bench by Mahmood, J. The facts are sufficiently stated in the order of reference, which was as follows:—

MAHMOOD, J.—The facts necessary for the decision of the main question of law raised by the argument of the learned pleader for [72] the appellant are these. The decree sought to be executed was passed on the 22nd May, 1878, and an application for execution thereof was made on the 14th February, 1881, and such application having been made more than one year after the decree, a notice was issued to the judgment-debtor

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* Second Appeal, No. 2245 of 1886, from a decree of C. Donovan Esq., District Judge of Benares, dated the 8th September, 1886, modifying a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Benares, dated the 2nd July, 1886.

(1) 7 A. 359. (2) 6 B. 681. (3) 10 B. 62. (4) 6 M. 250.

on the 25th June, 1881; but the application was objected to by the judgment-debtor upon the ground that it was not in due form, and the conclusion contained therein was erroneous. Thereupon the decree-holder's pleader stated to the Court that the prosecution of the application was not then desired, and that the execution-case might be struck off, and the decree, which had been filed with the application, might be returned. The Subordinate Judge thereupon struck off the case and directed that the decree should be returned to the decree-holder, which appears to have been done.

The present litigation has arisen from an application made by the decree-holder on the 14th February, 1884, and it was met by a plea that the previous application of the 14th February, 1881, having been withdrawn on the 24th December, 1883, the present application was barred by limitation. The Court of first instance disallowed the objection, upon the ground that the present application for execution, having been filed within three years from the preceding application, was within limitation. Upon appeal, the learned Judge has upheld the order of the first Court, and the main point raised in second appeal is whether the action of the decree-holder in having the former application struck off on the 24th December, 1883, bars the present application.

The determination of this question seems to depend upon the following points:—

(1) Whether ss. 373 and 374, read with s. 647, of the Civil Procedure Code, are applicable to applications for execution of decree.

(2) If so whether the withdrawal of the decree-holder from presenting his former application of the 14th February, 1881, renders that application unavailable for the purpose of limitation under cl. (4) of art. 179, sch. ii of Limitation Act (XV of 1877).

(3) Whether the notice issued to the judgment-debtor on the 25th June, 1881, was, under the circumstances, such notice as [73] cl. (5), art. 179, sch. ii of the Limitation Act contemplates for the purposes of calculating limitation.

Upon the two first points there is a conflict of decisions. Whilst the ruling of the Madras High Court in *Ramanandan Chetti* v. *Periatambi Shervai* (1) tends to show that an application for execution, though informal and not prosecuted, but returned for amendment, is sufficient to save limitation, the Bombay High Court held a contrary view in *Pirjade* v. *Pirjade* (2) by applying s. 374 read with s. 647 of the Code to applications for execution of decree, and this last case was followed by Oldfield, J., with my concurrence in *Kifayat Ali* v. *Ram Singh* (3). But in a more recent case, Sargent, C.J., in *Tarachand Megraj* v. *Kashinath Trimbak* (4), dissented from the rule laid down in *Pirjade* v. *Pirjade* (2), and held that the provisions of ss. 373 and 374 were not applicable to applications for execution, notwithstanding s. 647 of the Code, and that, therefore, even an application for execution which has been withdrawn by the decree-holder with permission to apply again was not affected for purposes of limitation under cl. (4), art. 179, sch. ii of the Limitation Act; and in laying down this rule, the learned Chief Justice relied upon the principle of a Full Bench ruling of the Calcutta High Court in *Eshan Chunder Bose* v. *Parannath Nag* (5). Under this state of the law I do not think that the questions involved in the two first points are free from difficulty.

Again, so far as the third point is concerned, the ruling of this Court

(1) 6 M. 250. (2) 6 B. 681. (3) 7 A. 359.
(4) 10 B. 62. (5) 22 W.R. 512.

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in *Behari Lal* v. *Salik Ram* (1) is important; but in that case, there being a difference of opinion between Pearson and Spankie, JJ., the appeal was referred to Oldfield, J., under s. 575 of the Civil Procedure Code (Act X of 1877), and the last-named Judge disposed of the case by agreeing with Pearson, J., but without consulting the two learned Judges who had differed in opinion—a procedure which, according to the latest interpretation of that section in *Rohilkhand and Kumaun Bank, Limited* v. *Row* (2) was not in strict accord with the intention of the Legislature in framing that section. Moreover, the ruling in that case impugned an [74] earlier ruling of this Court in *Franks* v. *Nuneh Mal* (3), and, under the circumstances, I can scarcely regard the points in this case as definitely settled by the case-law.

I may also add that in some recent cases the Lords of the Privy Council have applied the principles of the rule of *res judicata* as defined in s. 13 of the Civil Procedure Code to proceedings in execution of decrees, and those cases were referred to by Field, J., in *Bandey Karim* v. *Romesh Chunder Bundopadhya* (4); but that learned Judge went on to say:—"We do not, on the present occasion, purpose to go into this broad, general, and probably difficult question, whether the principle of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree." It seems to me that, so far as our Civil Procedure Code is concerned, probably the only authority by which the rule of *res judicata* as contained in s. 13 of the Code can be applied to execution cases is s. 647 of the Code; and if this is so, there seems analogical reason for holding that the provisions of ss. 373 and 374 of the Code would also be applicable to such cases, without interference with the provisions of art. 179, sch. ii of the Limitation Act. But I do not think that I should, sitting here as a single Judge, dispose of these important questions of law, notwithstanding the conflict of decision which I have pointed out, and indeed if I had the power under the Rules of this Court to refer the case to the Full Bench, I should probably have done so. But under the Rules of the 11th June 1887, I can only refer this case to a Division Bench consisting of two Judges, and I do so accordingly.

Lala *Juala Prasad*, Munshi *Hanuman Prasad*, and Munshi *Madho Prasad*, for the appellants.

Munshi *Kashi Prasad* and Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This is a second appeal from an order of the Judge of Benares, passed on the execution side, on the 8th September, 1886. The execution-proceedings in which it was passed had reference to a decree, dated the 22nd May, 1878, and the application for execution with which it deals was dated the 14th [75] February, 1884. The whole question involved in this appeal is whether that application of the 14th February, 1884, is prohibited by any rule of procedure or of limitation, which the lower Courts have held it is not.

The first application for execution of the decree was made upon the 14th February, 1881, and it is in reference to that application and to what took place upon it, that the questions involved in the discussion that has taken place before us are concerned. It seems that after notice of that application of the 14th February, 1881, had been given to the judgment-debtor, he appeared and objected to the form of the application upon the ground that there had been a miscalculation in the application as to

(1) 1 A. 675. (2) 6 A. 468. (3) N.W.P., H.C.R. 1875, p. 79. (4) 9 C. 65.

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the amount covered by the decree in respect of which execution was sought. And it seems there can be no doubt that there was a miscalculation, because such was admitted to be the case by the pleader for the decree-holder. Accordingly, on the 24th December, 1883, the application having been pending in the Court for that long period of time, an order was made by the Court, the terms of which it is not necessary for me to recapitulate at length, but they have been explicitly translated for my benefit by my brother Mahmood, and they come to this, that the application was struck off at the request of the decree-holder's pleader, and that the copy of decree which had been filed with the application was returned to him. It is to be observed that in that order of the Court it is recited that the decree-holder's vakil stated in terms that "for the present we are not anxious to carry on the execution proceedings, and we therefore apply that the case may be struck off." That being so, I now come to the application with which we are more immediately concerned, *viz.*, that of the 14th February, 1884. And I have to consider whether, having regard to what took place in respect of the application of the 14th February, 1881, we can adopt and act upon and we ought to adopt and act upon the provisions contained in ss. 373 and 374 of the Civil Procedure Code; because, if those provisions are applicable to this case, then undoubtedly the Courts below were wrong in allowing the execution of the decree, and the decree cannot be executed. Now I do not hesitate to say, and in making the remark I am only recapitulating what I have hitherto always desired to lay down in these matters, that I am [76] anxious, as far as I possibly can, to have introduced into the conduct of execution proceedings as much of the regularity and precision of procedure as is applicable to the trial of original suits as is reasonably possible; and s. 647 of the Civil Procedure Code contemplates the adoption by the Courts, as far may be applicable, of the formalities of procedure, so that in the transaction of their miscellaneous business they may have certain well-understood landmarks—if I may so call them—to guide them in the conduct of that branch of their judicial work. Speaking generally, it seems to me that the assimilation of the provisions of ss. 373 and 374 to execution proceedings is highly desirable, and with the profoundest respect for the learned Chief Justice of Bombay, Sargent, C.J., and for the view he expressed in *Tara Chand Megraj* v. *Kashinath Trimbak* (1), I fail myself to see how, by importing the provisions of those sections of the Code into execution proceedings, any violence will be done to the terms of the operation of art. 179 of the Limitation Law. It seems to me that while on the one hand it is perfectly possible to have an application for execution made in accordance with law which will render the terms of art. 179 of the Limitation Act perfectly and properly applicable, so on the other it is equally possible to have such a condition of things as an application for execution made and withdrawn under s. 373, in which state of things the limitation of art. 179 of the Limitation Act will not be applicable, because no application in accordance with law has been made, whereas the special limitation of s. 374 of the Civil Procedure Code will be applicable. Therefore, as I said before, I do not myself see that there will be any conflict between the sections of the Civil Procedure Code to which I have referred and art. 179 of the Limitation Act. Now, looking to the terms of the order of the Court passed in this matter upon the 24th December, 1883, it is obvious not only that the pleader for the decree-holder knew that there were defects in his application, but further,

(1) 10 B. 62

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he in explicit terms stated that he did not desire, for the present, to proceed with the execution: and I confess that it would seem to me to be almost a contradiction in terms to say that an application dealt with as this was, was an application for execution in accordance with law, such as would save the course of ordinary limitation running. On [77] the contrary, it seems to me that the state of facts, as they appear from the terms of that order, are such that we are fully warranted in applying s. 373 of the Civil Procedure Code, if it is applicable to what took place in respect of the application of the 14th February, 1881, and I myself have no doubt whatever, reading s. 647 of the Code in conjunction with ss. 373 and 374 of the Code, that those sections are applicable. Moreover, I am fortified in this view by the opinion expressed by my late brother Oldfield and approved by my brother Mahmood in the case of *Kifayat Ali* v. *Ram Singh* (1), and I am prepared unhesitatingly to follow that ruling, and accept the principle therein laid down, that s. 373 of the Civil Procedure Code is applicable to execution proceedings, so far as may be. With regard to that case of my brothers Oldfield and Mahmood, I may further say that they therein adopted a ruling of the Bombay High Court, in *Pirjade* v. *Pirjade* (2), and it seems to me that the reasoning of Melville, J., as stated in his decision in that case, is of a character to commend itself to one's better judgment, and I approve the grounds on which he proceeded. While he seems to me conclusively to point out why there need be no conflict or hostility between the provisions of the Civil Procedure Code and the Limitation Act, the learned Chief Justice of the Bombay High Court, Sargent, C. J., although he seems to indicate that there may be some such conflict, does not point out what that conflict is.

Adopting the view of the two judgments I have mentioned, how does it meet the circumstances of this case, and what portion of s. 373 of the Code fits into the particular circumstances of the case?

As regards the first paragraph of that section, it is clear that it has no applicability at all, because no leave or sanction was given by the Court to the withdrawal of the application of the 14th February, 1881, with leave to institute fresh proceedings upon the same basis. But paragraph 2 of s. 373 of the Code undoubtedly does apply to the circumstances, in my opinion. The application was withdrawn at the instance of the pleader for the decree-holder, and with the distinct intimation that "for the present we are not anxious to carry on the execution proceedings;" but no permission was given to withdraw with leave to take fresh proceedings. I am [78] of opinion, and disposed to think, that the prohibition contained in the latter portion of that section's second paragraph has application; that it was not open to the decree-holder to make the application which he has now made.

But further than that, even if one can assume here for a moment that permission is to be inferred from the action of the Court in returning the petition for execution to decree-holder, s. 374 of the Code, with its specific and special limitation steps in, and the present application of the 14th February, 1884, would be barred, because it was not made within three years from the date of the decree, the application of the 14th February, 1881, having become a nullity by reason of the withdrawal of the petition.

So it must be looked upon that there was an unbroken interval of time from the date of the decree, 22nd May, 1878, till the 14th February, 1884, when the application, now the subject-matter of appeal, was presented before the Subordinate Judge. That being so, it seems to me that this

(1) 7 A. 359. (2) 6 B. 681.

present application is undoubtedly barred, and that the decree-holder is not entitled to pray in aid the proceedings which commenced in 1881 and terminated in 1883. What I mean to say is this, that all that took place with regard to the proceedings commencing on the 14th February, 1881, and ending on the 24th December, 1883, must be struck out, and they cannot be regarded as constituting an application on which the decree-holder can rely. This being the view that I take of the matter, it seems to me that this appeal ought to be decreed, and I, therefore, decree the appeal and, reversing the orders of the Courts below, hold that the application of the decree-holder for execution should be dismissed, and the judgment-debtors are entitled to have their costs in all the proceedings.

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MAHMOOD, J.—I am of the same opinion, and as my learned brother has already stated the various aspects of the question of law which induced me to refrain from deciding the case myself, sitting as a single Judge, and to refer it to a Division Bench consisting of two Judges, I need not say much. I have only to say that it seems to me that, upon general principles, all rules of procedure or adjective law which provide pleas in bar to the action are rules of convenience which should be applicable as much to all [79] miscellaneous proceedings (be they in the nature of applications for execution or any other class of applications) as they are applicable to regular suits. To take as an example the plea of *res judicata*: it is based upon the maxim "*Nemo debet bis vexari pro una et eadem causa*," which is a maxim of wider application and has application to regular as well as miscellaneous proceedings. For, why should a judgment-debtor be harassed twice, unless there is a reason admitting of explanation that the second application is not in fact a harassing twice? Such as the decree not being paid off at all or only partially satisfied. in which case the doctrine of *res judicata* will not apply, for reasons into which I need not enter in detail for the purposes of this case. But where no such explanation is given the doctrine will apply; as in the two cases to which I alluded in my order of reference it has been laid down that *res judicata* is applicable to orders made in execution proceedings. But this is no longer an open question for the Courts in India, after the expression of opinion of their Lordships of the Privy Council that the law of *res judicata* is applicable to execution proceedings. I have said so much about the rule of *res judicata* because, so far as I can see, the operation of other pleas in bar of an application or a suit, such as ss. 373 and 374 of the Civil Procedure Code comtemplate, and upon which sections my brother has already fully dwelt, fall under the same category as the plea of *res judicata*, because they are all pleas *in limine* barring the action. My learned brother has already said that the operation of those two sections is almost imperatively required, not only by the express terms of s. 647 of the Civil Procedure Code, but also by the general principles of convenience and regularity of proceedings. There is, of course, a conflict of decisions. to which my referring order alludes, and it simply comes to this, that the learned Judges who decided the case of *Pirjade* v. *Pirjade* (1), and which was followed by Mr. Justice Oldfield and myself in the case of *Kifayat Ali* v. *Ram Singh* (2), took one view of the matter—a view approved by my learned brother Straight—and the Madras case of *Ramanandan Chetti* v. *Periatambi* (3) and the present Chief Justice of Bombay took the opposite view. It was, indeed, out of respect due to the learned Chief Justice of Bombay, and also to the view taken by the Madras Court, that I did not undertake [80] the

(1) 6 B. 681. (2) 7 A. 359. (3) 6 M. 250.

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responsibility of deciding the case myself. I have, however, no onger any doubts left now. If it is a true doctrine, regulating the principle upon which the rules of procedure should proceed, that those rules aim at facilitating the administration of justice by promoting the convenience of the parties by preventing recurrence and repetition of points already adjudicated upon, there is no reason why all the principles contained in Chapter XXII of the Civil Procedure Code should not be applied to execution proceedings. Indeed, as one who has acted as a Court of first instance in the mufasal for some time, I have applied the provisions contained in that chapter to proceedings in execution. And if that chapter were not applicable to such proceedings, there would scarcely be any provisions to enable the parties to a decree to enter into any compromise. I have added these few remarks simply because the case has taken up the time of two Judges instead of one. I entirely concur in the order of my learned brother Straight.

Appeal allowed.

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10 A. 80 = 8 A.W.N. (1888) 7.

APPELLATE CIVIL.

Before Mr. Justice Straight.

KIRPA DAYAL (*Petitioner*) *v.* RANI KISHORI AND OTHERS (*Objectors*).*
[3rd November, 1885.]

Temporary injunction—Civil Procedure Code, s. 492—"Wrongfully" sold in execution of decree.

An objection made under s. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed ; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond, and (*b*) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree.

Held that although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as [81] many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution-sale, and no practical injury to anyone would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the applicant.

[Overruled, 26 A. 311 (312, 313) = A.W.N. (1904), 37 ; F., 32 A. 79 (83) = 7 A.L.J. 932 = 7 Ind. Cas. 183 ; R., 2 L.B.R. 89 (90).]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *G. E. A. Ross* and Pandit *Bishambhar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Baboo *Ratan Chand*, for the respondents.

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*Application in F. A. No. 107 of 1884, under s. 492 of the Civil Procedure Code.

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APPELLATE CIVIL.

10 A. 80 = 8 A.W.N. (1888) 7.

JUDGMENT.

STRAIGHT, J.—This is an application for an interim injunction under s. 492 of the Civil Procedure Code. The following are the circumstances under which it has been preferred:—Sah Kirpa Dayal, the applicant before me, is the alleged assignee by an instrument of the 17th April, 1881, of, among other things, the rights as mortgagee of the three persons, Chunni Lal, Manik Ram and Kishen Das, under a mortgage executed on the 20th June, 1876, by one Laik Singh, for Rs. 7,000. On the 5th May, 1881, Musammat Rani Kishori instituted a suit for the recovery of Rs. 22,926-10-9 from Chunni Lal, Manik Ram and Kishen Das, and, on the 20th September following, obtained a decree from the Subordinate Judge of Mainpuri. While this suit was pending Musammat Rani Kishori, on the 17th May, 1881, obtained an interim attachment of the bond for Rs. 7,000 as then being in the hands of the three defendants, and subsequently, on the 13th June, a further attachment directed to Sah Kirpa Dayal, the now applicant, into whose possession it had passed, and the attachment was perfected on the 29th of the same month. Objections were then filed by Sah Kirpa Dayal, but were disposed of adversely to him, and he then instituted two suits, one against his three assignors and Mussammat Rani Kishori to have the instrument of the 17th April, 1881, and his right thereto declared valid, the other to recover Rs. 19.284-3-6 from his three assignors upon the basis of the assignment—Musammat Rani Kishori upon her own application being joined as a party. Both these suits were filed in the Court of the Judge of Mainpuri, who, on the 21st August, 1882, at the instance of Sah Kirpa Dayal, issued an injunction to restrain Musammat Rani Kishori from bringing the instrument of the 17th [82] April, 1881, to sale in execution of her decree of the 20th September, 1881. This order was upheld in appeal by this Court. The two suits of Sah Kirpa Dayal were subsequently tried together by the Judge of Mainpuri, who, on the 7th of June last, found that the alleged assignment of the 17th April, 1881, was in fact made after the attachment issued at the instance of Musammat Rani Kishori on the 17th May, 1881, in collusion between the three assignors and Sah Kirpa Dayal with the object of defeating such attachment, and he dismissed both the suits brought by the latter. Sah Kirpa Dayal filed an appeal in this Court from the decision of the Judge on the 28th July last, and on the 29th of the same month preferred the application which I now have to dispose of. It is not without some hesitation that I have come to the conclusion to grant it, my chief difficulty being caused by the word "wrongfully" in s. 492 of the Code under which it is presented. It seems to me that we cannot be too careful as to the mode in which we permit the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree-holder in another from obtaining the fruits of his judgment by executing his decree in ordinary course against the property of his judgment-debtor. At the same time it is of course most desirable to guard as far possible against a multiplication of suits, and I presume that this was one of the objects the Legislature had in view in passing s. 492 in its present shape. I cannot but feel that if Musammant Rani Kishori is allowed to proceed with the sale of the rights and interest of her judgment-debtors under the mortgage of the 20th of June, 1876, many complications are likely to arise which would probably result in further litigation in some shape or another, whereas if she is restrained from doing so until after the appeal in this Court has been disposed of, no practical injury that I can see will result to any one. I am considerably influenced

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in taking this view by the circumstance that my brothers Brodhurst and Tyrrell sanctioned the injunction granted by the Judge of Mainpuri, when the suit was in its original stage, as also by the fact that in First Appeal No. 113 of 1881, a not dissimilar case (1), my brother Oldfield adopted a similar course to that which I propose to follow. Upon the applicant Sah [83] Kirpa Dayal executing a bond with two sureties for Rs. 10,000, by way of security, let an interim injunction issue to the Subordinate Judge of Mainpuri, directing him not to hold the sale of the instrument for Rs. 7,000 executed by Laik Singh and dated the 20th June 1876, until he has received notice from this Court that this injunction has been dissolved.

The costs of this application will be costs in the cause (2) (3).

Application granted.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUL CHAND (*Judgment-debtor*) v. MUKTA PRASAD (*Decree-holder*).*
[3rd November, 1887.]

Execution of decree—Sale in execution pending appeal from deceee—Application for confirmation of sale after reversal of decree—Court not competent to grant confirmation—Civil Procedure Code, s. 312.

Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Basoppa bin Malapa Aki* v. *Dundaya bin Shivlingaya* (4), referred to.

THIS was an appeal from an order of the Munsif of Cawnpore granting confirmation of a sale in execution of a decree held by the respondent against the appellant. The sale took place on the 10th August, 1886, pending an appeal to the High Court from the decree. The appeal to the High Court was allowed and the decree reversed on the 5th Nobember, 1886, before the purchaser (who was the decree-holder), made his application (dated the 20th March, 1887) for confirmation of the sale. The Munsif was of opinion that he had no power to refuse such confirmation. He therefore allowed the application, observing :—" I cannot help remarking that this is rather a hard case for the judgment-debtor. The decree in execution of which this sale took place has now been set aside by the Hon'ble the High Court. The law as it at present stands does not allow us to interfere with a sale of this nature, [84] which is otherwise regular; and however inadequate the price may be of a house sold in auction, we have no power to interfere if the application is not based upon the ground of material irregularity in publishing or conducting the sale."

The judgment-debtor appealed to the High Court.

Mr. *G. E. A. Ross*, for the appellant.

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* First Appeal, No. 88 of 1887, from an order of Babu Nilmadhab Rai, Munsif of Cawnpore, dated the 30th March, 1887.

(1) Not reported.

(2) See also *Ganga Nand* v. *Balgobind Das* and *Bahuria Manraj Kuari* v. *Maharajah Prasad Singh* (A.W.N. 1884, pp. 349, 352).

(3) On the 3rd November, 1885, the appeals in both suits came on for hearing before Pettheram, C.J., and Tyrrell, J., who ordered a re-trial on the principle laid down in *Jagram Das* v. *Naraia Lal*, 7 A. 857. See *Jadu Rai* v. *Kanezak Husain*, 8 A. 586.

(4) 2 B. 540.

Babu *Dwarka Nath Banerji* and Munshi *Ram Prasad*, for the respondent.

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STRAIGHT, J.—This appeal relates to an application made to the Munsif of Cawnpore for confirmation of a sale which took place on the 10th August, 1886 I have not before me the date of the decree in execution of which the sale was held, whereat the respondent, decree-holder, purchased; but it is sufficient for the purposes of this case to state that the sale of the 10th August, 1886, took place while an appeal from that decree was pending in this Court, which appeal was heard on the 5th November, 1886, and the result of that appeal was that the decree obtained by the respondent against the appellant was reversed and his suit was dismissed. The decree-holder, notwithstanding this dismissal of his suit in appeal, on the 20th March, 1887, applied for confirmation of the sale at which he had purchased on the 10th August, 1886, and that confirmation has been granted by the Munsif.

It is from that order of the Munsif that the appeal is now preferred, and the single and simple position taken up for the judgment-debtor is that the Munsif should not have confirmed the sale, because, the decree having been set aside before application had been made for confirmation of the sale, the warrant for the sale was at an end.

I have no doubt that this is a sound contention. The Civil Procedure Code contemplates that, before a sale shall become absolute for the purpose of laying the foundation for the grant of a sale certificate, it must be confirmed, that is to say, the Court executing the decree must be satisfied before confirming not only that the sale was a good sale in advertence to the language of s. 311 of the Code, but that there was before him a subsisting decree with the execution of which he ought to proceed by granting confirmation. In the present instance the Munsif had direct notice on [85] the 30th March, 1887, when he made the order the subject of this appeal, that the decree in execution of which the sale of the 10th August, 1886, had taken place had been set aside. I do not think that a Court executing a decree ought to make an order under such circumstance confirming a sale.

This view of the matter is borne out and supported by a ruling of the Bombay High Court, *Basappa bin Malappa Aki* v. *Dundaya bin Shivlingaya* (1), which is directly in point to the facts of the present case, and with the reasoning contained in the judgment of the learned Judge who determined that case I entirely agree; and adopting his view, I decree this appeal with costs, and setting aside the order of the Munsif, direct that the application for confirmation of the sale of the 10th March 1886, be dismissed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

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(1) 2 B. 540.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MANSAB ALI (*Defendant*) v. GULAB CHAND AND ANOTHER (*Plaintiffs*).* [7th November, 1887.]

Bond—Interest post diem—Non-payment of principal and interest at agreed date—Limitation—Continuing breach—Act XV of 1877 (*Limitation Act*), s. 23, *sch ii, Nos.* 115, 116.

Interest as interest cannot be allowed on money lent on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond of deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be given only by way of damages. *Cook* v. *Fowler* (1) referred to.

Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of s. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation Act (XV of 1877).

[F., 13 A. 330 (336) = 11 A.W.N. 66; 19 C. 19 (25); 13 Ind. Cas. 148 (150); 14 Ind. Cas 244 (245); 15 Ind. Cas. 911 (913) = 15 C.L.J. 684; App., 2 M.L.J. 235 (238); R., 11 A. 416; 17 A. 581 (587) = 15 A.W.N. 128; 18 M. 257 (262); 18 M. 331 (332) 24 C. 699 (706) = 1 C.W.N. 437; 34 A. 429 (432); D., 2 B. 107, (109).]

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Hanuman Prasad* and Mr. *J. Simeon* for the appellant.

Munshi *Ram Prasad*, for the respondent.

[86] EDGE, C.J., and TYRRELL, J.—This is an appeal by Syed Mansab Ali, one of the defendants, from the decree of the Subordinate Judge of Banda, dated the 31st July, 1886. The action was brought on the 24th November, 1885, upon a registered hypothecation bond, dated the 5th January, 1868, executed by the defendant Syed Mansab Ali in favour of the plaintiff Gulab Chand and one Beni Prasad, who was the agent of the plaintiffs' firm of Babu Lal and Shankar Lal of Banda. The defendants Yad Ali, Karam Ali, the sons of Mir Syed Ali, deceased, and Musammat Khair-ul-nissa, the widow of Mir Syed Ali, were made defendants, as they laid claim to the hypothecated property, alleging that it was purchased by Mir Syed Ali for himself, although in the name of his eldest son, the defendant Syed Mansab Ali. The defendants Baldeo, Hazari and Chote are the representatives of Beni Prasad mentioned in the hypothecation bond in suit. The defendants Baldeo, Hazari and Chote admitted, by their written statement filed on the 21st December, 1885, that in the transaction in question Beni Prasad was merely the agent of the plaintiffs' firm, and that the money secured by the bond was the money of the plaintiffs' firm. In the bond in question Beni Prasad is described as the gomashta of the firm of Babu Lal and Shankar Lal at Banda. The plaintiff claimed as against the defendants Syed Mansab Ali, Yad Ali, Karam Ali and Musammat Khair-ul-nissa, payment of Rs. 2,300 principal money and Rs. 10,483-11 as interest from the 5th January, 1868, to the 20th November, 1885, further interest during suit and until payment, and costs, and in default of payment of foreclosure and possession. The defendant Syed Mansab Ali in the first and second paragraphs of his written statement raised a

* First Appeal No. 195 of 1886 from a decree of Pandit Ratan Lal, Subordinate Judge of Banda, dated the 31st July, 1886.

(1) L.R., 7 H.L. 27.

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defence which depended on the construction of the bond : that defence has not been supported by any argument on appeal before us. We agree with the judgment of the Subordinate Judge on that point. Mansab Ali also pleaded that Beni Prasad was a creditor in fact under the bond to the extent of one-half. That contention was not pressed before the Subordinate Judge and has not been raised before us. He also pleaded payment and an adjustment of the account. The defendants Yad Ali, Karam Ali, and Musammat Khair-ul-nissa pleaded that the hypothecated property was purchased by Mir Syed Ali with his own moneys ; that the [87] defendant Syed Mansab Ali only managed the cultivation and collections and the Court business ; that Mir Syed Ali was the real owner of the property, and that Syed Mansab Ali had no power to mortgage the share of the pleading defendants. They also pleaded an arbitration and award of 1863, and that the Settlement Officer had affirmed in 1875 their right to have their names entered in the register as proprietors.

The Subordinate Judge found on all the substantial issues in favour of the plaintiffs and made a decree in their favour as against the defendants Syed Mansab Ali, Yad Ali, Karam Ali, and Musammat Khair-ul-nissa. From that decree the defendant Mansab Ali has brought the present appeal, and from it the defendants Yad Ali, Karam Ali, and Musammat Khair-ul-nissa have brought a separate appeal. The two appeals came on together to be heard by us.

On the question as to whether the defendant Syed Mansab Ali was the purchaser on his own behalf, and, at the date of the hypothecation sued on, the sole proprietor of the property hypothecated by that bond, we find in favour of the plaintiffs, agreeing substantially with the reasons and conclusions of the Subordinate Judge. The sale-deed of the 3rd January, 1860, is evidence of a sale to the defendant Syed Mansab Ali as the sole vendee. This deed might not be conclusive evidence on the point. The proceedings of the Collector's Court of Hamirpur of the 12th March, 1860, of the holding of which notice must have been previously given, refer to the defendant Syed Mansab Ali as the purchaser of the 10 annas 8 pies share in question. Dewan, one of the vendors of the 3rd January, 1860, has proved that the sale was made to the defendant Syed Mansab Ali alone, that there was no other purchaser, and that Syed Mansab Ali paid the price and got possession. The mortgage-deed of the 22nd June, 1866, the conditional sale-deed of the same date, and the sale-deed of the 11th December, 1869, show that the defendant Syed Mansab Ali was dealing with the property in question as the sole vendee and owner of it, and this subsequently to the alleged award of the 10th July, 1863. The witnesses Pershad and Gauri Shankar prove that for several years the defendant Syed Mansab Ali was the person who was in possession of the property in question.

[88] The evidence of the defendant's witness Jagannath, where he says that Mir Syed Ali gave the purchase-money to Basant, is contradicted by Dewan, one of the vendors, who says that it was Syed Mansab Ali who paid the price. We believe the witness Dewan. The evidence of the defendant's witnesses, Jagannath, Dhamna and Umrao, as to the persons who made the collections is at variance with the written statement of the defendants Yad Ali, Karam Ali and Musammat Khair-ul-nissa, in which they say that Syed Mansab Ali managed the cultivation and collections and the Court business, and is contradicted by the evidence of Gauri Shankar, and inferentially by that of Dewan and Pershad. The defendants have relied upon the report of the Tahsildar of pargana Mahoba of the 13th

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October, 1875, and the order passed on the 6th November, 1875 (documents Nos. 147 and 148). The observation which we make as to these documents is that there is nothing to show that the plaintiffs were aware of the application referred to in them, and that it is more than probable that that application was conclusively made with the object of providing evidence to defeat the rights of the plaintiffs which had accrued four years previously, that is to say, in 1871. The defendants tendered in evidence before us a document alleged to be a copy of an award made on the 10th July, 1863. We rejected this evidence on the ground that it was not proved to our satisfaction that any such award was made, and that the absence of the original, if made, was not satisfactorily accounted for. The story as to the loss of the original document and that of the other instrument referred to in the Subordinate Judge's judgment, and the finding of the pieces, appeared to us to be too suspicious to be acted upon by us. No arbitration agreement was produced, although Sarfaraz Husain, a witness for the defendants, had stated that it remained with the Kazi. Besides, no such agreement to refer or award is alluded to in the deed of agreement, dated the 1st November, 1878, executed by the defendants Syed Mansab Ali, Yad Ali and Karam Ali, by which disputes as to property, including the property in question, were referred to arbitration. The evidence of the defendents witnesses as to what was the subject and scope of the alleged arbitration and the nature of the alleged award we have rejected on the ground that the alleged agreement to refer and the alleged award have not been produced, and the absence of [89] those documents has not been satisfactorily accounted for. As to the defence of payment, we agree entirely with the finding of the Subordinate Judge and his reasons. Further, if the evidence as to the payment is to be credited, the defendant Mansab Ali within two years after the execution of the bond made payments which were more than sufficient to discharge the principal and interest then due. No receipt has been produced, and although the bond provides that all payments on account should be endorsed upon it, and that no unendorsed credits should be claimed by Syed Mansab Ali, no payments have been endorsed on the instrument. If the payments had been made, it is inexplicable that the mortgagor would have allowed the mortgagees to retain possession of the bond from 1870 to the present day. As to the paper No. 43, the Court below properly rejected it as evidence, as we also have done.

Finding as we do, for the reasons which we have already stated, that the property hypothecated by the deed of the 5th January, 1868, was the separate property of Syed Mansab Ali, and that the principal and interest made payable by that deed are still due and unpaid it remains to be considered to what extent the claim of the plaintiffs is to be decreed.

It is clear that the plaintiffs are entitled to the principal, together with interest at the agreed rate of Rs. 2-2 per mensem for three years and six months from the date of the execution of the bond, the 5th January, 1868, up to the 30th of June, 1871. It is not disputed that this at least is the legal construction of the bond and the result of our findings on the facts. The plaintiffs, however, claim to be entitled in addition to interest from and subsequent to the 30th June, 1871. They contend that by the bond itself such additional interest is expressly made payable, or that we should infer from the wording of the bond that it was the intention of the parties that interest should be payable until the principal should have been repaid, or that the plaintiffs are entitled to damages for the non-payment on the 30th June, 1871, of the principal and interest then due, and that such

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damages may be awarded for the period of six years immediately prior to the commencement of this action. This latter contention was based on the further contention that the non-payment of the principal and interest on the agreed date constituted a continuing breach, giving a continually renewed cause of [90] action from day to day from that date up to the commencement of the action. As we read the authorities, interest as interest cannot be allowed on money lent in India on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was the intention of the parties that interest should be payable, and then only for the period during which it so appears that it was intended that interest should be payable. The principal authorities on this point are collected in the notes at pages 113 and 114 of Macpherson's Law of Mortgage in British India, 7th ed. In the case of *Cook* v. *Fowler* (1) it was decided in the House of Lords, (so far as the law in England is concerned) that in a contract for the payment of money borrowed for a fixed period on a certain day, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment is not "to be implied, unless there is something to justify it upon the words of the particular instrument ; and that although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract." See Lord Selborne's judgment in that case.

The mortgage-deed in question, so far as it bears upon this question, is as translated in the following words :—"I therefore declare and write that I shall without any objection discharge and pay in full the principal with interest at the rate of Rs. 2-2-0 per cent. per mensem within three years and six months from the date of the execution of this bond up to the 30th June, 1871. All the payments made by me, the executant, to the said mortgagees at each harvest and in each year shall first be applied to the payment of interest, and the balance, if any, shall be carried towards the satisfaction of the principal. I shall cause the payments I make to be endorsed on this document, and if I, the declarant, claim any payment not entered on the back of this document, such claim shall be false and untenable. If the mortgage-money together with interest be not paid in full within the stipulated time, then under this document the mortgage on the property hypothecated by me shall be foreclosed, and the mortgagees shall be at liberty to take proprietary possession of my the executant's share." There is [91] here obviously no express agreement to pay interest *post diem*, and we are of opinion that no such agreement can be implied from this deed. As we read the deed, the expressed intention of the parties was that if on the 30th of June, 1871, the principal and interest then due were not paid, the mortgagees should be entitled to foreclose for the principal and interest due and unpaid on the 30th of June, 1871, and not for any interest *post diem*. In our opinion, the wording of the deed negatives any such implication as that contended for on behalf of the plaintiffs. Whether or not the plaintiffs are entitled to have damages awarded to them for the non-payment of the principal and interest on the 30th June, 1871, must depend on whether or not s. 23 of the Indian Limitation Act, 1877, applies to this case. The damages are claimed in respect of the breach of a contract in writing registered within the meaning of art. 116 of the second schedule of the Indian Limitation Act, 1877, and, unless s. 23 applies, the

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period of limitation is six years from the date of the breach (see arts. 116 and 115 of the second schedule to the Indian Limitation Act, 1877). It cannot be said that there were here successive breaches within the meaning of art. 115. The contract was to pay the amount due on the 30th June, 1871, if not previously paid, and on the failure to pay on the day appointed the breach of the contract was committed. There are many contracts of which there may be successive breaches, as for instance contracts by which a party to the contract agrees to do or to forbear doing two or more different things: in such contracts the contracting party may commit several breaches by not doing those things which he has contracted to do, or by doing those things which he has contracted not to do. The contract under consideration was to do one thing; that was to pay the amount due on or before the 30th June, 1871, and on the non-payment of the money on the day appointed the breach of the contract was committed. It cannot, in our opinion, be said that there was here a continuing breach. A covenant for title is an instance of a contract of which, according to the English law, there may be continuing breaches. So is a covenant to maintain a building, in repair. There is a breach of the covenant for title so long as an adverse title exists, and there is a breach of covenant to maintain a building in repair so long as the building is out of repair. To take another [92] example from the English law, the period of limitation *prima facie* begins to run on a promissory note payable on demand from the date of the note, the debt being payable without any demand, and the non-payment of the note is not, according to English law, a continuing breach which extends the period of limitation. The Indian Limitation Act specifically provides for the period of limitation for bringing an action on a promissory note payable on demand, but this fact does not make the illustration from the English law the less apposite. We are clearly of opinion that the breach of agreement here took place on the 30th of June, 1871, and that there was no continuing breach within the meaning of s. 23 of the Indian Limitation Act, 1877. Taking this view of the law, we must hold that the claim of the plaintiffs to compensation for breach of the agreement is barred by art. 116 of the second schedule of the Indian Limitation Act, 1877, and must be disallowed. The result is that a decree as against the defendant Syed Mansab Ali will be drawn up in accordance with s. 86 of the Transfer of Property Act, 1882, but limiting the amount to be paid to be Rs. 2,300 principal money and interest thereon at the agreed rate of Rs. 2-2-0 per mensem for three years and one-half, that is, from the 5th January, 1868, up to the 30th of June, 1871, with proportionate costs and interest at the rate of Rs. 12 per centum per annum during the pendency of the suit, and at the rate of Rs. 6 per centum from the date of the decree until payment of the expiration of six months from the date of the decree, whichever shall first happen, and to this extent the appeal of the defendant Syed Mansab Ali is allowed with proportionate costs to him to be allowed in account.

Appeal allowed in part.

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[93] *Before Mr. Justice Straight and Mr. Justice Brodhurst.*

THE UNCOVENANTED SERVICE BANK, LIMITED (*Plaintiff*) v. GRANT (*Defendant.*)* [10th November 1887.]

Limitation—Acknowledgment in writing—Act XV of 1877 (*Limitation Act*) s. 19, *Explanation I.*

In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with refernce to s. 19, explanation I, of the Limitation Act (XV of 1877).

THIS was a suit brought by the Uncovenanted Service Bank, Limited, against C. W. Stapleton, Mrs. M. S. Stapleton, and Lieutenant-Colonel C. W. Grant, for recovery of Rs. 1,088-9-0, principal and interest due upon a bond dated the 17th April, 1879. As regards the two first-named defendants the suit was not pressed, the plaintiff (Bank) having been unable to ascertain their place of residence and to serve summonses upon them. The plea of the defendant (Colonel Grant) was that he had " executed the bond as a surety only, " to which extent he admitted the claim, and he prayed " that in passing the decree in this suit the Court will be pleased to make a provision that execution shall be taken only against the principal debtors first, and in case of their failure to satisfy it, the decree may be executed against him."

The suit was instituted on the 9th June, 1885. The third paragraph of the plaint was as follows :—" That the claim of the plaintiff is within limitation, inasmuch as the defendants subsequently, and before the expiry of the period of limitation acknowledged the said debt by their acknowledgments hereto attached."

So far as regards the defendant, Colonel Grant, the acknowledgments here referred to were contained in three letters written by him to the Manager of the Bank, and dated respectively the 13th July, 1881, the 6th June, 1882, and the 22nd February, 1883. That first of these letters was as follows :—" Your letter of the 19th instant just came to hand. I was under the impression that the amount of Rs. 1,000, for which I went in security for Mr. Stapleton, had been paid up long ago. Of course I do not dispute my liability for the balance remaining, Rs. 698-8-0, but as I have not received any notice of Mr. Stapleton having been a defaulter, I [94] must ask you to give me a few days' grace to enable me to write to him, to find out whether he wishes to let me in for the whole sum, or whether he has any sort of plan to suggest." The letter of the 6th June, 1882, contained expressions to the effect that the writer did not " deny his liability," but thought " that Mr. Stapleton and other sureties should pay up something." The letter of the 22nd February, 1883, contained these expressions :—" You appear to have twisted the meaning of my letter. I wish to see Mr. Stapleton, whether he is going to meet his engagement like an honest man or is going to let me in. I have no intention of withdrawing from the position I have taken up, as I wish Mr. Stapleton's conduct in the matter to be known to the public."

The Court of first instance (Subordinate Judge of Agra) was of opinion, upon the construction of the bond in suit, that Colonel Grant was liable

* Second Appeal No. 1434 of 1886 from a decree of A. Macmillan, Esq., District Judge of Agra, dated the 15th May, 1886, confirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 9th November, 1885.

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as a surety only; and that the action of the plaintiff (Bank) in not pressing the suit against the principal debtors was equivalent to a release or discharge of those debtors which, under s. 134 of the Contract Act, operated as a discharge of the surety. The Court accordingly dismissed the suit.

On appeal by the plaintiff (Bank), the District Judge of Agra gave judgment as follows;—

"This is a suit on a bond dated the 17th April, 1879. Colonel Grant, respondent, says he was a surety only. According to the terms of the bond he was a principal. Admitting that he could properly be permitted to adduce evidence in contradiction of the bond to show he was not a principal but a surety, there is no evidence which shows that there was any arrangement made between him and the appellant, in whose favour the bond was executed, to the effect that he, respondent, was to be treated only as a surety. There may have been an understanding between the respondent and Mr. Stapleton, who was a co-executant of the bond that the latter was to be primarily responsible as principal; but if such an arrangement was made, it is not shown that the appellant consented to it.

"A point has, however, been raised on behalf of the respondent which appears to me to be fatal to the appellant. This suit was brought after the ordinary period of limitation had expired. [75] Limitation has been saved by written acknowledgments given by the respondent. They are contained in his letters to the appellant dated the 13th July, 1881, the 6th June, 1882, and the 22nd February, 1883. In these letters he ackowledged liability only as a surety. His pleader argues that the appellant, who relies on the letters to save limitation, is bound by the restriction implied by their terms, and that he cannot succeed against the respondent as a principal when he only acknowledged liability as a surety.

"Having referred to such authorities as are at hand, I find that, according to the rulings of English Courts of law, the plea urged by the respondent's pleader is valid. There is in particular a case in which it was ruled that a promise by a debtor in respect of a debt for which he was jointly liable with others to pay his proportion of the debt renewed his liability only to the extent of his proportion: *Lechmere* v. *Fletcher* (1); and there is another case in which a promise by a surety to make up what the principal debtor should fail to pay was held to renew the debt for the deficiency only, after application to the debtor: *Humphreys* v. *Jones* (2).

"The rulings referred to were given on the principle that where an action is brought after ordinary limitation has run, and the creditor is obliged to rely on a renewed promise, he can enforce the promise only to the extent to which the debtor has limited it, and a conditional acknowledgment operates only subject to the condition. I am not aware of any rulings by High Court in India laying down a different principle. I therefore hold that in this suit the appellant can only deal with the respondent as a surety.

"It follows that the appellant cannot succeed in his appeal: for having sued the respondent along with two other defendants as principals, he got the lower Court to pass an order exempting the other two from being parties. That is to say, he withdrew from his suit against the other two. He did not ask the Court for permission to withdraw with liberty to bring a fresh suit, nor did the Court's order permit withdrawal with

(1) C. & M. 623.

(2) 14 M. & W. 1.

liberty to bring a fresh suit. The withdrawal without permission to bring a fresh suit involved the discharge of the other two executants of the bond alleged by the appellant to be principals. Their discharge discharges the respondent, according to the principle of s. 134 of Act IX of [96] 1872. I consider, therefore, that the appellant is not entitled to a decree against the respondent, and I dismiss this appeal with costs."

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The plaintiff (Bank) appealed to the High Court from the District Judge's decree.

Maulvi *Abdul Majid* and Munshi *Hanuman Prasad*, for the appellant.

Mr. *G. T. Spankie* and *Lala Durga Charan*, for the respondent.

JUDGMENT.

STRAIGHT, J.—It is sufficient for the purpose of determining the questions raised in this appeal to say that the learned Judge in the Court below has held that the defendant-respondent was a principal debtor under the bond of the 17th April, 1879, and in that capacity liable to the present suit. The contention on behalf on the plaintiff (Bank) is that the Judge, having formed this opinion as to the character filled by him in respect of that instrument, has erroneously held that the three letters of the 13th July, 1881, 6th June, 1882, and the 22nd February, 1883, did not constitute an acknowledgment so as to save time running against the plaintiff (Bank). I am of opinion that the contention for the plaintiff-appellant is a good one, and that these three letters and each of them does constitute such an acknowledgment as is contemplated by s. 19 of the Limitation law more particularly having reference to the language of the explanation I of the section. Incidentally I may observe that the language of the explanation I, is exceedingly wide, and that it covers cases which would not be covered by the ordinary rules applicable in the English Courts to acknowledgments which have been set by the parties for the purpose of saving limitation. I think that those letters were acknowledgments of the right of the plaintiff (Bank) to the amount of the bond-debt due to them, and that the mere circumstance that the defendant therein mentioned that his lability was of a conditional character only did not make them any the less acknowledgments. They were, in my opinion, sufficient to save time to the plaintiff and make their present suit unobjectionable upon the score of limitation. This being so, the appeal is decreed, the judgment of the Judge reversed, and the case will be restored to his file of pending appeals and disposed of upon the merits. Costs hitherto incurred will be costs in the cause.

BRODHURST, J.—I concur.

Cause remanded.

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[97] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

GOODALL (*Judgment-debtor*) v. THE MUSSOORIE BANK LIMITED, AND ANOTHER (*Decree-holders*).* [11th November, 1887.]

Assignment of interest pending suit—Assignment after decree in Court of first instance—Assignee made a party after appellate decree for purposes of execution—Civil Procedure Code, ss. 372, 647.

S. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The

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* First Appeal No. 78 of 1887, from a decree of G. Galbraith, Esq., Subordinate Judge of Debra Dun, dated the 28th February, 1887.

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section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading s. 372 with s. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. *Gocool Chander Gossamee v. The Administrator-General of Bengal* (1) and *Attorney-General v. Corporation of Birmingham* (2) referred to.

Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 (21) of the Code,—*held* that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor.

[R., 12 A. 510 (F.B.); 14 B. 232 (234, 235); U.B.R. (1897-1901), Vol. II, C.P.C., p. 310; Cons., 2 A.L.J. 516 (518).]

THE facts of this case were as follows:—In March, 1876, a suit was brought by the Mussoorie Bank, Limited, in the Court of Small Causes at Dehra Dun, against A. C. Raynor and Caroline Raynor, the executors of Mrs. M. A. Raynor, to recover a sum of money due to the Bank by the deceased. On the 18th April, 1876, the suit was decreed on confession of judgment. On the 25th May, 1876, upon application by the decree-holders, the Court attached thirty shares in the Delhi and London Bank standing in Mrs. Raynor's name, by an order under s. 236 of Act VIII of 1859, the Civil Procedure Code then in force. An objection to this attachment was filed by the defendant A. C. Raynor under s. 246 of the same Act, praying for the release of twenty-four of the shares upon the allegation that he was entitled to them in his own right under the will of Captain Raynor, the husband of the deceased Mrs. Raynor; that Mrs. Raynor had under that will a life-interest only in her husband's property with a power of appointment among her children; and that the shares were therefore not liable to attachment and sale in satisfaction of her debt. This objection was disallowed; and in March, 1877, a regular suit was brought [98] by A. C. Raynor in the Court of the the Subordinate Judge of Dehra Dun, in which he claimed a declaration of his right to and possession of, the twenty-four shares, and to have the summary order dismissing his objection set aside. On the 10th May, 1878, the suit was dismissed, the Subordinate Judge being of opinion that Mrs. Raynor took an absolute interest under Captain Raynor's will, and that consequently the twenty-four shares, as forming part of her estate, were attachable in execution of the Mussoorie Bank's decree for her debt. On the 22nd August, 1878, the High Court, on appeal by A. C. Raynor, reversed the Subordinate Judge's decree, holding that, under Captain Raynor's will, Mrs. Raynor held the estate not absolutely, but for life, as trustee for her children, with a power of appointment among them (3). The costs due to Raynor under this decree were Rs. 1,177-14-9.

At various dates from the 8th May to the 9th December 1878, applications were made, on behalf of the Bank, for the arrest of Raynor in execution of a decree against him passed by the High Court on the 2nd January, 1878, under which Rs, 2,959-8 were due from him to the Bank. In pursuance of orders passed on these applications, Raynor was several times arrested, but on making various payments in part satisfaction, was released. On the 12th December, 1878, Raynor having applied for execution of the High Court's decree of the 22nd August, the Subordinate Judge passed an order attaching the certificates of the twenty-four shares in the possession of the manager of the Mussoorie Bank. On the 13th January, 1879, the High Court refused leave to the Bank to appeal from the decree

(1) 5 C. 726=5 C. L. R. 108.

(2) L. R. 15 Ch. D. 423.

(3) *Raynor v. The Mussoorie Bank*, 2 A. 55.

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of the 22nd August to Her Majesty in Council. On the 10th February, the Manager, in pursuance of an order of the Subordinate Judge, produced the certificates in Court. They were handed over on the same date to Mr. H. B. Goodall, Barrister-at-law, who had acted throughout as Counsel for Raynor. This was done in pursuance of a written agreement entered into between Raynor and Goodall on the 17th January, whereby Raynor agreed to transfer to Goodall all his rights and interests in the twenty-four shares, in consideration of Goodall's paying off the Mussoorie Bank's decree of the 2nd January, 1878, and paying to Raynor Rs. 1,000 in cash. Upon the certificates being handed to Goodall [99] on the 10th February as already mentioned, Raynor executed in his favour a deed whereby he formally transferred the shares in pursuance of the agreement. On the 26th February, upon the application of Raynor, the Court of Small Causes released the shares from the attachment placed on them by its order of the 25th May, 1876.

On the 14th August, 1879, the Privy Council gave the Mussoorie Bank special leave to appeal to Her Majesty in Council from the High Court's decree of the 22nd August, 1878. Judgment was given in the appeal on the 21st March, 1882, the effect of the decree being to set aside, the decision of the High Court and to dismiss the regular suit instituted by Raynor in the Subordinate Judge's Court in March, 1877 (1). The Mussoorie Bank thereupon, on the 22nd June, 1882, applied to the Court of Small Causes to proceed with the execution of the decree of the 18th April, 1876, but apparently took no further steps in that Court, which, on the 9th March, 1885, passed an order striking off the case. Meanwhile, on the 24th July, 1882, the Bank presented an application to the Subordinate Judge in Raynor's regular suit for execution of the decree of Her Majesty in Council, by restoring certificates of the twenty-four shares which had been given up on the 10th February, 1879, under the High Court's decree of the 22nd August, 1878. On the 12th December, 1882, Raynor, who had been ordered "to produce the shares in Court," filed a petition in which he set forth the transfer of the shares to Goodall on the 10th February, 1879, and stated that in consequence of Goodall being in England, he could not at that time produce the shares, and prayed for an adjournment of six months to enable him to sue Goodall for their recovery. This application was rejected, and Raynor was arrested in execution of the Privy Council's decree; but the bank failed to obtain satisfaction, and on the 3rd March, 1884, applied to the Subordinate Judge to make Goodall a party to the execution-proceedings. On the 1st April, 1884, the Subordinate Judge issued a notice to Goodall, who was then in England, in the following terms:—

"In pursuance of an order passed this day in the above suit, you are hereby required to appear in this Court, either in person or by [100] a duly authorized pleader, on or before the 15th July, 1884, and show cause why you should not be called upon to restore the twenty-four Delhi and London Bank, Limited, shares, numbered 7371 to 7394, made over to you by the plaintiff."

Notwithstanding this notice, Goodall at some time in June or July, 1884, transferred the twenty-four shares through a broker. On the 25th November, 1884, an order was passed by the Subordinate Judge on the Bank's application of the 3rd March previous, directing that Goodall's name should be placed on the record, so that the Privy Council's decree might be executed against him. An application by Goodall to the High

(1) *The Mussoorie Bank, Limited* v. *Raynor*, 4 A. 500.

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Court for revision of this order under s. 622 of the Civil Procedure Code was rejected on the 9th May, 1885, on the ground that the order was passed under s. 372 of the Code and was appealable under s. 588 (21) (1).

On the 7th December, 1885, Goodall having, by the preceding orders, been made a party to the execution proceedings, the Bank applied for execution of the decree against him by attachment and sale of his house at Mussoorie, "if he fails to restore the twenty-four Delhi and London Bank shares and their dividends taken by him which are the subject of this suit." On the 28th January, 1886, an order was passed by the Subordinate Judge, purporting to be made under s. 259 of the Civil Procedure Code, and directing that the house should be sold, unless within six months the shares should be handed over. Upon the same date the house was attached by an order under s. 274 of the Code. On the 3rd May, 1886, a petition was presented by Goodall, in which he objected to the attachment and prayed for its removal; and at length, after repeated adjournments, the Subordinate Judge, on the 28th February, 1887, gave judgment dismissing the petition and ordering the sale [101] to proceed, if the shares were not made over by Goodall within a further period of six months.

The Court's order was in the following terms:—"He is ordered to produce the shares called for, Nos. 7371 to 7394, Delhi and London Bank, within six months from this date. Should Mr. Goodall prefer it, he is hereby allowed to hand over to the Court, or to the Mussoorie Bank, Delhi and London Bank shares of a value equivalent to the twenty-four shares in question as given above or again Mr. Goodall is permitted to pay in a sum of money into Court, or to the Mussoorie Bank, equivalent to the value of the twenty-four shares at the prevailing market rate. In addition, Mr. Goodall must pay all the interest which has fallen due on the twenty-four shares from the date on which he got possession up to such date on which he obeys the above order in any one of the ways specified. An enquiry will have to be made in order to ascertain what amount of interest be due, and, if necessary, a commission will issue for that purpose. In case Mr. Goodall fails to obey the Court's orders within the specified period of six months, the property, under s. 259 of the Code, will, on the application of the Mussoorie Bank, decree-holder, be sold, and the proceeds dealt with as provided for by that section. Mr. Goodall must also pay all costs of these proceedings."

From this order Goodall appealed to the High Court. The sixth of the grounds taken in the memorandum of appeal was "that the Subordinate Judge was wrong in holding that the appellant purchased the shares *pendente lite*, and in making appellant a party to the execution-proceedings under s. 372 of the Civil Procedure Code."

Mr. *A. Strachey*, for the appellant.

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(1) *Raynor* v. *The Mussoorie Bank, Limited*, 7 A. 681, where the Subordinate Judge's order of the 25th November, 1884, is set forth. The report of that case contains mistakes which may conveniently be correceted here. The title of the case should be *Goodall* v. *The Mussoorie Bank, Limited*, Raynor not having been a party. Both in the judgment and in the statement of facts it is made to appear that the Subordinate Judge's order under revision was passed on Raynor's application of the 12th December, 1882, and the judgment proceeds to a considerable extent upon the supposition that the case was "a controversy between to judgment-debtors *inter se*" and that the decree-holder was not a party to it. In point of fact the order was, as above stated, passed on the application of the decree-holder, the Mussoorie Bank, of the 3rd March, 1884, against Goodall only; and Raynor's application of the 12th December, 1882, was rejected, and not granted, by an order dated the 14th of the same month.

[STRAIGHT, J.—Confine yourself to your sixth ground of appeal. I do not see what jurisdiction the Subordinate Judge had to make the order of the 25th November, 1884, making the appellant a party to the suit after decree.]

There was no jurisdiction to make such an order; *Attorney-General* v. *Corporation of Birmingham* (1), *Gocool Chunder Gossamee* v. *The Administrator-General of Bengal* (2), per Pontifex, J. **[102]** See Order XVII, Rules 1 and 3 under the Judicature Act, Rules of 1883. The appellant did not purchase "pending the suit."

The other side will rely on s. 647 of the Code, but that section does not mean that the procedure in suits before decree is to be applied indiscriminately after decree. It was intended to provide a procedure for miscellaneous matters, such as probate, similar to that of suits: *Amir Hasan* v. *Ahmad Ali* (3), *Naigappa* v. *Gangawa* (4), *In the matter of the petition of Jodoo Monee Dossee* (5) The only way in which s. 647 could have been applied was to make the appellant a party while the appeal was pending before Her Majesty in Council by application to the Judicial Committee, or, if the appellant had purchased during the proceedings in execution of the Privy Council decree, those proceedings might have been treated as analogous to a suit. Further, the proper person, if any, to be made a party under s. 372 was not Goodall, but his transferee. At the time when the order of the 25th November, 1884, was passed, the appellant had parted with all his interest in the share [He was stopped].

Mr. *J. E. Howard*, for the respondent (the Mussoorie Bank). This plea is too late The order of the 25th November, 1884, as pointed out by Tyrrell, J., might have been appealed under s. 588 (21) of the Code. No appeal having been preferred, the order has become final and cannot now be questioned.

Mr. *A. Strachey*, for the appellant, in reply. The order of the 25th November, 1884, was of an interlocutory character, and the order now under appeal is in the nature of a final decree—s. 2 of the Code—in appeal from which all interlocutory orders, appealable or otherwise, may be objected to: Civil Procedure Code, s. 591, *Har Narain Singh* v. *Kharag Singh* (6), *Googlee Sahoo* v. *Premlal Sahoo* (7). The objection goes to the jurisdiction of the Subordinate Judge to make the order now under appeal, and it may be made at any time.

JUDGMENT.

STRAIGHT, J.—This is an appeal from an order passed by the Subordinate Judge of Debra Dun on the 28th February, 1887. That order professes to be passed in execution of a Privy Council **[103]** decree dated the 21st March, 1882, and I may, for the purpose of making it quite intelligible why I have adopted the view of this case that I have, state a few dates and facts. Sometime prior to August, 1878, a gentleman of the name of Raynor brought a suit against the Mussoorie Bank in respect of an attachment that had been made of twenty-four shares in the London and Delhi Bank. That suit was instituted in the Court of the Subordinate Judge of Dehra Dun, and it was ultimately dismissed by that Court. Then an appeal was preferred to this Court, and Sir Robert Stuart, Chief Justice, and Pearson, J., who heard that appeal, reversed the decision of the Subordinate Judge, and decreed the plaintiff's suit on the 22nd August, 1878.

The Bank then applied to the two learned Judges of this Court who

(1) L. R. 15 Ch. D. 423. (2) 5 C. 726=5 C. L. R. 108. (3) 9 A. 36. (4) 10 B. 433. (5) 11 W.R. 494. (6) 9 A. 451. (7) 7 C. 148.

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had heard the appeal for leave to appeal from their decree to their Lordships of the Privy Council, and on the 13th January, 1879, that application was refused. The Bank incidentally observed, I suppose for the purpose of affording information to the parties, that it was open to them to go direct to their Lordships of the Privy Council and obtain special leave. That course was adopted by the Mussoorie Bank, and on the 14th August, 1879, they obtained such leave from their Lordships of the Privy Council, and their appeal was admitted. Between the date when this Court refused leave and the date when special leave was granted by the Privy Council, twelve out of the twenty-four shares in the London and Delhi Bank which were the subject-matter of the action were transferred by Raynor to Mr. Goodall, the appellant before us. Whether that was a transfer *pendente lite* is a matter about which, I am not called upon to express any opinion, and I express none, though upon further consideration since yesterday, and in order to correct any erroneous impression that may have been gathered from some remarks made by me, I am by no means clear that the doctrine of *lis pendens* will apply to the circumstances of this case. The Privy Council order decreeing the appeal and dismissing the suit was made on the 21st March, 1882, and in the ordinary course it was forwarded to this Court for transmission to the Court of the Subordinate Judge of Dehra Dun for execution. On the 24th July, 1882, an application for execution was made, and among the matters asked by the decree-holder was that the Court would cause [104] the shares unduly realized by Raynor in execution of the High Court's decree to be restored. Upon that application an order was made by the Subordinate Judge directing Raynor to produce the shares, and he failing to do so, an order was made for his arrest, and, as I understand it, he was arrested. From that time until the month of March, 1884, no further steps seem to have been actively taken for the purpose of executing the decree; but on the 3rd March, 1884, the Bank filed a petition in the Court of the Subordinate Judge, praying that Goodall, the appellant before us, might be brought on as the representative of Raynor. On the 1st April, 1884, the Court issued a notice to Goodall, the terms of which are most significant, and they in substance were as follows, namely, that Goodall was to show cause why he should not be called upon to restore the shares. Now that was the notice to Goodall, and was the only intimation he ever received from the Court of the Subordinate Judge as to what was required from him, and yet upon a notice of that kind, and in reference to a certain affidavit which Goodall sent from England to the Court of the Subordinate Judge, that Court, on the 25th November, 1884, made Goodall a party to the decree in the character of a judgment-debtor. Having put him on the record in that character and after certain proceedings had been held, the Subordinate Judge subsequently passed the order of which complaint is now made on the 28th February, 1887, by which, treating Goodall as a judgment-debtor and as a person amenable to the execution of the decree, they directed him either to hand over the shares or to pay their equivalent, and went on to order that, in default of doing so, under the provisions of s. 259, certain property belonging to him would be sold to satisfy decree.

At the commencement of the argument yesterday, which was so concisely put before us by Mr. *Strachey* for the appellant, I suggested to him the propriety of confining himself to the single question of the jurisdiction of the Subordinate Judge to pass such an order by reason of his want of jurisdiction to have passed the order of the 25th November, 1884, making Goodall a party to the decree. That is the only question that has

been discussed, that is the only question which I propose to decide, and, as I am in favour of the [105] appellant upon that point, his appeal will succeed and the order of the Judge will be set aside.

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Before, however, closing the remarks I have to make in regard to this case, I desire to point out why it is that I think the order of the Judge is without jurisdiction. Mr. *Howard* for the respondent yesterday suggested that as the order of the 25th November, 1884, had not been appealed as it might have been, it had, by reason of the absence of any such appeal, become final, and it was not open to Mr. *Strachey* in the present proceeding to question the jurisdiction of the Subordinate Judge to make either that order or any other order passed in regard to Goodall, who by that order had been joined as a judgment-debtor.

I dissent from that contention of Mr. *Howard*, and I have no hesitation in holding that in an appeal of the kind before me, where the objection goes to the very root of the matter and to the authority of the Court to make the order in the sense that it had no jurisdiction at all, I am entitled to entertain it, and if it has force, to give effect to it. In my opinion the Subordinate Judge had no power under the law to bring in a party after the decree and make him a judgment-debtor for the purpose of applying the provisions applicable to the execution of the decree. It is said that taking s. 647 of the Code and reading it in conjunction with s. 372, it is competent for a Court executing a decree to do on the execution side what a Court on the original side may do under the latter section; that is to say, it may, after decree, bring in any person who, by assignment, creation, or devolution of any interest pending the suit, has become interested in the subject-matter thereof. It is noticeable that s. 647 is specific in its terms. It says that the procedure herein prescribed shall be followed "as far as it can be made applicable" in all proceedings, in any Court of civil jurisdiction other than suits and appeals. But it is impossible to my mind to make s, 372 applicable to execution-proceedings, because by its own language it negatives any such applicability to execution-proceedings. The words used there are "assignment, &c., *pending the suit.*" What the meaning of the words "pending the suit," is to my mind perfectly clear, namely, during the progress of the suit and before the passing of the decree, and in that interpretation I am [106] borne out by the observations of Pontifex, J., in *Gocool Chander Gossamee* v. *The Administrator-General of Bengal* (1). Moreover, in reference to a somewhat analogous rule under the Judicature Act, I find a decision of Jessel, M. R., concurred in by James and Brett, L. JJ., in *Attorney-General* v. *Corporation of Birmingham* (2), where Jessel, M.R., remarks :—"A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose."

Here it is to be observed that in the wording of s. 372 the language is almost identical with the rule cited by Jessel, M.R., and it shows what is to be done in reference to the continuing of a suit, *i.e.*, a *trial* of a case when the subject-matter with which the suit is concerned has passed away to another person. It is not pretended here that Goodall acquired any interest prior to the date of the decree; on the contrary, it was subsequent to the decree that he acquired such interest [see *Raynor* v. *The Mussoorie Bank* (3).] That being so, I am of opinion that ss. 372 and 647 had no

(1) 5 C. 726. (2) 15 Ch. D. 423. (3) 7 A. 681.

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application to the case; that Goodall was improperly made a judgment-debtor, and so improperly being made a judgment-debtor, the provisions of s. 259, which are sought to be enforced against him, are in no way applicable. The result is that the appeal is decreed with costs, *quoad* the Mussoorie Bank, and the order of the Subordinate Judge set aside. As to the respondent Raynor it is by consent dismissed with costs (1).

BRODHURST, J.—I concur. *Appeal allowed.*

10 A. 107 = 7 A.W.N. (1887) 290.

APPELLATE CIVIL.

[107] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

BALWANT SINGH (*Plaintiff*) *v.* SUBHAN ALI AND ANOTHER (*Defendants*).*
[12th November, 1887.]

Pre-emption—Wajib-ul-arz—" Pattidars "—" Chakdars."

Held that the terms of a *wajib-ul-arz* conferring a right of pre-emption upon "*pattidars*" did not apply to a *chakdar* holding a share in the same *chak* as the vendor.

[R., 3 O.C. 110 (117).]

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village, which gave a right of pre-emption to "*pattidars*" in cases of transfer. The clause of the *wajib-ul-arz* relating to pre-emption was as follows:—"If any *pattidar* wishes to sell or mortgage a part or whole of his property, at first he will have to offer it to his brother or brother's son or a member of the same family on a proper consideration. In case of their refusal he will transfer to the other co-sharers, and they will have to pay the same price as offered by the stranger; and in case of the latter's refusal he will have power to mortgage or sell it to anyone he likes."

The facts of the case are set out in the following judgment of the lower appellate Court (District Judge of Allahabad) dismissing the suit:—

"This is a claim of pre-emptive right. The plaintiff-appellant and the vendor are '*chakdars*' holding shares in the same *chak*. The question at issue is whether the right of pre-emption under the *wajib-ul-arz* extends to *chakdars* or not.

"I have no hesitation in deciding that it does not.

"The terms of the pre-emption clause clearly restrict its operation to 'pattidars," and it is well understood that the object of the provision is in all cases to exclude strangers, and a *chakdar* would not ordinarily be one of the co-parcenary community, nor is it asserted that the applicant is so.

"It is, however, ingeniously contended that a *chakdar*, inasmuch as he is a proprietor paying revenue is as much a sharer in the mahal as a pattidar, and that the circumstance of his owning a certain area of land instead of a fractional share does not affect his status as a sharer in the mahal.

[108] A ruling, *Niamat Ali* v. *Asmat Bibi* (2) has been referred to, to show that the expression '*hukiyat*' has been held to mean any land

* Second Appeal, No. 1390 of 1886, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 4th June, 1886, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 11th December, 1885.

(1) Raynor had been cited as a respondent through some mistake. He was represented by Mr. *G. E. A. Ross.*

(2) 7 A. 626.

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held under a proprietary title, such as a grove, &c., and not merely a fractional share; and it is argued that a '*chak*' thus comes within its scope, and *therefore* within the pre-emption clause, in which the word '*hakiyat*' is used.

"The fallacy of this argument is patent. The '*chakdar*' is a proprietor in the *mahal* no doubt, but he is not a pattidar or co-sharer of the mahal. The word '*hakiyat*' may no doubt include a '*chak*,' but that is not the point, which is, whether a '*chakdar*' can claim the right to pre-emption, and not whether, if an acknowledged pattidar should sell a '*chak*,' a right of pre-emption could be raised by another pattidar, to which latter case the ruling might apply. To the present case it does not.

"The fact that the *chakdars* are entered in the *khewat* and *wajib-ul-arz* does not advantage the appellant as it is contended on his behalf that it does. In the *khewat* they are necessarily entered, as they pay a quota of the Government demand and own proprietary rights, but they are even in that distinguished and separated from the pattidars.

"In the *wajib-ul-arz* they are similarly dealt with in the category of inferior proprietors.

"The difference between a '*pattidar*' and a '*chakdar*' is apparent in the fact that the former is jointly responsible with his fellow-pattidars for the payment of the Government demand assessed on the mahal, and in the undivided part of a mahal has rights in each biswa, but no separate rights in any particular biswa, whereas the latter is responsible for his own quota of the revenue only, and owns a certain area which is all his own, while he has no right outside it.

"Neither party has produced any evidence to prove whether the *chakdars* were admitted to enjoyment for payment of the Government demand, but there can be no doubt that they were not.

"Failing the contention that a '*chakdar*' is as much a sharer in the mahal as a 'pattidar,' and therefore has a good claim to [109] the right of pre-emption, it is argued that '*chakdars*' have at least the same right among themselves within the limits of their '*chak*' that the pattidars have in the whole mahal. This again is an ingenious but untenable proposition.

"The pre-emptive clause applies to pattidars only; there is no provision for its extension to *chakdars* even within the limits of their *chak*. This appears to me to be too obvious to require further remark.

"The appeal is dismissed with costs.

The plaintiff appealed to the High Court, on the ground that the terms of the *wajib-ul-arz* were applicable to *chakdars*.

Munshi *Ram Prasad*, for the appellant.

Mr. *Amiruddin* and Maulvi *Abdul Majid*, for the respondents.

EDGE, C. J.—The judgment of Mr. Elliot is a very clear judgment. I approve of that judgment. I think Mr. Elliot's conclusions are correct. The appeal is dismissed with costs,

STRAIGHT, J.—I concur.

Appeal dismissed.

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APPELLATE CIVIL.

10 A. 109 = 8 A.W.N. (1888) 8.

10 A. 109 = 8 A.W.N. (1888) 8.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

AHMAD ALI KHAN (*Plaintiff*) *v.* HUSAIN ALI KHAN (*Defendant*).*
[25th November, 1887.]

Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 60. 127—"*Joint family property*"—"*Exclusion*" *from such property.*

A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit, upon any allegation of fraud. It was contended that art. 127, sch. ii of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand.

[110] *Held* that the amount claimed could not, under the circumstances, be regarded as joint family property; that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that, consequently, art. 127 did not apply to the suit.

THE facts of this case were as follows:—The plaintiff Ahmad Ali Khan, his two brothers Asghar Ali Khan, and Khurshaid Ali Khan, and his uncle, the defendant Husain Ali Khan, held certain immoveable property jointly. This property was managed by the defendant. An agreement for partition of the estate having, in 1873, fallen through, on the 21st May, 1875, a settlement of accounts was effected between the plaintiff's two brothers and the defendant, with reference to the profits of the preceding thirteen years. Whether or not the plaintiff was an active party to that settlement was a matter of dispute. Upon the settlement of accounts, the plaintiff received Rs. 5,419 in cash, and a large sum of money (of disputed amount) was deposited by his brothers with the defendant. On the same date as the settlement of accounts and receipt of the Rs. 5,419, namely, the 21st May, 1875, the plaintiff joined with his brothers in executing in favour of the defendant a deed of acquittance, whereby they acknowledged having received all the money which was due to them by him for their share of the profits of the family property.

In 1876 the plaintiff brought a suit against his brothers Asghar Ali Khan and Khurshaid Ali Khan, in which the defendant Husain Ali Khan was subsequently added as a defendant by order of the Court. In that suit the plaintiff alleged that the money which on the taking of accounts in 1875 was ascertained to be the share of the three brothers was a sum of Rs. 88,531; that this amount less the Rs. 5,419 which he acknowledged having received had been deposited with Husain Ali Khan by his brothers; that they had dishonestly removed it from Husain Ali Khan's custody and deposited it elsewhere in their own separate account, and that out of it he was entitled to recover Rs. 24,091, being the balance of Rs. 29,570, which he alleged to be his one-third share of the

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* First Appeal, No. 216 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 17th August, 1885.

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Rs. 88,531. The defendant, Husain Ali Khan, pleaded in a written statement, dated the 18th August, 1877, that the accounts of thirteen years had been taken with the plaintiff's knowledge, that a deed of acquittance had been given by him, and that Rs. 83,111 [111] odd which remained after payment to the plaintiff of Rs. 5,419 had been deposited with him by the plaintiff's two brothers, and had been withdrawn by one of them in June, 1875, and nothing remained in his hands on deposit. On appeal the High Court decided that the plaintiff was not entitled to share in the amount deposited with the defendant and afterwards withdrawn by Asghar Ali Khan and Khurshaid Ali Khan, and accordingly dismissed the suit.

On the 15th May, 1884, the plaintiff brought the present suit against Husain Ali Khan. In his plaint he alleged that his brothers and the defendant, on the 21st May, 1875, had adjusted the account of the joint estate and found that Rs. 1,12,200 were due to the plaintiff and his brothers from the defendant in respect of the profits of the estate. He alleged also that a deed of acquittance was drawn out, which he, not being acquainted with the real facts, signed at the request of his brothers and the defendant. In para. 6 of the plaint he said :—" After the adjustment of account, the aforesaid amount was placed in deposit with the defendant ; and two-thirds of it, namely Rs. 74,800, were realized by the plaintiff's brothers as their share from the defendant ; and by deducting Rs. 5,419, the balance is due to the plaintiff." He proceeded to allege that a misunderstanding took place between the defendant and his brothers, and the defendant seeing them ready to file a suit, gained over the plaintiff, who, according to his own account, was "a simpleton" and an inexperienced person, and that the defendant, by making use of the plaintiff's signature to some blank papers, caused a groundless suit in the name of the plaintiff to be brought against plaintiiff's brothers to the effect that they had his share in the money which they had realized, and that it should be paid to him by them. He further alleged that after that suit was determined the defendant put off from time to time paying the money to him, and at last he took measures to obtain his right ; and he stated in para. 11 that his cause of action arose on the 25th October, 1883. He alleged in para. 12 that he was deceived by the defendant, but he did not base his action on any allegation of fraud. In para. 13 he stated :—"As the plaintiff has no proper means for enquiring into the facts prior to the amicable settlement of 1875, and he finds it useless to repu-[112] diate the adjustment of account and the matters irrelevant thereto, he is compelled to confine himself to one out of several reliefs, and he prays to obtain a decree for Rs. 31,981, being his share in the remaining amount held in deposit, with costs and future interest against the defendant. Suit valued at Rs. 31,981. All the papers relating to the case will be filed at the first hearing of the case."

In reply the defendant raised a number of pleas which it is unnecessary for the purposes of this report to mention. Para. 3 of the written statement was as follows:—" The allegation that at the adjustment of accounts the profits of the joint estate amounting to Rs. 1,12,000 were found due to the plaintiff and his brothers, and that they were deposited with the defendant, is quite false and contrary to the plaintiff's own repeated declarations. After the adjustment and settlement of the accounts, Rs. 88,531-11-9 only were found due to the plaintiff and his brothers, and with the exception of Rs. 5,419, which the plaintiff's brothers themselves got to be paid to the plaintiff, the whole of the balance

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of Rs. 83,111-11-9 which was deposited with the defendant by the plaintiff's brothers was paid to them by him, as has "been invariably admitted by the plaintiff." Para. 5 was as follows:—" The suit is fit to be dismissed for this reason also, that the defendant had, on the 18th August, 1877, in distinct words totally denied his responsibility to the plaintiff, and computing the period of limitation from the said date, this suit is certainly beyond time; because, whatever may be the nature of the plaintiff's demand, the cause of action in respect thereof had accrued on that date."

The Court of first instance held that the plaintiff's cause of action accrued on the 18th August, 1877, the date of the defendant's written statement in the former suit, and that the suit was barred by limitation. The Court at the same time considered the case upon the merits, and coming to the conclusion that the plaintiff had not proved the allegations contained in his plaint dismissed the suit.

The plaintiff appealed to the High Court. In reference to the question of limitation, it was contended that either art. 60 or art. 127 of the Limitation Act (XV of 1877) was applicable, and that, upon either supposition the suit was within time. In regard to art. [113] 60, it was argued that the deposit was admitted by the defendant in para. 3 of his written statement, and that there was no evidence of any demand prior to the 25th October, 1883, the date mentioned in para. 11 of the plaint. In regard to art. 127, it was argued that the amount claimed was "Joint family property," that the plaintiff not having been a party to the settlement of accounts of the 21st May, 1875, nothing had been done which, so far as he was concerned, deprived the property of its joint family character or altered the nature of his title to it, and that his "exclusion" from his share, within the meaning of art. 127, accrued on the 18th August, 1877, when the defendant first denied all liability in respect of the share.

Mr. *C.H. Hill*, Mr. *A. Strachey*, and Pandit *Sundar Lal*, for the appellant.

The Hon. *T. Conlan*, Maulvi *Abdul Majid*, Munshi *Hanuman Prasad* and Pandit *Moti Lal Nehru*, for the respondent.

EDGE, C. J. (after stating the facts, and holding that the conclusions of the Court of first instance upon the merits were substantially correct, continued):—The question of limitation has been argued in two ways before us. It has been argued that art. 60 of the 2nd schedule of the Limitation Act applies to this case on the basis that it has been proved that there was a deposit within the meaning of that article, and that we must infer an agreement to pay on demand, and that there was proof that the first demand was made on the 25th October, 1883. I see no evidence of deposit within the meaning of that article or at all, so far as the plaintiff is concerned. As I have said, it is very probable that these parties intended to defraud, and did probably in that transaction of May, 1875, defraud the plaintiff. But that is not his case now. The plaintiff relies of course on para. 3 of the defendant's written statement, but that paragraph would not assist the plaintiff, even if it were not absolutely at variance with the finding of this Court in the previous action. That paragraph makes no admission that any money was deposited by the plaintiff or by the plaintiff's brothers on the plaintiff's behalf with the defendant

The other question which has been argued with regard to limitation is based on art. 127 of the 2nd sch. of the Limitation [114] Act. It is contended that art. 127 applies to this case, and that the plaintiff in the

present action is a person excluded from joint family property who is suing now to enforce a right to share therein. There are two or three answers to that contention. In the first place, according to the plaintiff's own case, the account was settled, the share of the three brothers was appropriated, and the money representing that share was deposited with the defendant, and the plaintiff's two brothers subsequently drew out their portion of the common share of the three. That is the plaintiff's case. How the balance now claimed could be said, under those circumstances, to be joint family property, I fail to see. If the plaintiff's case was a true one, according to his plaint, that balance would represent the moneys which had come to him out of the joint family property; but having once so come to him, and having been separately appropriated and enjoyed by him, I fail to see anything of joint family property in it. It was the result of his having enjoyed the family property, and the fact of his having received it and then deposited it in the hands of the manager of the joint property would cause it to cease to retain the status of a joint family property, just as much as if it had been deposited in the hands of a third person not connected with the estate. I may say that I do not think that art. 127 applies at all to a cause like this. There has never been, so far as we know, a denial of the plaintiff's right to share in the family property. What has been denied is the plaintiff's right to recover the specific money. I cannot see how it can be said that he was excluded. If he has been excluded from the proceeds of his share, he was excluded either by fraud on the part of the defendant and his brothers, which is not the case which he attempts to make out here, or he was excluded in this sense, that he did not exercise his right of asking for the money from his agent. In any way looking at this case as launched before this Court on behalf of the plaintiff, we fail to see from the plaintiff's own case how art. 127 can possibly apply.

Under these circumstances, I come to the conclusion that the judgment and the decree of the Court below was a proper one, and that this appeal ought to be dismissed with costs.

TYRRELL, J.—I concur. *Appeal dismissed.*

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10 A. 115 = 8 A.W.N. (1888) 25.

[115] CRIMINAL REVISIONAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* SHEODIN AND ANOTHER. [25th November, 1887.]

Act X of 1872 (*Criminal Procedure Code*, s. 518—*Duration of Magistrate's order—Criminal Procedure Code*, s. 144—*Act XLV of* 1860 (*Penal Code*). s. 188.

In 1876 a Magistrate passed an order under s. 518 of Act X of 1875 (Criminal Procedure Code), directing the Saraogis of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886, in which year there was no fresh promulgation of the order, the Saraogis took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code.

Held, that the conviction was wrong, the order of 1876 having a temporary operation only. *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (1), *referred to.*

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

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(1) 5 C. 7.

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Mr. *J. Simeon*, for the petitioners.

Babu *Jogindro Nath Chaudri* and Babu *Ratan Chand*, for the respondents.

MAHMOOD, J.—This case has come up before me at the instance of the petitioners for interference in revision under s. 439 of the Code of Criminal Procedure. The facts, out of which the dispute has arisen, may briefly be stated to be the following:—

In the town of Etah the Hindu population seems to be divided into two sections holding religious views antagonistic to each other. One of these sections, and probably, as I am informed, forming the majority of the population, are Vaishnavites, that is, the worhippers of Vishnu, who is one of the gods of the Hindu Trinity. The other sect, who are stated to be the minority of the population, are Saraogis or Jains, who repudiate entirely the sanctity of the Hindu Trinity of the Godhead and the authority of the minor gods and goddesses, and who also repudiate the sanctity of the Vedas, the Puranas, and other holy scriptures of the Hindu religion. Indeed, they are a section of the Buddhists holding doctrines which also prevail in other parts of India. These conflicting doctrines have before now produced disturbances of the peace in connection with religious processions. It is stated by Mr. *Simeon* on behalf of the petitioners and I myself am aware of the fact as a matter of the religious history of this part of the country (of which fact I can **[116]** take judicial notice under the latter part of s. 57 of the Evidence Act I of 1872) that the Hindus belonging to the Vaishnav creed look with horror upon the appearance of the idol of Parasnath, whom the Saraogis worship, and, indeed, regard it as a sin to look at the idol. It was no doubt in consequence of this circumstance that, on the 2nd September, 1876, the Magistrate, acting under the authority which s. 518 of the Criminal Procedure Code (Act X of 1872) conferred upon him, promulgated an order whereby it was determined that the Saraogis were to take the procession of *Rath-Jatra*, or *Parasnath-ka-Mela*, as the ritual is called there, by a particular route and at a particular time. The object of making the night as the time when the *Rath*, or chariot, was to proceed was to obviate as much as possible the Vaishnav section of the Hindu community from looking upon the image.

It appears that for some years after the 2nd September, 1876, the route and the time of the procession of this annual ceremony were duly observed, and that no occasion arose for any dispute between the two sections of the community, and it was not till 1886 that any quarrel arose in respect of the matter.

It appears that in September, 1886, when the Saraogis contemplated the performance of the ceremony of *Rath-Jatra*, or religious procession of the chariot of Parsanath, which in many respects and incidents is analogous to the procession of the chariot of Jagarnath—a Vaishnav Hindu deity—they applied to the Magistrate for certain police arrangements, no doubt expecting possible disturbances by the Vaishnav section of the community. Thereupon the Magistrate, by an order of the 13th September, 1886, which may perhaps be taken to have been passed under s. 144 of the Criminal Procedure Code (Act X of 1882), issued no specific directions to the petitioners Saraogis, but directed the District Superintendent of Police to make the usual arrangements. The procession took place on the 14th September, 1886, in the forenoon of the day, and it proceeded by a route and at a time not prescribed by the Magistrate's order of the 2nd September, 1876, which pointed out night to be the time when the Rath was to be paraded.

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Upon this state of things a complaint was made by Mr. *Simeon's* clients, the Vaishnav Hindus, charging Mr. *Chaudhari's* clients, the [117] Saraogis, with having committed the offence mentioned in s. 188 of the Indian Penal Code, and it resulted in a conviction of the accused and sentence of fine by the Magistrate, who held that the action of the Saraogis amounted to a disobedience of the Magistrate's order of the 2nd September, 1876. The Saraogis, who are represented before me by Mr. *Chaudhri*, appealed from such conviction to the learned Sessions Judge, who, by his order of the 2nd July, 1887, directed a further enquiry as to whether or not the original order of the 2nd September, 1876, was re-promulgated in 1886. It was found by the Magistrate upon evidence, and in that conclusion the learned Sessions Judge agreed, that the order of 1876 was not re-promulgated in 1886. The learned Judge, therefore, held that at the time when the procession of the *Rath-Jatra* took place on the 14th September, 1886, the Saraogis in varying the time and the route of the procession were not disobeying any subsisting order of the Magistrate, and that, therefore, they were not guilty of offence under s. 188 of the Indian Penal Code.

I am entirely of the same opinion. It seems to me that in interpreting statutes of a penal character it is important to see that the powers conferred upon the Magistrates are duly exercised with reference to the rendering unlawful of acts that would otherwise be lawful. Under the old Code, Act X of 1872, s. 518 gave to Magistrates the power to issue orders in cases of obstruction, danger to human life, or riots, and explanation to the section clearly shows that the Legislature in conferring this power intended it only to be applied to emergent matters. That section, however, did not prescribe any limitation or duration as to the duration of the order remaining in force; but a Full Bench of the Calcutta High Court in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (1) concurred in holding upon general principles of the interpretation of such statutes that the Magistrate was not empowered to pass an order under s. 518 of Act X of 1872, which would have more than a temporary operation, and that the grant of what is in effect an order for a perpetual injunction was beyond such magisterial jurisdiction. I follow the principles of that ruling, and I cannot help thinking that s. 144 of the present Code, in modifying the [118] law contained in the corresponding s. 518 of the old Code, takes into account what Garth, C. J., said in the Full Bench case to which I have referred, and I say this because I find that whilst s. 518 of the old Code was silent as to the duration of a Magistrate's order passed for the purposes mentioned, the present Code in the last paragraph of s. 144 contains express provisions, saying that "no order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs." This, then, is the present law, and I think also was virtually the older law, though, of course, no duration was named in the older Code.

Applying these views to this case, it is clear that the order of the 2nd September, 1876, was not promulgated again in 1886 by the Magistrate, and that no conviction could take place because of any disobedience of the order of September, 1876, an order which cannot be held as having subsisted ten years. Mr. *Simeon* on behalf of the petitioners has, indeed, contended that the language of the order of the 13th September, 1886, was to incorporate

(1) 5 C. 7.

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all the terms, conditions, and particular directions of the order of the 2nd September, 1876. I have heard the original order of September, 1886, and cannot accept this contention. The words of the order contain no specific directions either as to the time of the procession or the route through which it was to pass, and I cannot take the expression "as usual" to imply that the order of the 2nd September, 1876, was incorporated there in its entirety. And because the order of the 13th September, 1886, was silent as to this matter, no offence was committed by the Saraogis in carrying the procession by a route and at a time other than that prescribed by the Magistrate's order of 1876 as they did on the 14th September 1886.

I hold, therefore, that the learned Sessions Judge has rightly acquitted the Saraogis, and that no interference in revision is required by this Court. The application is dismissed. *Application rejected.*

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10 A. 119 = 8 A.W.N. (1888) 26.

[119] CIVIL REVISIONAL.

Before Mr. Justice Mahmood.

SHEO PRASAD SINGH (*Petitioner*) v. KASTURA KUAR (*Decree-holder*).*
[26th November, 1887.]

Jurisdiction, presumption of—Maxim, Omnia præsumuntur rite et solemniter esse acta—*Civil Procedure Code, ss.* 103, 283, 647—*High Court's power of revision—Civil Procedure Code, s.* 622.

The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it.

Held that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction; that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or suit under s. 283; and that the High Court should not interfere in revision.

[Appl., 15 A. 405 (407) = 13 A.W.N. 172 ; R., 30 A. 331 (333) = 5 A.L.J. 297 = A.W.N. (1908), 142 ; 34 A. 592 (594) = 10 A.L.J. 130 ; 12 O. C. 109.]

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Pandit *Sunder Lal*, for the petitioner.

Mr. *G. T. Spankie*, for the respondent.

MAHMOOD, J.—This is an application presented to this Court invoking its interference, as a Court of revision, by exercise of the authority conferred upon it by s. 622 of the Civil Procedure Code. The facts from which this application has arisen may briefly be recapitulated to be the following :—

One Musammat Kastura Kuar obtained a money decree against one Musammat Jelaba Kuar on the 16th July, 1884, and in execution of the decree, the property to which this litigation relates, was attached on the 30th November, 1886, as the property of the judgment-debtor. These proceedings of attachment admittedly took place in the Court of the Additional Subordinate Judge of Ghazipur, and it was in that Court that the present petitioner, Babu Sheo Prasad, filed an application on the 30th March, 1887, objecting to the attachment mainly upon the ground that

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* Miscellaneous application, No. 187 of 1887.

1887 Nov. 26. — Civil Revisional. — 10 A. 119 = 8 A.W.N. (1888) 26.

the judgment-debtor was not the owner of the property attached. Indeed, Pandit *Sunder Lal*, on behalf of the petitioner, concedes that the application was of the character contemplated by s. 278 of the Code of Civil Procedure.

[120] It appears, then, the Rai Cheda Lal was the Additional Subordinate Judge of Ghazipur, and we find that, on the 10th May, 1887, he adjourned the hearing of the application. Another adjournment was made by his order of the 4th June, 1887, and then the case appears to have come on for hearing, not before the Additional Subordinate Judge, Rai Cheda Lal, but before Pandit Kashi Narain, who is the Subordinate Judge of the District, and by his order of the 14th June, 1887, the hearing of the application was once more adjourned. The order says that the pleaders for the parties having departed, the case was to come on for hearing the next day, *i.e.*, the 15th June, 1887. What happened then is best represented by the order of the learned Subordinate Judge himself, and it runs as follows :—

"The case came on to-day again, and the pleaders have departed. Ordered that the case should be struck off for default." This order, dated the 15th June, is the one of which revision is prayed for in this application.

The application originally came on before the learned Chief Justice, who, by his order of the 9th August, 1887, directed notice to be issued to the opposite party to "show cause why the order of Pandit Kashi Narain, dated the 15th June, 1887, should not be set aside on the ground that it was made without jurisdiction, and why the case should not be restored to the list of the Additional Subordinate Judge for disposal."

In obedience to this order Mr. *Spankie* has appeared to show cause on behalf of the opposite party, and the learned Counsel has, among other things, relied upon a preliminary contention which aims at showing that in the due exercise of its revisional powers this Court should not interfere, In the first place, the learned Counsel contends that the rule contained in the maxim *omnia praesumuntur rite et solemniter esse acta* applied to this case, and that, until the contrary is shown, the order by the learned Subordinate Judge, Pandit Kashi Narain, of the 15th June, 1887, should be deemed to be an order passed with jurisdiction and in the manner the law contemplates.

To this argument the reply which Pandit *Sunder Lal*, on behalf of the petitioner, could make was that the only manner in which [121] the case could be within the jurisdiction of the Subordinate Judge was that a Court of appeal exercising its functions had transferrred it under s. 25 of the Civil Procedure Code, and that the mere circumstance of the absence of such order from the record of the present case removed the presumption, and, indeed, proved, as the learned pleader contends, that the Subordinate Judge, Pandit Kashi Narain, had no jurisdiction to dispose of the case. The learned pleader has also argued that even if it be taken for granted that the learned Subordinate Judge and the Additional Subordinate Judge, had concurrent jurisdiction over the matter, the circumstance that Rai Cheda Lal, the Additional Subordinate Judge, was seized of the case, would render the concurrent jurisdiction of the learned Subordinate Judge, Pandit Kashi Narain ineffective in taking over a case and making orders thereon, of which case the Additional Subordinate Judge was already seized. In supporting this argument the learned pleader has used the analogy of the concurrent jurisdictions of the various Judges of this Court, and he has contended that as one Judge

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seized of a case cannot thereafter be deprived of it by another Judge, so even if the Additional Subordinate Judge and the Subordinate Judge did possess concurrent jurisdiction, one could not be deprived of his legal powers to adjudicate upon a case he was seized of.

So far as the latter part of this contention is concerned, I do not think it necessary to determine the point because, although the argument has been very ably put before me by Pandit *Sunder Lal*, I cannot help feeling that the answer Mr. *Spankie* relies upon renders its decision unnecessary in this case. Mr. *Spankie's* contention is that the want of jurisdiction upon which the whole argument proceeds must not be presumed. I think this is a sound argument, because it seems to me that the want of jurisdiction may arise owing to numerous classes of facts which are to be determined by the lower Courts, and not by Courts of revision. There may be want of jurisdiction owing to territorial limits of jurisdiction, owing to the nature of the class of litigation owing, perhaps, to an order such as s. 25 of the Civil Procedure Code contemplates, owing perhaps, to the appointment of the Judge not being duly and lawfully made, owing to the cause of action having accrued at a place other than that where the litigation commenced, [122] and owing to other numerous matters, such as the defendant's living in a foreign jurisdiction. In regard to the manner in which I understand the word "jurisdiction," I need only say that I have already given expression to my views in *Dhan Singh* v. *Basant Singh*, (1) and that I still adhere to those views.

But the question is whether I, sitting here as a Court of revision, should enter into the various hypotheses and possibilities which may result in one answer or other as to the question of jurisdiction. Mr. *Spankie* contends that this Court should not exercise, under the circumstances, the discretionary powers it possesses under s. 622 of the Civil Procedure Code. Apart from the questions of fact which may have a bearing upon the question of jurisdiction, the learned Counsel contends that the ordinary remedies which were open to the present petitioner have not been adopted by him, and that, therefore, this Court should not interfere in revision. The learned Counsel contends with great force that the order of the 15th June, 1887, now sought to be revised, was such as could have been passed under s. 102, read with s. 647, of the Civil Procedure Code, and that, indeed, the usual remedy open was to apply under s. 103 of the Civil Procedure Code for the restoration of the case and due adjudication thereupon. Further, the learned Counsel argues that another remedy was open to the petitioner before asking this Court to revise the order complained of, and that remedy was a regular suit such as s. 283 of the Civil Procedure Code contemplates.

I am of opinion that this contention has force. The principles upon which the visitatorial functions of the Courts of revision, such as in this case, should be exercised were fully considered by Mr. Justice West in the case of *Shiva Nathaji* v. *Joma Kashinath* (2), in which, at the end of the judgment, certain conclusions are specifically enumerated. I have always entertained the greatest respect for the rulings of that eminent Judge, and I have more than once stated that this particular judgment was one deserving of the highest respect from the Indian Courts, and I adopted it in *Sundar Das* v. *Mansa Ram* (3), in which my brother Brodhurst concurred. The general effect of these rulings, as far as this case is concerned, [123] is to lay down general principles that the especial and extraordinary

(1) 8 A. 519. (2) 7 B. 341. (3) 7 A. 407.

remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant. In this case the ordinary remedies have not been adopted by the petitioner, and I do not think it is necessary for me, as a Court of revision, to go into the detail whether or not such facts exist as to justify the conclusion that the lower Court did not exercise jurisdiction.

Pandit *Sunder Lal* in an elaborate and able argument has, indeed, contended, as a matter directed to induce me to exercise the revisional powers of this Court, that the simplest course would be for me not only to decide matters of fact which would suggest one decision or other as to jurisdiction, but also to decide, even if there was jurisdiction, whether or not sufficient reasons existed for striking off the case in default. All I need say to this argument is that I do not think that the Legislature intended this Court, as a Court of revision, to exercise any such functions. I therefore decline to interfere in revision and dismiss the application with costs.

Application rejected.

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10 A. 123=7 A.W.N. (1887) 301.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

CHAJJU (*Defendant*) v. SHEO SAHAI (*Plaintiff.*)*
[29th November, 1887.]

Pre-emption—Rival suits—Each pre-emptor made defendant in the other's suit—Suits, tried together, but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit—Appeal by inferior pre-emptor in his own suit—Appellate Court not competent to alter decree so as to affect superior pre-emptor's right.

In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of s. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right, and the decree in the second suit should not have been made subject to the condition above stated.

[124] *Held* that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that that decree having become final, the questions between the two pre-epmtors could not be reopened on appeal from the second pre-emptor's decree.

[F.,—A.W.N. (1908) 211=4 M.L.T. 172 ; 7 A.L.J. 86 (F.B.)=7 Ind. Cas. 156 L.B.R. (1912) 3rd. Qr. 93 (95)=17 Ind. Cas. 860=5 Bur. L.T. 199 ; Appr. and F.,—33 A. 51 (55)=7 A.L.J. 361=7 Ind. Cas. 156 ; R ,—5 O.C. 384 (391) ; 151 P.L.R. 1905=85 P.R. 1905 (F.B.) ; 33 C. 1101 (1111)=10 C.W.N. 934=4 C.L.J. 149 ; 8 P.R. 1904.]

THIS was a reference to a Division Bench by Mahmood, J., under the proviso to Rule I of the Rules of 11th June, 1887. The order of reference, in which the facts are fully stated, was as follows:—

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* Second Appeal No. 1427 of 1886 from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated the 14th May, 1886, reversing a decree of Baboo Brijpal Das, Subordinate Judge of Meerut, dated the 1st March, 1886.

1887 Nov. 29. — Appellate Civil. — 10 A. 123 = 7 A.W.N. (1887) 301.

MAHMOOD, J.—This is a case in which the question raised seems to be one of sufficient importance to be referred to a Division Bench.

The facts are that three persons, Sikandar, Aladad, and Durjan, executed a sale of their 10 biswansis share in favour of two persons, Sheo Sahai and Harjas, on the 6th June 1884, for a sum represented in the sale-deed as Rs. 4000. Thereupon Chajju, the present defendant-appellant. instituted a suit to enforce his right of pre-emption on the 3rd June, 1885, and to this suit he impleaded the vendors and the vendees, and subsequently the name of Sheo Sahai, plaintiff-respondent, was also added. This suit was numbered 130 in the register of the first Court.

Similarly Sheo Sahai, plaintiff-respondent, instituted another suit to enforce his right of pre-emption in respect of the same sale, dated the 6th June, 1884, and to that suit he impleaded the vendors and the vendees and the rival pre-emptor, Chajju, plaintiff, in the suit No. 130. The suit was instituted two days after the earlier suit, *i.e.*, on the 5th June, 1885, and was numbered 131 in the register of suits.

Both these suits appear to have been tried together and upon the same evidence, and resulted in two decrees of even date, namely, the 1st March, 1886. In the judgment of the first Court it was held that Chajju, plaintiff in the suit No. 130, had a right of pre-emption superior to that of Sheo Sahai, plaintiff in suit No. 131. Therefore the first Court passed a decree enforcing the right of Chajju to the property in suit upon payment of Rs. 4,000 as the consideration-money in suit No. 130. In the other suit, No. 131, in which Sheo Sahai was the plaintiff, the first Court decreed his claim, but rendered the decree subject to the condition that, in the event of the plaintiff Chajju in the other case failing to [125] execute his decree, Sheo Sahai was entitled to execute it. Chajju, plaintiff in suit No. 130, did not appeal, nor did Sheo Sahai or any other defendant to that action appeal against the decree in that suit. But Sheo Sahai, plaintiff in the suit No. 131, being dissatisfied with the decree passed in his favour, appealed to the lower appellate Court principally upon the ground that the amount of consideration was excessive, and that the pre-emptor Chajju, plaintiff in the other suit, had lost the right of pre-emption, and as such, did not stand as an impediment to the exercise of his right of pre-emption.

Upon this appeal from the decree in suit No. 131, the learned Judge modified the decree of the first Court by reducing the purchase-money to Rs. 701, and holding that Chajju had no right of pre-emption, because he was in collusion with the vendees of the sale of the 6th June, 1884.

In second appeal it is contended by Mr. *Sunder Lal* that the judgment and the decree of the lower appellate Court is erroneous, because the decree before him was the decree in suit No. 131, and the decree in the suit No. 130, not having been appealed against, became final, and as such binding upon the parties, the rival pre-emptors, namely, Chajju and Sheo Sahai, and that the lower appellate Court in adjudicating upon the decree in suit No. 131 practically set aside the finality of the decree in suit No. 130. Mr. *Chaudhri* on the other side contends that the effect of the decree of the lower appellate Court must be held to be limited to modifying the decree in suit No. 131, and the fact that the effect of it may be inconsistent with the decree in suit No. 130 does not vitiate the validity of the lower appellate Court's decree in this case.

In the case of *Kashi Nath Mukta Prasad* (1), I have expressed my

(1) 6 A. 370.

view as to the array of parties in cases where in respect of one and the same sale rival suits to enforce the right of pre-emption are instituted. But the question raised in this case is one not covered by that ruling, and it is one which I consider sufficiently important to refer to a Division Bench. I therefore, under the proviso to Rule 1 of 11th June, 1877, refer the case accordingly.

1887 Nov. 29. — APPELLATE CIVIL. — 10 A. 123 = 7 A.W.N. (1887) 301.

Pandit *Sunder Lal*, for the appellant.

[126] Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT and BRODHURST, JJ.—The facts of this case are very fully and clearly stated in the referring order of our brother Mahmood. The only argument addressed to us was based upon the sixth plea taken in the memorandum of appeal, namely, that the decree passed in favour of the defendant-appellant, in suit No. 130 having become final by reason of no appeal being preferred from it, the matters in issue between him and the plaintiff No. 131, respondent before us and defendant in suit 130, had been heard and finally determined, and could not be again tried and determined in the appeal from the decree passed in suit 131. We are upon consideration constrained to hold that this contention is a sound one and must prevail. It is true that the first Court tried the two suits 130 and 131 together, and disposed of them by a single judgment; but separate decrees were prepared, each of which was appealable by the party or parties aggrieved thereby, and, failing such appeal, finally settled the question between the plaintiff on the one side and the defendant on the other. In suit 130 as between the plaintiff Chajju and the defendant Sheo Sahai, the decree determined the issues as to the former's preferential right over the latter, and the amount to be paid and directed the period within which it was to be paid, in accordance with the provisions of s. 214 of the Civil Procedure Code. This decree still stands, and the Rs. 4,000 having been paid in by Chajju, the decree-holder, within the specified time, he has now become entitled to possession of the property. It was from this decree that Sheo Sahai, the respondent before us, should have appealed, if he desired to get rid of his decision in regard to the plaintiff Chajju's right to pre-empt, and not having done so, it was not competent for the Judge in the appeal from the decree in suit 131 to re-open the questions between those two persons.

In so far, therefore, as his decision dwelt with those matters and his decree affects Chajju, this appeal must be and it is decreed with costs, and the respondent's appeal to the lower appellate Court *quoad* Chajju dismissed with costs. *Appeal allowed.*

10 A. 127 = 8 A.W.N. (1888) 21.

APPELLATE CIVIL.

[127] *Before Mr. Justice Mahmood.*

PRAN KUAR (*Judgment-debtor*) v. DURGA PRASAD (*Decree-holder*).*
[3rd December, 1887.]

Execution of decree—Decree for enforcement of hypothecation—Decree limiting judgment-debtor's liability to the hypothecated property.

A decree upon a hypothecation-bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other

* Second Appeal No. 1785 of 1886, from a decree of C.W.P. Watts, Esq., District Judge of Moradabad, dated the 6th August, 1886, reversing a decree of Babu Gopal Datta, Munsif of Bilari, dated the 16th January, 1886.

1887 DEC. 3. — APPELLATE CIVIL. — 10 A. 127 = 8 A.W.N. (1888) 21.

property of the judgment-debtor, though an order for costs contained therein may be so executed.

[R., 35 C. 431 (432) = 12 C.W.N. 364 ; D., 9 A.W.N. 149.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Ratna Chand*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

MAHMOOD, J.—The facts of the case, as they have been put before me by the learned pleaders of the parties, are the following :—

The present appellant, Musammat Pran Kuar, judgment-debtor, executed a hypothecation-bond in favour of Sabu Durga Prasad, the decree-holder-respondent before me, who, having sued upon the bond, obtained a decree on the 7th July, 1881. It is also admitted that the decree was put into execution, and the property hypothecated in the bond, the lien created whereby was given effect to by the decree, has already been brought to sale in execution of the decree.

The present litigation has arisen out of an application made by the decree-holder for the execution of the above-mentioned decree, not against the hypothecated property, but against the other property of the judgment-debtor, the appellant before me, and personally against her. To this application objections were taken by the appellant, in which the main contention urged by her was that neither was she personally liable nor her property other than that hypothecated could be sold in execution. This contention was accepted by the Court of first instance, which disallowed the application, but upon appeal to the lower appellate Court, the learned Judge of that Court reversed the first Court's order in a judgment which runs [128] as follows :—" The prayer for relief distinctly asks that if the hypothecated property be not sufficient, decree may be satisfied from the other property of the debtor. Now decree was given according to the claim. One would suppose that the Munsif had never seen the file. I accept the appeal and cancel the order of the Munsif with costs. Decree can be executed against the other property of the judgment-debtor, but as to her person I say nothing."

From this order this second appeal has been preferred, and Mr. *Ratan Chand* for the appellant contends that the only point on which he relies in support of the appeal is that the terms of the decree of the 7th July, 1881, cannot bear the interpretation which the learned Judge of the lower appellate Court has put upon it. The original decree is framed in the Hindustani language, and I have carefully read its terms. The effect, as I understand, of the original Hindustani may be represented in English in the following terms :—" It is ordered and decreed that Rs. 946-5, the money claimed, and Rs. 97-14-6 costs, making a total of Rs. 1,044-3-6. together with future interest at annas eight per cent. per mensem, be decreed *ex parte* against the defendant. If the defendant within a period of six months pays up the amount decreed, then the decree will become inoperative ; otherwise it will be executed, and the hypothecated property having been brought to sale, the decretal amount will be paid from the proceeds thereof ; and it is also ordered that the defendant pay to the plaintiff the sum of Rs. 99-14-6 in respect of costs of this Court to which she has been rendered liable.

Mr. *Ratan Chand* argues that these terms of the decree are limited to the liability of the hypothecated property, and do not render the judgment-debtor liable personally to any execution that can be taken out

under the decree. I am of opinion that this contention is sound, but only to a partial extent. In the case of *Raghubar Dayal* v. *Ilahi Bakhsh* (1), Mr. Justice Oldfield and myself had to consider a similar question of the interpretation of a decree, and in that case both of us concurred in holding that a decree that was worded similarly to this so far as the present point is concerned, [129] was limited to the liability of the hypothecated property, though it decreed a personal obligation, so far as order as to costs was concerned. This is a case in which a similar question arises, and I still adhere to the views expressed in that case. These views are in accord with those expressed by Mr. Justice West in the recent case of *Sheik Budan* v. *Ramachandra Bhunjgaya* (2), and I am not prepared to alter the views which were adopted in the former ruling.

Mr. *Kashi Prasad* in resisting the appeal argues that the first part of the decree declares the liability for the whole amount to be borne by the hypothecated property, and also personally by the judgment-debtor. For this contention he relies upon a Full Bench ruling of this Court in the case of *Debi Charan* v. *Pirbhudin Ram* (3). In regard to that ruling, all I need say for the purpose of this case is that the decree considered there was differently framed, and the ruling is inapplicable to the present case.

The interpretation of the decree, as I understand it, is that it limits the liability for the principal sum of the money claimed to the hypothecated property, but that the order as to costs is an order which could be executed to the extent of such costs against the judgment-debtor. I therefore decree the appeal, and, setting aside the order of the lower appellate Court, direct that the execution of the decree against the judgment-debtor-appellant personally be limited to the order as to costs which the decree contains ; but as this view of the case was not taken by the Courts below, the proper course for me is to remand the case to the Court of first instance under s. 562 of the Civil Procedure Code for being dealt with according to law with reference to the observations I have made.

Costs will abide the result. *Cause remanded.*

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10 A. 130=8 A.W.N. (1888) 41.

APPELLATE CIVIL.

[130] *Before Mr. Justice Mahmood.*

MADHO LAL AND ANOTHER (*Decree-holders*) v. KATWARI (*Judgment-debtor*).* [14th July, 1887.]

Execution of decree—Decree for enforcement of hypothecation—Objection by judgment debtor that property ordered to be sold is not legally transferable under N.W.P. Rent Act, s. 9—Such objection not entertainable in execution.

In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to s. 9 of the N.W.P. Rent Act, cannot be entertained.

THE facts of this case are sufficiently stated in the judgment of the Court.

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* Second Appeal No. 1603 of 1886 from a decree of J. Dess, Esq., District Judge of Jaunpur, dated the 10th July, 1886, confirming a decree of Maulvi Nasur-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd September, 1886.

(1) 7 A. 450. (2) 11 B. 537. (3) 3 A. 388.

1887 JULY 14. — APPELLATE CIVIL. — 10 A. 130 = 8 A.W.N. (1888) 41.

Lala *Juala Prasad*, Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the appellants.

Munshi *Kashi Prasad*, for the respondent

MAHMOOD, J.—The facts of this case are very simple. The appellants-decree-holders are zemindars of the village in which the land to which this litigation relates is situate, and that land was hypothecated by Musammat Katwari, judgment-debtor-respondent, to the appellants on the 24th February, 1876. The money due upon that mortgage not having been paid, a suit was brought thereunder resulting in the claim being decreed on the 24th February, 1882. The decree specifically directs that the land now in question should be sold in enforcement of the lien.

By an application made on the 9th February, 1884, the decree of the 24th February, 1882, was sought to be put into execution by the decree-holders-appellants, but such execution was resisted by the judgment-debtor, Musammat Katwari, upon the ground that the land which she held was an occupancy tenure which could not be transferred under s. 9 of the Rent Act, and this plea having been accepted by the lower Courts, the application for execution has been disallowed.

From the order so disallowing the application this second appeal has been preferred, and I am of opinion that it should prevail. There is no question that the land held by the respondent, Musammat Katwari, is an occupancy tenure, such as that contem [131] plated by s. 9, and within the prohibition of that section against transfer. The nature of such tenures with special reference to the question of transferability was fully discussed by me in *Gopal Pandey* v. *Parsotam Das* (1), though, I being in the minority, the majority of the Full Bench held that the hypothecation by an occupancy tenant of his right of occupancy was not a transfer within the meaning of s. 9 of the Rent Act of 1873, which Act would govern the hypothecation of the 24th February, 1876, whereon the decree was obtained by the appellants on the 24th February, 1882. From the opinion expressed by the majority of the Full Bench in that case I still dissent with profound respect, the more so because I find it difficult to reconcile the *ratio decidendi* of that ruling with a more recent Full Bench ruling, *Ganga Din* v. *Dhurandhar Singh* (2), in which they held that an usufructuary mortgage was a transfer, and the prohibition of s. 9 of the Rent Act applied to such a case.

But it is not open to me to consider in this case the question as to the validity of the hypothecation of the 24th February, 1876, or the correctness of the decree of the 24th February, 1882, because that decree having been passed, the proceedings which have given rise to this appeal were taken only in execution of the decree, and as such, this Court, as much as the Courts below, is bound to give effect to that decree. Mr. *Kashi Prasad*, however, contends on behalf of the respondent that the specific provisions of s. 9 of the Rent Act having prohibited transfer of such occupancy holdings, the lower Courts were right in not giving effect to the terms of the decree, and in declining to sell the property by auction in execution of that decree. For this contention the learned pleader relies on *Naik Ram Singh* v. *Murli Dhar* (3), where it was held by the Full Bench that the land-holder who had attached an occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force was not entitled under s. 2, of that Act to bring

(1) 5 A. 121. (2) 5 A. 495. (3) 4 A. 371.

such right to sale after that Act came into force, that section not saving the right of the land-holder to bring such right to sale in execution of the decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

1887 JULY. 14. — APPELLATE CIVIL. — 10 A. 130= 8 A.W.N.= (1888) 41.

[132] If the Full Bench ruling relied upon were on all fours with this case, I should, of course, have felt it my duty to have followed it, sitting as a single Judge, but the case is distinguishable from the one before me. In the case before the Full Bench the decree was a simple money decree, so far at least as the property which had been attached in execution thereof and to which that litigation related was concerned. In the present case the decree of the 24th February, 1882, is not a simple money decree. It is a decree which decrees a claim for money, and orders sale by specific enforcement of lien against the land which forms the subject-matter of this dispute. It may be that the decree was erroneously passed, but the Court executing that decree has no power to go behind it and to decline to execute it, because such a refusal to execute the decree amounts to nullifying the decree altogether. This view was expressed by me in the case of *Bisheshar Rai* v. *Sukhdeo Rai* (1) where the case was very similar to this, and Oldfield, J., concurred with me in holding that when a decree is passed and specifically directs the sale of a tenure which may or may not be transferable, the Court executing the decree is bound to give effect to [133] it and not to question the validity of the decree. I still adhere to the views which I expressed in that case, and following them am constrained to decree this appeal, and setting aside the orders of both the lower Courts, to remand the case to the Court of first instance for executing the decree of the 24th February, 1882, with reference to the observations which I have made. Courts will abide the result. I wish only

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(1) The facts of this case are sufficiently stated in the judgment of Mahmood, J.
Munshi *Sukh Ram*, for the appellant.
Lala *Jwala Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case, so far as it is necessary to state them, are very simple. Sukhdeo Rai and others executed a hypothecation bond on the 10th September, 1874, in favour of Bisheshar Rai and subsequently sold the hypothecated property to Ramjas Rai, who is the respondent in this second appeal. On the 31st March 1882, Bisheshar Rai obtained a decree on his hypothecation bond not only against the obligor, but also against Ramjas Rai. The decree in clear and specific terms decreed the sale of the mortgaged property in satisfaction of the mortgagee's claim. The present dispute has arisen out of Bisheshar Rai's application to put in force the mandate of the Court of the 31st March 1882. He is met by the objection that the property mortgaged is a non-saleable tenure, its sale being made illegal by s. 9 of Act XII of 1881. There is much doubt whether the tenancy here is one at fixed rates, and as such not subject to the prohibition contained in that section. The Courts below have gone behind the decree, and have arrived at the conclusion that the property mortgaged and ordered to be sold was merely an occupancy tenure, and that its sale was prohibited. Such questions could be dealt with only in the suit but the action of the lower Courts amounts to a proceeding which practically nullifies the decree of 1882. The appellant before us complains of this, and rightly, because where a clear and specific order is made by a decree, it is not competent to a Court in its execution department to take notice of any matter except that which relates to execution. We are not concerned here as to what may be properly ordered as to third parties. As between the parties to the decree, there is nothing in s. 244 (c) which justifies such a procedure as that of declaring a decree to be illegal and refusing to carry into execution. I do not think that the law contemplates such procedure when an application for enforcement of decree is made. I would set aside the orders of the lower Court, and direct the first Court to entertain the decree holder's application for execution, and dispose of the same according to law. The costs of the present appellant in this and the lower Courts to be costs in the cause.

OLDFIELD, J.—I concur.

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to add that I must not be understood to say anything as to whether the auction-sale which would take place in execution of the decree would or would not convey any valid title to the purchaser (1).

Cause remanded.

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10 A. 133 = 8 A.W.N. (1888) 35.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

BANSIDHAR (*Defendant*) *v.* SANT LAL AND ANOTHER (*Plaintiffs*).*
[5th December, 1887.]

Hypothecation—Moveable property—Non existent moveables—Contract to assign after acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion—Measure of damages.

Held, upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized, and was enforcible against a transferee of such produce with notice of the obligee's equitable interest. *Collyer* v. *Isaacs* (2) and *Holroyd* v. *Marshall* (3) referred to.

Held, also that an interest would not avail against a transferee without notice, *Joseph* v. *Lyons* (4) and *Hallas* v. *Robinson* (5) referred to.

In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security,—*held* that the measure of damages, under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal* v. *Mazhar Hossain* (6) referred to.

[F.—16 M. 429 (434); 7 N.L.R. 72 (81); Rel.,—10 Ind. Cas 869 (874) = 7 N.L.R. 72 Appl.,—29 A. 163 (165) = 4 A.L.J. 57 = A.W.N. (1907) 7; R.,—31 C. 667 (675) 11 O.C. 301 (304); 10 A.W.N. 62; D.,—34 M. 64 (67) = 6 Ind. Cas. 504 = 8 M.L T. 91 = 20 M.L.J. 966.]

The facts of this case are stated in the judgment of the Court.

[134] The Hon. *T. Conlan* and Maulvi *Abdul Majid*, for the appellant.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the respondents.

STRAIGHT and BRODHURST, JJ.—This was a suit for damages brought by the plaintiff respondent against the defendant-appellant under the following circumstances. On the 13th June, 1884, one Deoki Prasad executed a bond in favour of the plaintiffs for Rs. 4,000, the material portion of which was as follows :—" For the satisfaction of the said bankers the indigo produce for 1292 fasli of mauza Jarah, mauza Secunderabad, shall remain hypothecated in lieu of the amount of the bond. I shall not sell it to any one else until the whole principal and interest of the amount of the bond, *i.e.*, the entire demand of the bond, shall have been paid." On the 5th November, 1884, the amount of the bond not

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* Second Appeal No. 1430 of 1886 from a decree of T.E. Wyer, Esq., District Judge of Meerut, dated the 22nd July, 1886, reversing a decree of Babu Brij Pal Das, Subordinate Judge of Meerut, dated the 12th April, 1886.

(1) This case was followed in *Ramgobind Das* v. *Gulzar Singh* (S.A.No. 698 of 1887) decided the 11th August, 1887, *Jagraj Puri* v. *Harbans Dyal* (S. A. No. 268 of 1887) decided the 3rd January, 1888, and *Janki Rai* v. *Ram Ghulam* (S. A. No. 896 of 1887) decided the 27th January, 1888.

(2) L. R. 19 Ch. D. 342. (3) L. R. 10 H. L. 191; 36 L. J. Ch. 193. (4) L. R. 15 Q. B. D. 280. (5) L. R. 15 Q. B. D. 288. (6) 13 C. 262.

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having been paid, the plaintiff brought a suit against Deoki Prasad for recovery of the amount due, and attached before judgment ten boxes of the indigo produce of the mauza mentioned in the bond, which were then in the hands of the police at the Dadri police station. The present defendant Bansidhar preferred objections to this attachment, alleging that the indigo had been sold to him by Deoki Prasad. Subsequently, how does not exactly appear, he got possession of the ten boxes, forwarded them to Calcutta, and realized by their sale Rs. 3,894-6-9. On the 7th of January, 1885, the plaintiffs got a decree against Deoki Prasad, but by this time their security had been appropriated by the defendant Bansidhar, as has already been stated. By the present suit the plaintiff seeks to recover the amount of Deoki's debt with interest, namely Rs. 4,900, by way of damages from the defendant for his wrongful conversion of the security created by the bond of the 13th June, 1884. The first Court dismissed the claim, but the Judge in appeal decreed it for Rs. 3,894-6-9, the amount realized by the defendant on the sale of the indigo. The defendant appeals to this Court, and the substantial ground upon which the case has been argued before us is, that as, at the time of the bond of the 13th June, 1884, the indigo of mauza Jarah for 1292 fasli was not in existence, no valid pledge in law could be made, because no tangible thing was in [135] existence that was capable of actual or constructive possession. It was also contended that there was no evidence from which the Judge below could infer that at the time the defendant appropriated the indigo he had notice of any lien thereon in favour of the plaintiff. This latter point had best be disposed of first. As to this the Judge observes: "I am clearly of opinion that Bansidhar knew perfectly well of the lien, and I have but little doubt that the sale to Bansidhar was a collusive arrangement executed with a view to defraud the plaintiff." This conclusion he arrives at from a view of all the circumstances, and this being a second appeal, we are bound by this finding of fact, unless there is absolutely no evidence to support it. The learned counsel for the appellant did not emphasize his contention on this head by reference to the proofs on the record; but we have looked to see what they were, and after doing so we are not prepared to say that there were no circumstances in evidence which warranted the Judge in drawing the conclusion he did. It therefore must be taken as a fact found against the defendant that he appropriated and sold the ten boxes of indigo with notice and knowledge of the plaintiff's claim thereto.

Then arises the main point, the nature of which has already been stated, namely, whether the instrument of the 13th June, 1884, created any valid security in favour of the plaintiff. We think that it did and in support of this view we cannot do better than refer to the remarks of Jessel, M. R., in *Collyer* v. *Isaacs* (1). "The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on the premises. That assignment in fact constitutes only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property and the contract to assign them becomes a complete arrangement." See also *Holroyd* v. *Marshall* (2).

(1) L.R. 19 Ch. D. 342.

(2) L. R. 10 H. L. 191 ; 36 L.J. Ch. 193.

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[136] Now we think, applying the principle thus laid down to the instrument of the 13th June, 1884, that it was a contract to assign something that was to come into existence, namely, the produce of the crop for 1292 fasli of mauza Jarah, which according to the authority of *Clements* v. *Matthews* (1) would constitute a sufficiently specific description for the purpose of creating a valid assignment in equity. The evidence establishes that the crop in question was grown and the produce of it realised before the defendant purchased it from Deoki Prasad, and putting aside the question whether it was in fact, prior thereto, handed over to the servant of the plaintiff, of which there undoubtedly is proof upon the record, so as to constitute a clear pledge, there was enough to create an equitable interest in the plaintiff in respect thereof. The equitable title so acquired by the plaintiff would no doubt in the absence of notice of that title not avail him against the defendant (see *Joseph* v. *Lyons* (2), *Hallas* v. *Robinson* (3); but here the defendant is fixed with notice, and it is found that, despite such notice, he appropriated and sold the produce. The defendant therefore was in our opinion a wrongdoer and the plaintiff had a right to damages, as against him, the measure of which would, under ordinary circumstances, where the fair price has been realized and such as subsist here, be the amount he realized by the sale. A somewhat analogous view was adopted by the Calcutta Court in *Misri Lal* v. *Mozhar Hossain* (4); and we may add that in this country, where contracts of the kind disclosed in this case, are very largely entered into with regard to the cultivation of indigo, which industry without them would be seriously hampered from a financial point of view, it is in the highest degree important that effect should be given to the obvious intentions of the parties making them, if it can be, without violence to the law or equity our Courts have to administer. We think the Judge below was right therefore in the view that he took, and we dismiss this appeal with costs (5).

Appeal dismissed.

10 A. 137 = 8 A.W.N. (1888) 28.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

[137] HAR NARAIN SINGH (*Defendant*) *v.* BHAGWANT KUAR AND OTHERS (*Plaintiffs*).* [16th December, 1887.]

Arbitration—Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Effect of acceptance of award by the Court—Effect of arbitrator first tendering and then withdrawing resignation—Civil Procedure Code, ss. 508, 514, 521.

The provision contained in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad.

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* First Appeal, No. 73 of 1885, from a decree of Maulvi Muhammad Saiyad Khan, Subordinate Judge of Agra, dated the 6th April, 1885.

(1) L.R., 11 Q.B.D. 808. (2) L.R., 16 Q.B.D. 280.
(3) L.R., 15 Q.B.D. 288. (4) 13 C. 262.
(5) See also *Rajah Sahib Prahlad Sen* v. *Baboo Budhu Sing* (2) B.L.R. (P.C.) at p. 117, *Ranee Bhubosoondree Dasseah* v. *Issur Chunder Dutt* (11 B.L.R. 36), and *Kedari* v. *Atmarambhat*, 3 B.H.C.R. (A.C.) 11.

Under s. 514 of the Code the Court may extend the time for making the award after the time fixed therefor has expired. 1887 DEC. 16.

The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award. APPELLATE CIVIL.

Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award,—*held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award. 10 A. 137 = 8 A.W.N. (1888) 28.

The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. *Maharajah Jaymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (1) referred to.

[F.—18 M. 22 ; Doubted—2 N. L. R. 81 (84).]

THE facts of this case are sufficiently stated in the judgment of STRAIGHT, J.

The Hon. *T. Conlan*, *Mr. C. H. Hill*, Babu *Dwarkanath Banerji*, Munshi *Hanuman Prasad* and Pandit *Sundar Lal*, for the appellant.

Mr. *C. Dillon*, the Hon. Pandit *Ajudhia Nath* and Pandit *Moti Lal Nehru*, for the respondents.

STRAIGHT, J.—The suit to which this appeal relates was instituted by the plaintiffs-respondents on the 8th February, 1884, in the Court of the Subordinate Judge of Agra, for the recovery of certain valuable property of various kinds and for money from [138] the defendant-appellant. On the 16th July, 1884, an agreement to refer all matters in difference in the suit to the arbitration of Lalas Bansidhar and Jagannath Prasad, nominated by the plaintiffs, and Lalas Radhe Prasad and Janki Prasad, nominated by the defendant, with Lala Sukhan Lal as umpire, was filed in Court, and on the 17th of July an order of reference was made by the Subordinate Judge, the 19th August, 1884 being fixed therein for the hearing of the case by this Court, or, in other words, such last-mentioned date was that fixed for the delivery of the award. On the 9th August the time for the delivery of the award was enlarged to the 5th November, and again on the 4th November to the 30th of the same month. On the 5th of December there was an application for further extension, and this was granted until the 5th January, 1885. On the 5th January, the umpire having put in a report, a further extension of time was granted until the 19th January, 1885. Subsequently, the arbitrators having met, an award was made by them on the 23rd March, 1885. That award was filed in Court, and to it certain objections were taken by the defendant upon the 2nd April, 1885. The defendant's pleaders were heard in support of those objections ultimately upon the 6th April. The Subordinate Judge, disallowing them, passed a decree in accordance with that award. From that decree the appeal now before us was preferred to this Court upon the 2nd May, 1885.

There are three grounds of appeal which in substance are, *first*, that the award was not a valid award ; *second*, that one of the arbitrators having refused to act, either a fresh arbitrator should have been appointed in his place or that the order of reference should have been superseded, and that this not having been done, there was no valid award ; *third*, that Janki Prasad was an unwilling arbitrator and acted against his will, and the arbitration proceedings and award were therefore void.

(1) 23 W.R. P. C., 429.

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The appeal came before my brother Tyrrel and myself upon the 29th March, 1886, and in reference to the pleas that had been taken, more particularly the plea which had reference to Janki Prasad, one of the arbitrators, the matter was remitted to the Subordinate Judge for him to take evidence and to report to us whether Janki Prasad had acted judicially and voluntarily in the arbi-[139]tration proceedings. That evidence has been taken and is before us, and in addition thereto we have a report from the Subordinate Judge in regard to that evidence. The appeal now comes before us for disposal in reference to the pleas taken in the memorandum of appeal with the light thrown upon them by the materials supplied us by the Subordinate Judge.

Mr. *Conlan* and Pandit *Sundar Lal*, who argued the case on behalf of the defendant-appellant, have substantially put their case upon two grounds. First of all, they say there was no valid award, because on the 5th December, when the third extension of time was granted, the prior period of extension had expired, and next, because in the order of the 5th January no date was fixed as the date by or upon which the award was to be delivered. The second ground upon which the award is assailed is that as Janki Prasad had tendered his resignation as arbitrator, and as it is obvious from the evidence that he did not act willingly and freely in the arbitration proceeding, such proceeding was invalid and the award arising out of it void.

Now as to the first of these objections, that has been argued in reference to the terms of ss. 508 and 514 of the Civil Procedure Code, read in conjunction with the last paragraph in s. 521. It is contended by Mr. *Conlan* as a primary proposition of his argument, that under s. 508 it is the imperative duty of a Court directing an arbitration by its order of reference to fix a time for the delivery of the award. He says that the word "shall" as used therein is not merely directory but mandatory, and that if a Court directs a reference without fixing a date in the order for the delivery of the award, the order of reference falls through and any arbitration proceedings held under that order are ineffectual and bad. Starting with this proposition, Mr. *Conlan* then contends that under s. 514, when a time has been fixed by the Court for the delivery of the award, it is only competent for such Court to further enlarge the time on some day within the original period fixed for the delivery of the award, or within any subsequent period to which such original period has been extended. He accordingly argues that the Subordinate Judge in the present case, when he made his order of the 5th December, had no jurisdiction to do so, because the 30th November being the last date covered by the preceding [140] order of extension, his power in the matter has ceased and the authority of the arbitrators to deal with the case had lapsed.

Now there can be no doubt that, looking to the whole scope and purpose of the earlier sections of Chapter XXXVII of the Civil Procedure Code relating to arbitrations held under the sanction of a Court of justice, the Court which makes the order of reference is intended to have complete control in the matter. The words in s. 514 are "the Court may if it thinks fit"; it does not require it to act only upon the application of the parties or of either of them, and it is obvious that the Court may of its own motion grant an enlargement of time. No doubt in s. 508 the words are "*shall* fix such time," &c., but it seems to me that this amounts to no more than the imposition of a public duty on the presiding officer of a Court of justice, and that as the neglect of it, through mistake or error on his part, could not affect the substantiality of the proceedings of the arbitrators or their

award, they may reasonably be regarded as not mandatory but directory only. To hold otherwise would, in my opinion, "involve general inconvenience or injustice to innocent persons without promoting the real aim and object of the enactment" (Maxwell on the Interpretation of Statutes, p. 452). If this is the correct view, then the same construction may be placed on s. 514. In this connection I have directed my attention to certain English rulings which seems to me to some extent to be *in pari materia*. Now there is a provision to be found in the Common Law Procedure Act of 1854 that has received interpretation in the Courts in England which to my mind has some bearing on the point before us. Those decisions have reference to s. 15 of that Act (17 and 18 Vic., c. 125). The first of those cases is *Lord* v. *Lee* (1). There the learned Judges, more particularly Mr. Justice Blackburn, who was the senior presiding Judge, went very fully and clearly into the principles governing arbitration proceedings. There an arbitrator appointed by a private agreement in writing, which contained no limit of time, made his award more than three months after he had entered upon the reference. The submission was then made a rule of Court, and a learned Judge to whom application was made in Chambers enlarged the time. The award was taken up by the successful party and he brought **[141]** an action upon it. That action was tried before Mellor, J., at the sittings in Middlesex after Trinity term, 1867. It appeared that there being matters in difference between the plaintiff and defendant, an agreement of reference was made and signed on the 8th August, 1866. No time for making the award was mentioned in the submission. The arbitrator entered upon the reference at once. On the 17th January, 1867, he made his award, and gave notice the same day that he had made it. On the 7th February the submission was made a rule of Court; and on the 11th March a Judge's order was obtained directing "that the time for the arbitrator to make his award be enlarged till the 15th March instant." The award was taken up on the 14th March and was in favour of the plaintiff. A verdict was directed for the plaintiff for the amount awarded, with leave to move to enter it for the defendant. A rule was obtained accordingly, on the ground that the time for making the award had not been duly nor legally enlarged by the arbitrator, and the Court or Judge had no power to enlarge the time after the award had been made.

It will be seen that in this case no time was fixed in the agreement of arbitration. But the statute law stepped in to fix the time. By s. 15 of the Common Law Procedure Act it was enacted that "the arbitrator... shall make his award under his hand and (unless such document or order respectively shall contain a different limit of time), within three months after he shall have been appointed and shall have entered upon the reference or shall have been called upon to act by notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award; and it shall be lawful for the superior Court for which such document or order is or may be made a rule of Court or of any Judge thereof for good cause to be stated in the rule or order from time to time to enlarge the term for making the award."

Therefore in that case there was the following state of facts:—That there was no mention in the agreement of any time; that under the terms of the statute the time applicable would be three months after the appointment of the arbitrator and his entering upon the reference, that he did not

(1) L. R. 3 Q. B. 404.

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promulgate his award within three months from that date; that he did promulgate it long after [142] the statutory period; that after such award have been so promulgated, the agreement of the parties was made a rule of Court; and that even after that, the Court thought fit and proper to enlarge the period for making the award. In that case Mr. Justice Blackburn, in a judgment which put the matter most clearly, pointed out the principle which was applicable to such cases, and upon which that statute proceeded, and those remarks seem to me applicable to the statute with which we have to deal here. He says: "I feel no doubt that, under the clause in the section which says that 'it shall be lawful for the Court or Judge for good cause, from time to time, to enlarge the time for making the award,' the Judge may at any time give such further time to the arbitrator to make his award as he shall think fit under the circumstances, so as to make it as if the further time had been originally given in the submission. Thus, if the time originally limited was twelve months, and the Judge give six months more, it is the same as if the time had been from the first eighteen months, and the effect is to make any step taken by the arbitrator within eighteen months valid."

Then he proceeds to go on and discusses what the state of things was with reference to arbitration under the common law, and he says:—"So if an arbitrator omits to enlarge the time limited for making his award, but continues to act as if he had enlarged to, even to making his award, although in fact he has no authority, yet he is a person *animo agendi*, and if the parties afterwards choose to ratify his act by agreeing that the time shall be enlarged or otherwise, though the act was not enforcible, yet, if ratified, it would be just as binding as if done with the original authority. It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission, but that is not so; the act having been done under the professed authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority."

Then he goes on and refers to s. 15 of the Common Law Procedure Act (17 and 18 Vic., c. 125) and says:—"The Common Law Procedure Act, s. 15, after limiting the time to three months, when the submission is silent as to the limit of time, gives the parties themselves power to enlarge the term; and the effect of this [143] enlargement of the term under the statute would be the same as at common law, that is, it makes it as if the extended time had been originally inserted in the submission. The same construction must be given to the clause giving power to the Court or Judge to enlarge the time and if an enlargement by consent of parties amounts to a ratification of all that has been done in the interval, inasmuch as it amounts to saying that the submission shall be read as if the extended time had been originally inserted, then the award, which had been made in the interval after the three months had expired, and before the order for enlargement was made, as it purported to be made under the authorities of the parties, would be valid; if the anthority were subsequently ratified by the parties by enlargement. The same power is given to the Judge, in his discretion, from time to time to enlarge the term, notwithstanding the parties do not consent, and it must have the same effect as an enlargement by consent, namely, amount to a ratification. The evils of an opposite construction are obvious. Suppose the arbitrator inadvertently to have neglected to enlarge the time and several meetings to have been held in the interval before the omission is discovered: if the subsequent enlargement of the time had only the effect

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of a new submission, all the witnesses must be recalled, and all the expense must be incurred again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves I am, therefore, clearly of opinion that the section gives power to the Judge to enlarge the term for making the award at any time, and under any circumstances, in which he thinks there is good cause for his intervention, (of course he would not grant an order if he saw that injustice might be done thereby), and the effect of the enlargement is the same as if it had been by the parties ; it amounts to a ratification, and is as if the enlarged time had been originally in the submission."

It seems to me that the case, which is supported by another to which I need only give reference namely, *May* v. *Harcourt* (1) goes to show that there is nothing unreasonable in the view that we **[144]** are prepared to take, that the provisions of s. 514 do allow of the Court, at any period of its own motion or on the application of the parties, granting an enlargement, as was done in the present case by the order of the 5th December, 1884.

Then arises the further question as to whether the terms of the order of the 5th January, by which no positive date was fixed within which the award was to be filed, are fatal to the validity of the award. I do not think they are. I think that the same principle of interpretation which I have stated as applicable to s. 508 and the word "shall" therein is applicable, and that the neglect or omission of the Court cannot prejudice the proceedings before the arbitrators or their award. If this be so, then there would be no time appointed within which the award could be filed, which would bring into opeation the provision contained in the last paragraph of s. 521. At any rate, whatever defects there may have been in the order of the Subordinate Judge of the 5th January, 1885, they were in my opinion defects that could be cured, and I hold that the adoption by the Subordinate Judge of the award must be taken to amount to an enlargement of the time for the delivery of the award to the date on which it was in fact delivered and to ratification of what had been done by the arbitrators. Moreover, no objection was taken by either of the parties to his acceptance of the award on the ground now urged, and it seems to me not unreasonable to assume that any such objection was waived by them.

The second question which was argued by Mr. *Sundar Lal* relates exclusively and entirely to the arbitrator Janki Prasad having refused to act, that the Court should have appointed either a new arbitrator in his place or have superseded the arbitration, and further that after his refusal to act he was incompetent to act any further in the matter. Now I have very carefully read through all the evidence that has been taken by the Subordinate Judge upon this particular point. I do not see the slightest ground for supposing that Janki Prasad did not take a complete and full part in all the proceedings of the arbitrators held in respect of the differences between the parties to the suit. It is to be noted that all the other three arbitrators have been called and examined, and I may more particularly **[145]** notice that Radhe Lal, the first of the two arbitrators nominated by the defendant-appellant before us, deposes in most explicit terms to Janki Prasad's having taken part in the arbitration proceedings, to his having been present at every meeting and to his having taken an

(1) L.R., 13 Q.B.D. 688.

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intelligent share in the proceedings. Then there is the statement of Sukhan Lal, the umpire, to the effect that he and Janki Prasad examined the account-books together, Janki Prasad, as a mahajan having been selected as an arbitrator more particularly for this part of the work. I have also read very carefully through the various representations that were made to the Court and the umpire for the purpose of obtaining adjournment, and I find nothing to satisfy me that any arbitration meeting was held without the presence of Janki Prasad. It is said by Mr. *Sundar Lal* that looking to the terms of the order of the Subordinate Judge which was passed upon the 24th January, 1885, Janki Prasad was frightened into coming and attending the arbitration proceedings, and no doubt there are indications that the Subordinate Judge thought that Janki Prasad's excuses for absenting himself were not *bona fide*, and though he had no power to compel him to serve, it seems to me he was at least erring on the right side in endeavouring to get him to join his colleagues and hold the arbitration. At any rate it is clear that after Janki Prasad sent in his resignation he did meet Sukhan Lal, the umpire, and the three other arbitrators, and had a conversation with them, the result of which was that he reconsidered his determination and withdrew his resignation. In this connection I may refer to the authority of their Lordships of the Privy Council, which lays down in very explicit terms that the mere circumstance that an arbitrator had first tendered and then withdrawn his resignation, did not formally divest him of his character of arbitrator: *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (1).

In the Court below when the objection that I am now dealing with was taken for the first time, it was not suggested that there had been misconduct on the part of this man Janki Prasad. What was suggested was that he was an unwilling participator in the arbitration proceeding. It is not my business now to determine whether upon the story he tells, if true, he was guilty of such **[146]** misconduct as would have warranted the Court below in setting aside the award, for I do not believe it, and I prefer the statements of the three arbitrators and the umpire, who very plainly gave an account of all that transpired in the cause of the arbitration proceedings, and certainly leave the impression on my mind that Janki Prasad took a conscious, intelligent, and voluntary part in the proceedings. This disposes of the second objection. I therefore am of opinion that the award was a good award and that we have no right to interfere with the decree which was passed in accordance with that award. The appeal is dismissed with costs.

TYRRELL, J.—I concur. *Appea dismissed*

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10 A. 146=8 A.W.N. (1888) 5.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* ZOR SINGH. [16th December, 1887].

Act XLV of 1860 (*Penal Code*), *ss.* 380, 454—*House-breaking in order to the commission of theft—Theft—Separate convictions and sentences—Criminal Procedure Code, ss.* 35, 235—*Practice—Revision—Criminal Procedure Code, s.* 438—*Reference by Magistrate of orders passed by Sessions Judge.*

Under ss. 35 and 235 of the Criminal Procedure Code a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine

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(1) 23 W.R. (P.C.) 429.

under each of the ss. 379 or 380 and 454 of the Penal Code for house-breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted,—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code.

But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft.

Queen-Empress v. *Ajudhia* (1) and *Queen-Empress* v. *Sakharam Bhan* (2), referred to.

A Magistrate is not justified in referring under s. 438 of the Criminal Procedure Code orders passed by the Sessions Judge on appeal, except in very special cases. *Queen-Empress* v. *Shere Singh* (3), referred to.

[F., 11 A. 393 (395); R., 28 A. 91 = A.W.N. (1905) 198 = 2 A.L.J. 589 (590); 16 A.W.N. 194; 1 Sind. L.R. 40 (41); Rat. Unrep. Crim. Cas. 473; Rat. Unrep. Crim. Cas. 597 (598); Rat. Unrep. Crim. Cas. 601; 2 Weir 566.]

[147] THIS was a reference under s. 438 of the Criminal Procedure Code, made under the following circumstances. The Joint Magistrate of Etawah in a case that was before him for hearing, charged one Zor Singh, first, with having on or about the 17th September, 1887, committed house breaking in order to the commission of theft in the shop of Lala Ram Bania, and with having thereby committed an offence punishable under s. 454 of the Indian Penal Code; and secondly, with having, on or about the 17th September, 1887, committed theft of one anna's worth of cowries in the house of the said Lala Ram Bania, and with having thereby committed an offence punishable under s. 380 of the Indian Penal Code. Zor Singh pleaded guilty to having entered Lala Ram's shop by climbing over the tatti fastened against the door-way, and to having stolen thence the cowries. The Joint Magistrate observed that the accused "has been three times previously convicted and sentenced to seven days' imprisonment, twenty stripes, and two years' imprisonment. I do not think, however, there is any necessity of committing him for trial by the Court of Session, as I have charged him under ss. 454 and 380, Indian Penal Code, two distinct offences having been committed, and separate sentences being legal [vide *Queen-Empress* v. *Sakharam Bhan* (2)]. I deal with the case therefore according to the provisions of s. 35, Criminal Procedure Code. Prisoner's last conviction was under s. 454, Penal Code. I convict him of an offence under s. 454, Penal Code, and sentence him to two years' rigorous imprisonment and thirty stripes; and I convict him of an offence under s. 380, and sentence him to two years' rigorous imprisonment, to include three months' solitary confinement. The second sentence to follow the first." The prisoner preferred an appeal to the Court of Session, and the Sessions Judge, in disposing of it, observed: "It is true, as remarked by the Joint Magistrate, that the Bombay High Court has held separate convictions in such a case to be legal. But in a similar case the Allahabad High Court set aside the sentence under s. 380; *Queen-Empress* v. *Ajudhia* (1). I prefer to follow the ruling of our own High Court, and set aside the conviction and sentence under s. 380. The accused pleaded guilty to the first charge, and no ground is shown for interference with the conviction under s. 454. Although the [148] value of the property stolen was trifling, the

(1) 2 A. 644. (2) 10 B. 493. (3) 9 A. 352.

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appellant had been three times previously convicted, and the sentence is not too severe."

The Magistrate of Etawah submitted a letter to the Registrar of the Court, in which he stated the facts above referred to, expressed the opinion that the sentence, as modified by the Judge, was inadequate, and suggested that as the sentences passed by the Joint Magistrate were in accordance with the ruling of a Bench of the Bombay High Court under the Criminal Procedure Code, Act X of 1882, now in force, they should be restored.

BRODHURST, J. (after stating the facts, continued).—The judgment reported in I. L. R. 2 All. 644 was delivered by my brother Straight on the 19th January, 1880, when Act X of 1872 was the Code of Criminal Procedure. He did not rule that a conviction and sentence under each of the ss. 380 and 457 of the Indian Penal Code for offences arising out of the same transaction was absolutely illegal, but he held that "in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the graver offence proved." I notice that a similar view was taken by a Full Bench of the Calcutta High Court in their judgment in the case of the *Queen* v. *Ramcharan Kairi* (1). The head-note is as follows:—"The prisoner was convicted by the Magistrate of two separate offences under ss. 456 and 380 of the Penal Code and sentenced for both. On appeal the Sessions Judge, holding that the offence proved was under s. 457, ordered a new trial for offences under ss. 457 and 380. *Held* that there ought not to be a new trial, but that the conviction and sentence under s. 380 should be set aside." And Peacock, C. J., in a judgment concurred in by the other learned Judges, observed: "The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate offences." The judgments above referred to of the Bench of the Bombay High Court were delivered by Birdwood and Jardine, JJ., on the 25th February, 1887, that is, since the present Criminal Procedure Code, Act X of 1882, has been in force, and certain alterations have been made in the Code as pointed out by the above-mentioned learned Judges. Illustration 6 to paragraph I of s. 235 shows that [149] if "A commits house-breaking by day, with intent to commit adultery with B's wife, A may be separately charged with and convicted of offences under ss. 454 and 497 of the Indian Penal Code." It admits I think of no doubt that the Joint Magistrate might, with reference to the provisions of ss. 35 and 235 of the Criminal Procedure Code, have tried and convicted Zor Singh for house-breaking in order to commit theft and for theft and might have sentenced him under the first part of s. 454 of the Penal Code to two years' rigorous imprisonment for house-breaking and under s. 379 of the same Code two years' rigorous imprisonment for theft. Moreover I am of opinion that the sentences as passed were not illegal, but the best course to have adopted would, in my opinion, have been that which is usual in such cases, *viz.*, to have committed the accused for trial to the Court of Session, under ss. 454-75 of the Indian Penal Code. Although I consider that a Magistrate might legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the ss. 379 or 380 and 454 of the Penal Code, I nevertheless think that, were a Sessions Judge trying such a case under the same sections, he would, under no circumstances, be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 for house-breaking with intent to commit theft, and, with reference to the provisions in s. 35 of the

(1) B.L.R., Sup. Vol., p. 488.

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Criminal Procedure Code, of four years' imprisonment under s. 380 for theft in a building, for it appears to me obvious that this could not have been the intention of the Legislature. The offences punishable under ss. 454 and 457 of the Penal Code are, with the exception that the former is committed by day and the latter by night, precisely the same. The latter part of each section enacts that, if the offence intended to be committed is theft, the term of imprisonment may be extended from three and five years to ten and fourteen years respectively. An intent to commit theft would not be punishable until after lurking house-trespass, or house-breaking, had been committed. It is evident that the Legislature never meant that a house-trespasser or house-breaker should be liable to seven and nine years' additional imprisonment, merely because he intended to commit theft. The latter portion of each of those sections was obviously framed to include the cases of house-trespassers and house-breakers who [150] had not only intended to commit theft but had actually committed that offence. To sentence a house-trespasser or house-breaker to the enhanced punishment of ten years' imprisonment under the latter part of s. 454 because he intended to commit theft, and to sentence him also under s. 380 to four years' imprisonment or any other punishment for theft in a building, would virtually be to punish him twice for the same offence and would be grossly unjust. Had the Joint Magistrate in the exercise of a wise discretion adopted the course I have above mentioned, that is, had committed Zor Sing under ss. 454-75 of the Penal Code to the Court of Session, there would have been no ground whatever for this reference. I think for the reasons recorded by my brother Straight in *Queen-Empress* v. *Shere Singh* (1) that references such as this by a Magistrate against the order passed in appeal by his superior officer, the Sessions Judge, are generally inconvenient and undesirable, and are only justifiable in very special cases ; and having regard to all the circumstances of the case, I do not think that any interference in revision is necessary in the present instance.

STRAIGHT, J.--I entirely concur in the view of my brother Brodhurst that this is not a case in which we should interfere. Let the Magistrate be so informed.

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10 A. 150 (F.B.) = 8 A.W.N. (1888) 17.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight, Mr. Justice Brodhurst. Mr. Justice Tyrrell, and Mr. Justice Mahomed.

QUEEN-EMPRESS v. IMAM ALI AND ANOTHER. [20th December, 1887.]

Act XLV of 1860 (Penal Code), s. 295—"Object" held sacred by any class of persons—Killing cows in a public place.

The word "object" in s. 295 of the Penal Code does not include animate objects.

[F., 17 C. 852 (857); R., 30 A. 181 = 5 A.L J. 147 (153) = A.W.N. (1908) 64 = 7 Cr.L J. 381.]

In this case two Muhammadans, Imam Ali and Amiruddin, were convicted by Mr. E. T. Lloyd, a Magistrate of Shahjahanpur, of an offence punishable under s. 295 of the Penal Code (destroying) an object held

(1) 9 A. 362.

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sacred by any class of persons), and were each sentenced to pay a fine of Rs. 25. It appeared that each of the [151] accused had, on the day of Id, the 30th August, 1887, killed a cow in a place within a few yards of a public road, exposed to public view. The Magistrate found that there were two slaughter-houses in the town of Tilhar where the cows were killed, that it was customary for sacrifices of cows to be made inside the premises of Muhammadans, that the road near which the prisoners had killed cows was frequented by Hindus, who on "seeing a cow being killed or dead by the side of the road must be much disgusted and distressed," but that cows had on previous occasions been sacrificed in the same place without the Hindus making any complaint. The prisoners applied for revision of the Magistrate's order to the Sessions Judge of Shahjahanpur, who referred the case to the High Court under s. 438 of the Criminal Procedure Code, by the following order :—

"The applicants, Amiruddin and Imam Ali are Muhammadans resident in the town of Tilhar. On the day of Id, according to their religious customs, they sacrificed a cow within four or five yards of a public road. They have been convicted under s. 295 of the Penal Code, of having, I presume, 'destroyed an object' (to wit, a cow) 'held sacred' by the Hindus resident at Tilhar.

"Apart from the doubt I hold that the conviction can be sustained under this section, I think it is bad for the following reasons :—

"1. The lower Court admits that there is strong reason to believe that cows have been sacrificed before in this very spot, and without the Hindus preferring any complaint, 'despairing of obtaining any redress.' The practice has therefore the sanction of previous custom or use.

"2. There are no Hindus dwelling immediately proximate to the place where the cow was sacrificed. The surrounding dwellings are those of Muhammadans, and though a Hindu might have had his feelings outraged or his religious prejudices hurt had he passed that way, there is no reason to believe that such was the case.

"3. It is not established that the applicant ever meant to outrage any such feelings or prejudices. It is just possible, in the strained relations that now exist between Hindus and [152] Muhammadans, that he stretched his privilege or custom to its extreme limit; but I cannot think that in sacrificing where previous sacrifices had taken place, he violated any rule of law that would subject him to criminal prosecution."

"The executive have been given most ample powers, especially in municipal towns like Tilhar, to make rules and regulations for matters like the present. It is to be regretted that certain places were not marked out and proclaimed as fit places for such secrifices; but I cannot think that under the present circumstances the applicant is shown to have infringed any rule, law, or regulation whatever.

"The doubt of applicant's guilt that the Magistrate held should have gone rather to prompt an acquittal than to reduce the sentence. The record will be submitted to the High Court for orders that to it may seem fit."

The reference came before Straight and Brodhurst, JJ., who directed that it should be laid before a Full Bench.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

The prisoners were not represented.

EDGE, C.J.—Two men, Imam ali and Amiruddin, were convicted by the Magistrate of Shahajanpur under s. 295, Indian Penal Code, for having on the 30th August, 1887, at Tilhar municipality on the side of

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Muzampur street, destroyed each a cow by the side of a public highway. The Magistrate found that they knew very well that the killing of the cow was considered an insult by their Hindu fellow-subjects, and he fined them Rs. 25 each. The case has come up to us in revision, and the sole question to consider is whether a cow is an "object" within the meaning of s. 295, Indian Penal Code. The earlier words of that section are as follows:...

Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons."

If I were to apply the usual principle of construction to this section, I should come to the conclusion that it was intended that the "object" should be one *ejusdem generis* with a "place of worship," that is, some inanimate object, such as an idol, &c. In my opinion the intention of the Legislature in passing this section was to [153] use the term "object" in that sense, and the Legislature did not intend that the term should apply to animate objects such as cows. If it had been intended that the term "object" here should not be construed as relating to something *ejusdem generis* with the place of worship, but should have a wider meaning, I should have expected to find in the definition clause the word "object" defined. But there is no such definition. The words 'animal,' 'man,' 'woman,' and 'person' are there defined. It is admitted by the Government Pleader, who appears in support of this application, that the killing of a cow under any circumstances, of course except by accident, would be considered, an insult by a strict Hindu. If that be so, any butcher who knew that fact and killed a cow, even in his private slaughter house or for the matter of that in a public slaughter house, would be guilty of the offence contemplated by s. 295 of the Penal Code.

I, therefore, come to the conclusion that s. 295 of the Penal Code does not apply to this case, and consequently that this conviction must be set aside, and the fines, if realized, be refunded.

STRAIGHT, J.—I entirely concur that a cow is not an object within the meaning of s. 295 of the Indian Penal Code. It seems to me that the words in connection with which it is used, namely, destroys, damages or defiles, preclude the notion that a cow does come within the definition. I think, therefore, that these convictions should be set aside, and the fines, if realized, should be returned.

BRODHURST, J.—In my opinion the killing of a cow as a sacrifice or otherwise is not an offence punishable under s. 295 of the Indian Penal Code.

The words "destroys" and "object," as used in that section, could not, I consider, have been intended by the Legislature to have, under any circumstances, included the killing of a cow. Had it been intended that the killing or maiming or injuring of things animate, such as a cow or a monkey or a peacock or a jay, should have been included as offences punishable under s. 295, language more appropriate than "destroys, damages or defiles" "any object" would have been brought into use; and such words as "or kills, maims or otherwise injures any animal," would have been inserted [154] between the words "any object" and the words "held sacred by any class of persons."

The whole construction of the section as it stands shows, I think, that it refers only to inanimate objects, such as churches, mosques, temples and marble or stone figures representing gods.

Under this view of the law, I would set aside the convictions of Imam Ali and Amiruddin and direct that the fines, if realized, be refunded.

TYRRELL, J.—I concur with the learned Chief Justice.

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MAHMOOD, J.—I concur so entirely in the exposition of the law to which the learned Chief Justice and my learned brethern have given expression that I consider it unnecessary to say much upon that aspect of the case. The section (295 of the Penal Code) which we are called upon to consider occurs in a penal enactment; and according to the well-recognised rules of interpretation of the language of statutes, words importing a doubtful or ambiguous meaning must be construed, strictly and in favour of the subject that is to say, that, unless the meaning of the Legislature is perfectly clear, no penalties are to be imposed upon the subjects of the Crown nor are their liberties to be restricted. This canon of construction has been uniformly applied to the interpretation of a vast multiplicity of statutes in England and also in India, and I do not think any doubts have been thrown upon it. There is also another well-recognised rule of construing statutes to which the learned Chief Justice has already referred, namely, that the operation of words of a general signification is restrained " when they follow closely upon words of a limited meaning, upon words which refer to a particular class of thing or persons, or which necessarily excludes such matters as are of higher dignity. In all these cases general words are confined to things and persons *ejusdem generis* with those enumerated or of inferior quality." (Wilberforce, p. 179). Now in this case the words " any object" occur in such close proximity to the phrase "*any place of worship*," which phrase again follows upon the words "*destroys damages or defiles*," that, as the learned Chief Justice has pointed out, we cannot extend the meaning of the word "*object*" to animals, and that we must interpret it by the rule of *ejusdem generis*. This conclusion is further supported by [155] another rule of interpreting statutes, namely, that when words importing a popular meaning are employed in a statute, they ought to be construed in such a sense, unless the Legislature has defined such words in any other sense. Now the word 'object' no doubt has a technical and extensive meaning in philosophy and would include not only an animal but also a human being, and indeed if we go further, the word would in philosophy include also abstract concepts. But such is not the manner in which the popular mind understands the words, nor can we attach any such meaning to the word in interpreting a penal enactment such as s. 295 of the Indian Penal Code. The Code devotes a whole chapter (II) to the explanation of certain general expressions which it employs, and considering that it defines the word " *animal* " (s. 47) as also the words "*man*" and "*women*" (s. 10), it seems to me that if the word " *object* " as it occurs in s. 295 of that Code were to be interpreted by us to include a cow or any other animal, there would be no logical reason why we should not include a human being within the meaning of that word. I have no doubt therefore that the words " *any object* held sacred by any class of persons " must be understood to be limited to inanimate objects.

But there is another aspect of this case in respect of which I wish to give expression to my views consistently with the rule of judicial etiquette which requires that Judges should abstain from taking part in matters of a purely political character. Facts similar to those out of which this prosecution has arisen are not of unfrequent occurrence, and sometimes cause breach of the peace, of which I as one of Her Majesty's Judges feel myself entitled to take notice. As my brother Brodhurst has pointed out, the bovine species is not the only class of animals held sacred by the Hindu population of India, and indeed I may add that even trees, such as the *pipal*, are included among the objects of worship or veneration by that

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section of the community—a state of things which only shows how serious in connection with such matters, is the task of those who as Judges are bound to administer justice in conformity with the laws of the land.

I think it is not beyond my province as a Judge of this Court to take judicial notice of the religious history of the Hindus as [156] also of the Muhammadan ecclesiastical law in so far as they bear upon the facts of this case. So far as I am aware, it appears to me that in the ancient times of the Hindu history just as *aswamedha*, or the sacrifice of a horse, was allowed as a symbol of imperial domination, so upon other occasions of ritual ceremonies *gaumedha*, or cow sacrifice, was permitted and almost enjoined by the ancient sages of the Hindu religion. No doubt, with the progress of time, the advance of civilization and the development of utilitarian ideas among the people, both these sacrifices fell into disuse, and the cow as the furnisher of milk and the mother of the bovine species (so universally employed in this country for purposes of agriculture) rose from being an object of utility to the footing of sanctity. The law, however, in dealing with such matters is not concerned with facts as they were in ancient times, but with living facts of modern times, and we as Judges cannot ignore the fact that among the Hindus of the present day the cow is regarded as perhaps the most sacred animal, though this circumstance would not, for the reasons which I have already mentioned, affect the interpretation of the word "*object*" as it occurs in s. 295 of the Indian Penal Code. I also know that under the Muhammadan ecclesiastical law, on the *Id-ul-Zuha* (or *Id-e-kurban*), as the anniversary of the great pilgrimage of Mecca, the sacrifice of a camel, a buffalo, a cow, a sheep or any other quadruped whose meat is lawful food to the Muslim is enjoined. I am equally aware of the fact that so far as the poorer sections of the Muhammadan population are concerned, the only chance which they practically have of eating meat is to rely upon the cheapness of beef in comparison to mutton or meat of any other kind. It may or may not be so that until somewhat recent times the Hindus and the Muhammadans living as close neighbours were accustomed to be considerate to each other, and respecting each other's feelings, did not recklessly hurt the religious prejudices of each other in such matters. But from the number of cases which come up to this Court in the exercise of its criminal jurisdiction as the highest tribunal in the land, I cannot but conclude that with the change of the times a most unsatisfactory and reprehensible state of things has come into existence which it is the duty of those entrusted with the administration of justice, in the impartial and even-handed from which the law of [157] British India enjoins, to recognise and deal with. Speaking for myself I have had before now considerable difficulty in deciding how Courts of justice are to deal with such matters, how the law stands with reference to cases in which in the most offensive manner the slaughter of a cow is accomplished by a Muhammadan before the eyes of a Hindu fellow-subject, or cases in which a Hindu procession is carried with offensive demonstrations in front of a Muhammadan mosque. Similar difficulty I have felt in connection with the bearings of the law in cases where the Hindu procession of the *Ram Lila* takes place on the same occasion as the Muhammadan procession of the *Moharram*. The one is a day of rejoicing with the Hindus as the anniversary of the greatest victory in their history; the other is the anniversary of what has been called "the darkest day of Islam," and as such the occasion of deepest mourning. It may be that on such occasions (as I am afraid is often the case) events may occur which would constitute

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the *corpus delicti* of one or other of the various offences relating to religion dealt with in Chapter XV of the Indian Penal Code, and indeed it may be that those events require the application of even severer sections of that Code. There can scarcely be any doubt that the difficulties with which Courts of justice have to deal in such matters arise from the fact that Her Majesty's subjects in India having long been accustomed before the advent of the British rule to oppressive methods, cannot easily accommodate themselves to the new state of things ushered into existence by the British Government, under which religious toleration and individual liberty of the citizen is recognized to an extent which, according to some deep thinkers, was too much in advance of the stage of civilization which the country had attained. Quite recently in Crim. Rev. No. 629 of 1887 (1) I had to deal with a somewhat similar matter. There the dispute was not between Hindus and Muhammadans, but between two sections of the Hindu community, that is, between the *Vaishnavas* and the *Saraogis* in connection with a religious procession of the latter to which the former objected. Similarly quarrels arise between the two sections of the Muhammadan community—the *Sunnis* and the *Shiahs*—in connection with the uttering of certain words which are most offensive to the religious feelings **[158]** of the *Sunni* Muhammadans, and which words might in some circumstances fall under the purview of s. 298 of the Indian Penal Code. I have no doubt that the Legislature in framing Chapter XV of the Indian Penal Code has made a great advance in the direction of the religious toleration which civilized methods of thoughts enjoin, and if difficulties arise in connection with such matters, they are due not to any defect of the law but to the inconsiderate and reckless behaviour of the various sections of a population which does not fully appreciate the blessings of religious toleration and individual liberty which the British rule by framing wise laws has accorded to the people of this country.

Having regard to the facts of this case as they appear from the judgment of the Magistrate and of the learned Sessions Judge, I cannot help feeling that it was imprudent and inconsiderate on the part of the accused to have slaughtered cows on the roadside and in a locality which would be visible to any Hindu passer-by, and I think I may say as a Muhammadan myself that it is difficult for me to conceive that the gentlemanly feelings of any person belonging to the better classes of the community which professes Islamism would, even on the festival of the *Id-ul-zuha*, permit the sacrifice of a cow in violation of considerations suggested by the religious feelings and prejudices of his Hindu fellow-subjects and neighbours with whom the Mussalmans have for centuries associated on friendly terms as neighbours and fellow-subjects. It is, however, not necessary for me to go further into the particular facts of this case, because, as the learned Chief Justice has pointed out, the question is a pure question of law, and in this view I am bound to hold that s. 295 of the Indian Penal Code does not cover the case, and that the convictions were therefore wrong in law. I may, however, add that the circumstances of the case require that such matters should be dealt with by municipal regulations for which ample provision is made by our law, and that the learned Government Pleader, Munshi *Ram Prasad*, who appeared on behalf of the Crown to support the convictions, has been unable to show me any section of the Indian Penal Code under which the facts proved in this case would constitute a criminal offence within the

(1) *Queen-Empress* v. *Sheodin*, 10 A. 115.

meaning of that Code (s. 40). But when I say this I wish to guard myself [159] against being understood to lay down any general rule as to whether acts done by Hindus or Muhammadans offensive to each other's religious feelings would not in certain circumstances constitute an offence under the Code.

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I agree in the order proposed by the learned Chief Justice (1).

Convictions set aside.

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10 A. 159 = 8 A.W.N. (1888) 32.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

IMDAD KHATUN AND OTHERS (*Plaintiffs*) v. BHAGIRATH (*Defendant*).*
[3rd January, 1888.]

andholder and tenant—Occupancy tenant—Trees, sale of—Such sale invalid—Act XII of 1881 (*N. W. P. Rent Act*), s. 9.

The trees upon an occupancy-holding, whether planted by the tenant himself or not, belong and attach to such holding, and, like it are not susceptible of transfer by the tenant.

[F., 7 C.P.L.R. 7 (9) ; 23 A. 211 (212) ; 5 Ind. Cas. 256 : R., 2 O.C. 280 (283) ; 22 C. 742 (751); 1 O.C. 231 (249); Cons., 21 A. 297 (299) = 19 A.W.N. 72 (73).]

THE first three defendants in this case, Rupram, Jairam and Netram, were occupancy-tenants of the plaintiffs, in respect of a plot of land No. 215, upon which there grew a number of mango and other trees. By deed of sale, dated the 20th March, 1884, they sold the trees only to the defendant Bhagirath, who subsequently sued for possession thereof, and, on the 19th May, 1885, obtained a decree on confession of judgment in execution of which he dispossessed them from the whole of the occupancy-holding. The plaintiffs-zemindars brought the present suit on the 27th May, 1885, in which they prayed for cancelment of the deed of sale of the 20th March, 1884, and for ejectment of the defendant-vendee.

The Court of first instance (Munsif of Kasganj) decreed the claim. On appeal by the defendant-vendee, the Subordinate Judge of Aligarh reversed the Munsif's decree and dismissed the suit. In the course of his judgment he observed :—" The next point is whether the vendors could sell the trees. The evidence satisfactorily [160] proves that the trees belonged to them. The vendors and their ancestors had planted the trees and had always enjoyed their fruits and wood. As the trees were their property, they could sell them to the appellant. Under the rulings of the High Court in *Sadar Singh* v. *Madara* (2) and *Debi Prasad* v. *Har Dayal* (3) the plaintiffs-zemindars are not entitled under the circumstances of this case to dispossess the defendant from the land or the trees. I hold that the appellant is entitled to remain in possession of the trees and the land under them, so long as he pays the zemindars the rent formerly paid by his vendors."

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* Second Appeal, No. 541 of 1886, from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 16th December, 1885, reversing a decree of Babu Madan Mohun, Munsif of Kasganj, dated the 2nd July, 1885.

(1) The only other reported case in which it was necessary to consider the effect of s. 295 of the Penal Code is *Hakim* v. *Empress* (Punjab Record, 1884, No. 27) in which it was held by Plowden and Burney, JJ., "that the word 'object' as used in s. 295 of the Penal Code is not limited to inanimate objects, but is wide enough to include animate objects which are held sacred, as well as idols, relics, or the like."

(2) A.W.N. (1883) 2. (3) 7 A. 691.

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The plaintiffs appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sunder Lal*, for the appellants.

Munshi *Ram Prasad* and Lala *Durga Charan*, for the respondent.

STRAIGHT and TYRRELL, JJ.—For the purpose of determining this appeal it must be taken to have been found as a fact that the first set of defendants are occupancy-tenants of the land on which the trees stand, that such trees were planted by themselves or their ancestors, that only the trees were sold to the second defendant by the sale-deed of the 20th March, 1884, and that by the decree of the 19th May, 1885, obtained by him on confession of judgment against the first set of defendants, he has dispossessed them from their cultivatory holding. Now it has been ruled by this Court in *Jagrani Bibi* v. *Gineshi* (1) that a suit for possession of trees is a suit for possession of land within s. 29 of Act IX of 1871, and this principle has been more or less recognized in the Full Bench ruling that standing timber is immoveable property—*Umed Ram* v. *Daulat Ram* (2)—by Mahmood, J., in *Deoki Nandan* v. *Dhian Singh* (3), and by another Full Bench in *Juggal* v. *Deoki Nandan* (4). It was also held by Pearson and Oldfield, JJ., in *Ajudhia Nath* v. *Sital* (5), followed by Straight and Tyrrell, JJ., in *Ram Narain* v. *Madho* (6) that an occupancy-tenant can only make a valid hypothecation of the trees held by him for the term of his tenancy. **[161]** With his ejectment from the land and the determination of his tenancy such an hypothecation ceases to be enforcible. Again in *Jhagaru* v. *Shamshere Khan* (7) it was held that a tenant who, while cultivating land, had planted trees thereon was not entitled, after he had ceased to cultivate it, to sue for possession of the trees ; and in *Ram Baran Ram* v. *Salig Ram Sing* (8) the same principle was recognized. Nor is there anything inconsistent with this view in a decision of this Bench as constituted in *Khasim Mian* v. *Banda Husain* (9). We think, upon a review of all these authorities, that the trees on an occupancy-holding, even whether planted by the tenant himself or not, belong and attach to such occupancy-holding, and like it are not susceptible of transfer by the occupancy holder : indeed this is what we take it to have been laid down by the Full Bench in *Jugal* v. *Deoki Nandan* (4). To recognize such a sale as that which is the subject of the present suit would be to sanction a transfer by an occupancy-tenant who on the facts stated here has in fact been ousted. We do not lose sight of the fact that by local custom having the force of law an occupancy tenant may have a saleable interest in the timber, fruit, and loppings of trees planted by him, but no such custom is pleaded or proved in the present case, and the fact remains that the first set of defendants have sold something to the defendant No. 2, which, as a part of their occupancy-holding, they are by law forbidden from transferring. We think therefore that the plaintiffs were entitled to have the sale-deed of the 20th March, 1884, avoided, to eject the defendant No. 2 from their land, and to have their proprietary possession of it restored. We accordingly decree the appeal with costs, and, reversing the decree of the Subordinate Judge, we direct that a decree be prepared declaring the above reliefs in favour of the plaintiffs with costs against all the defendants.

Appeal allowed.

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(1) 3 A. 435. (2) 5 A. 564. (3) 8 A. 472. (4) 9 A. 38. (5) 3 A. 567. (6) A. W. N. (1883) 100. (7) A. W. N. (1881) 20. (8) 2 A. 896. (9) 5 A. 61.

10 A. 162=7 A.W.N. (1887) 295.

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APPELLATE CIVIL.

10 A. 162=7 A.W.N. (1887) 295.

[162] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

LACHMAN PRASAD (*Defendant*) v. JAMNA PRASAD AND OTHERS (*Plaintiffs*).* [4th November, 1887.]

Practice—Remand—Power of appellate Court to deal with whole appeal after return of findings—Customary easement—Privacy.

In a second appeal by the defendant, in which the plaintiff filed objections to the decree under s. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled to succeed, and at the same time remitted an issue under s. 566 of the Code with reference to the plaintiff's objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court.

Held that upon the return of the findings on remand, the Court could not treat the appeal as already decided and the objections the sole matter for consideration, but must consider both appeal and objections and decide the whole case.

Held, however, that where Judges have heard arguments on some of the issues and have expressed their views thereon and have remitted another issue or issues under s. 566, they are not bound, on the return of findings, to hear the case *de novo* but may confine counsel to argument upon the findings.

Case in which it was found that the plaintiff was by local custom entitled to an easement of privacy, and in which the Court granted a mandatory order compelling the defendant to permanently close the door or window complained of.

[F., 80 P.L.R. 1902 ; Rel., 15 Ind. Cas. 39 (41) ; R., 17 C.W.N. 462 (466)=15 Ind. Cas. 39.]

THE plaintiffs and the defendant in this case were the owners of adjoining houses in mohulla Nawabganj in the city of Cawnpore. The suit was brought for the removal of a door or window opened by the defendant in his western wall contiguous to the plaintiffs' house and alleged to invade their privacy ; of a drain constructed by the defendant upon the same side of his house, the water from which flowed or dropped upon the plaintiffs' property; a *chaja* or cornice in the same wall, and, another *chaja* on the northern wall with a spout from which water fell upon a public thoroughfare used by the plaintiffs. The plea of the defendant was, in substance, that the drains and cornices complained of had existed for a long time ; that no special damage to the plaintiffs from the drain on the north wall had been shown, and that the door or window on the western wall occupied a place where an aperture had for a long time existed without any complaint being made.

[163] The Court of first instance (Munsif of Cawnpore) decreed the the claim, except in regard to the door or window and the drain on the northen side. Upon the issue as to the door, the Court observed :—"This point is very clear. It has been repeatedly held by the honourable High Court that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house on the ground that they overlook the zenana of the plaintiff—*vide Mahomed Abdur Rahim* v. *Birij Sahu* (1), *Sheikh Golam Ali* v. *Kazi Mahomed Zehur Alum* (2), and *Jogul Lal* v.

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* Second Appeal, No. 1517 of 1885, from a decree of Maulvi Syed Farid-ud-din, Subordinate Judge of Cawnpore, dated the 16th May, 1885, confirming a decree of Babu Bepin Behari Mukerji, Munsif of Cawnpore, dated the 18th September, 1884.

(1) 5 B.L.R. 676. (2) 6 B.L.R. App. 76.

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Musammat Jasoda Babee (1). This issue is accordingly decided against the plaintiffs." In regard to the issue as to the drain on the northern side, the Court held that the plaintiffs could not succeed, having failed to prove special damage, and referred to *Karim Bakhsh* v. *Budha* (2).

From the Munsif's decree the defendant appealed to the Subordinate Judge of Cawnpore, the plaintiffs at the same time filing objections to so much of the decree as was adverse to them. The Subordinate Judge concurred with the Munsif on all points. Upon the issue as to the door he said :—"I hold that although the door affects the privacy of the plaintiffs' house, yet as the defendant has set it up in his own wall, the plaintiffs have no right to have it closed. The remedy is in the hands of the plaintiffs. They can raise their wall so high that the door may not affect their privacy."

The defendant appealed to the High Court. The plaintiffs filed objections under s. 561 of the Civil Procedure Code with regard to the door or window and the northern drain.

On the 25th May, 1886, Oldfield and Mahmood, JJ., remitted an issue to the lower appellate Court for a finding as to how and to what extent the door or window affected the privacy of the plaintiffs. In his finding the Subordinate Judge said that the window in dispute overlooked the whole of the plaintiffs' house, and in particular those portions of the house, which were reserved for females. Upon the return of this finding, the defendant filed objection under s. 567 of the Civil Procedure Code to the effect that the plaintiffs were not entitled to restrain him from opening and using his window on the ground of interference with their privacy, in the absence of proof of twenty years' uninterrupted user.

[164] On the 11th January, 1887, the following order was passed by Oldfield and Brodhurst, JJ.—

"We are of opinion that the appeal on behalf of the appellant must succeed in respect of the *chajja* and *kasi* made by him on the west wall of his house. The only ground on which the Court below ordered their removal is that they are recently made, but they are not shown to interfere with any right of the plaintiffs so that the later can insist on their removal.

"Dealing with the objections filed by plaintiffs, we are of opinion that they have no force in respect of the complaint as to the drain defendant has made on his north wall.

"There is, however, the objection that the window and door have interfered with the privacy of the plaintiffs and overlooked apartments kept for the occupation of the female members of their family, and the Court below has found that this is so in fact. We think it desirable that an issue be tried whether by local custom there is any right of easement by which the plaintiffs have a right to have the privacy of their apartments maintained by the removal of the door and window. The case is remanded, and ten days will be allowed for objections on return of the finding.

The Subordinate Judge's finding upon this issue was that the existence in the mohalla where the parties lived of a customary easement of privacy was proved. Upon the return of the finding the defendant objected under s. 567 of the Civil Procedure Code, that "no custom has been established in law." The case came on for hearing before Edge, C. J., and Brodhurst, J., on the 4th November, 1887.

Kunwar *Shivanath Sinha* and Pandit *Sundar Lal*, for the appellant.

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(1) N. W.P.H.C.R. (1870) 311.

(2) 1 A. 249.

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Mr. *Amiruddin*, for the respondents.

EDGE, C.J.—In this case the defendant appealed and the plaintiffs filed objections. The case came on for hearing first before my brother Mahmood and Mr. Justice Oldfield, by whom an order of remand was passed with regard to the issue arising on the objections. On the return of the remand the case came on before my brother Brodhurst and Mr. Justice Oldfield on the 11th January [165] last. On that occasion they expressed an opinion as to the merits of the appeal. They did not give judgment on the appeal, but merely stated that the appellant would be entitled to succeed, giving certain reasons for that view. It appears to me that the appeal can have hardly been argued out before those Judges on the 11th January, as it is obvious that the true meaning of the facts as found was not present to their minds. However, on this occasion we have had the opportunity of hearing Mr. *Amiruddin*, who has taken care that we shall not overlook the findings. On the 11th January a further remand arising out of the objections originally taken was ordered. The return is now before us. Mr. *Amiruddin* contends that we have got to decide the whole case, and that we are not entitled to treat the expressions of the Judges on the 11th January as a judgment on the appeal. He has contended that the determination of an appeal when there has been a remand must be on a hearing of the appeal, that is, on a hearing of the whole case, and that this applies equally to an appeal in which there are objections as to an appeal in which there are none. I confess I thought at one part of the argument that we might treat the appeal as already decided and the questions arising on the objections the sole matter for our consideration. The practical difficulty which would arise from separating the appeal and the objections and treating the appeal as having been decided on the 11th of January last leads me to think that Mr. *Amiruddin's* argument is well founded. A difficulty would arise under s. 579 of the Code of Civil Procedure. That section provides that the decree of the appellate Court shall bear the date on which the judgment was pronounced, and the decree must be signed by the Judge or Judges who passed it. If Pandit *Sundar Lal's* contention were correct, there would be here two decrees, one of the 11th January of this year, the other a decree of to-day's date. If his contention is correct, we could not adopt the decree of 11th January as our own, as it would not be the decree of this Bench as constituted. I therefore come to the conclusion that the question which has been raised by the appellant and the objections raised by the respondents are to be considered by us. From my ruling on this point it must not be inferred that where Judges have heard arguments on some of the issues and have come to or [166] expressed their views on those issues and have remanded another issue or issues under s. 566, the same Judges should be bound to hear on the return to the remand the case *de novo*. In such a case I for one would confine counsel to the findings on remand, which, of course, I had not had an opportunity of considering before. The defendant in his appeal asks to have set aside that part of the decree which interferes which the *chajja* and drain he had made. It is found that no *chajja* or drain existed previous to the time of the erection of the additional building which the defendant has erected. The *chajja* extended an appreciable distance over the plaintiff's land. It is obvious that if the plaintiffs were not entitled to a decree with regard to the *chajja* and drain, the defendant might in course of time acquire an easement which might seriously interfere with the enjoyment by the plaintiff of his land. I am of opinion that the appeal should be dismissed

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with costs. As to the objection, the findings on remand show that the plaintiff is entitled to have his right of privacy observed, and to have a mandatory order to compel the appellant to permanently close the door or window complained of. In this respect the decree of the Court below will be varied. I am of opinion that the objections should be allowed with costs.

BRODHURST, J.—On further consideration of this second appeal I no longer hold the opinion that is expressed in the order of remand, dated the 11th January last, and I concur in the judgment that has been delivered by the learned Chief Justice.

Decree modified.

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10 A. 166 = 15 I.A. 12 = 5 Sar. P.C.J. 129.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

ZAIN-UL-ABDIN KHAN *v.* MUHAMMAD ASGHAR ALI KHAN AND OTHERS. [3rd December, 1887.]

Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to bona fide *purchaser, not a party to the decree, distinguished from sale to decree-holder.*

A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the [167] decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it.

Held, that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.

[F., 17 A.W.N. 28; 26 C. 734; 27 C. 810 = 4 C.W.N. 692; (1912) M.W.N. 513; Rel., 12 Ind. Cas. 65 (66) = 14 C.L.J. 76; R., 49 P.R. 1894; 1 L.B.R. 22 (23); 22 A. 168; 23 A. 60 = 20 A.W.N. 199; 24 A. 467 (471); A.W.N. (1902) 116; 27 M. 98 (100); 31 C. 499 (501); 29 B. 435 = 7 Bom. L.R. 585 (F.B.); 27 M. 504 (508); 30 M. 295 = 17 M.L.J. 165 = 2 M.L.T. 186; 13 C.W.N. 710 (714); 12 Ind. Cas. 444 (446) = 21 M.L.J. 969 = 10 M.L.T. 373 = (1912) 2 M.W.N. 425 (427); Expl., (1912) 2 M.W.N. 425 (427) = 10 M.L.T. 373; D., 2 A.L.J. 358 = A.W.N. (1905) 153.]

APPEAL from two decrees (11th June, 1883) of the High Court, reversing a decree (16th March, 1882) of the Subordinate Judge of Moradabad.

The question raised in this appeal was whether or not several auction sales of property formerly belonging to the appellant, who was judgment-debtor under the decree in satisfaction of which the sales took place, where to be set aside, on the ground that this decree had been, subsequently to the sales, so far modified by an appellate Court as to make what had been realized at a prior sale of the appellant's property sufficient to cover the amount finally decreed.

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The sales were in execution of an *ex parte* decree (8th April, 1874) obtained by three of the defendants in the present suit for possession of shares in zemindari lands and houses, and for mesne profits and payment of a dower-debt, also for money due on a promissory note, the whole aggregating in value more than a lakh of rupees.

An appeal having been rejected by the High Court (26th August 1875) on the ground that there could be no appeal from such an *ex parte* decree, an appeal to Her Majesty in Council (1) (22nd November, 1878) resulted in a remand, followed by a decree of the High Court (1st March, 1880) disallowing part of the claim, on grounds, thus expressed in the judgment, having reference to jurisdiction, which affected the right to recover the dower-debt, and upon the promissory note:

[168] "The cause of action cannot be held to have arisen in the district of Moradabad, for the lady was a resident of Jaipur and died there, and the plaintiffs are residents of the foreign State of Jaipur and the defendant dwells in the foreign State of Jaipur, and has no connection with Moradabad.

"Equally, the Court will not have jurisdiction to try the claim for the dower-debt: this item is claimed as part of the assets left by the lady and divisible among the heirs. As already stated, the lady died at Jaipur and had no connection with the district of Moradabad, and her marriage, and presumably the contract for dower, took place at Rampur."

By the decree (1st March, 1880) which followed this judgment, the former decree (8th April 1874) was confirmed as to the estates in land and as to the mesne profits for Rs. 3,746 only, with Rs. 4,908 for costs.

Meanwhile, the holders of the decree of 1874 had, in that year, obtained orders for sale in execution of it and brought to sale some of the judgment-debtor's property.

The first sale was on the 17th November, 1874, and comprised a house known as Diwan Kaumal's in Moradabad, for Rs. 5,050, the purchaser being Asghar Ali Khan, one of the present respondents.

This property was not included in the present claim, the plaintiff explaining that this sale might stand good as satisfying what was due under the decree of the 1st March, 1880. Of those sales which the present suit (22nd February, 1881) sought to have set aside, the first was a sale (21st November, 1874) of twelve and a half biswas owned by the plaintiff, appellant, in mauza Alata for Rs. 8,575. The second was a sale (20th November, 1875) of his right, title, and interest in other villages which had realized Rs. 18,900 and Rs. 12,000. Another was a sale (16th November, 1876) of the Bank Kothi in Meerut cantonment. At these sales the decree-holders had purchased some of the property, and they, or purchasers from them, were originally the only defendants. But by an order of the Court of first instance (17th January, 1882) the respondents, Har Sarup, Prasadi Lal, and Jeo Ram, purchasers [169] at the auction-sales who were not parties to the decree of 8th April, 1874, were made defendants.

Issues having raised the question (among others) whether the sales could be set aside on the ground of the subsequent modification of the decree, the Subordinate Judge held that the plaintiff was entitled to have them set aside both as against the decree-holders who had brought the property to sale in satisfaction of their decree and had purchased at the sales, and property as against the purchasers who were no parties to the decree.

(1) *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmed Raza Khan*, 5 I. A. 233.

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The latter only were the appellants in the appeal to the High Court which followed, and a Divisional Bench (Straight and Oldfield, JJ.) reversed the above judgments as against them, on the ground that the sales, as against *bona fide* purchasers, not parties to the decree subsequently modified, were not rendered invalid by the modification taking place (1).

On this appeal:

Mr. *T. H. Cowie, Q. C.*, and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *W. A. Raikes* appeared for the respondents.

For the appellants it was argued that the Judgment of the first Court had been so far correct that all the sales subsequent to that which had realized enough to satisfy the decree as finally made should be set aside; and that the modification of the decree of the 8th April, 1874, which had taken place on the ground of the absence of jurisdiction, showed that sales realising amounts in excess of what was ultimately allowed by the decree of 1st March, 1880, were unauthorized.

Reference was made to *Jadunath Kudnu Chowdhry* v. *Brijanath Kundu* (2), *Kanhaye Singh* v. *Oomadhar Bhatt* (3), *Abdool Hye* v. *Nawab Raj* (4).

Counsel for the respondents were not called upon.

Sir B. Peacock gave their Lordship's judgment.

JUDGMENT.

Sir B. Peacock.—In this case the plaintiff sued several defendants, claiming to set aside certain auction sales which had [170] taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several defendants as regards the properties of which they were severally purchasers.

Some of the defendants were the decree-holders, and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued. The circumstances are peculiar. The plaintiffs in the suit in which the execution was issued sued the present appellant in the Court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present appellant to the plaintiffs in that suit, and a large amount alleged to be due from the appellant as dower to their mother, whom they represented. The defendant in that suit—the present appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he the then defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes and on account of the dower.

(1) A.W.N. (1883) 158.
(2) B.L.R., Appendix 90.
(3) 21 W.R., 291.
(4) B.L.R. Sup., Vol. 311 (F.B.).

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court and remanded [171] the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge in respect of the dower and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court which reversed a part of the original judgment of the Subordinate Judge, the plaintiffs in that suit who are now some of the defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realized which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the defendants, Asghar Ali, purchased *bona fide*, he not being a party to the original decree.

The plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bona fide* purchaser who was no party to the decree.

Pending the suit certain other defendants were added, as appears at page 2 of the record. The entry on the record is as follows:—According to the order dated 17th January, 1882, Har Sarup, Parshadi Lal, and Jiwa Ram, auction-purchasers, were joined as defendants." The three defendants, who were then joined were no parties to the decree, so that there are two sets of defendants in the suit: the decree-holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the plaintiff, being a *bona fide* purchaser and a stranger to the decree; and the three other defendants, who were alleged to be auction-purchasers under the decree and who were no parties to it.

The plaintiff claimed that "the auction-sales of the disputed property detailed in the plaint held on 20th November, 1874, 20th November, 1875, and 15th November, 1876, be declared null and void, and the sale-deed in favour of Shaukat Husain Khan, dated 2nd November, 1880, so far as it appertains to the plaintiff's claim, [172] be set aside." Thus he claimed to set aside all the auction-sales, not only as against the decree-holders who had purchased, but as against *bona fide* purchasers who were no parties to the decree. Secondly, he claimed that "plaintiff be but in absolute possession, of the undermentioned property of the value of Rs. 21,450 after dispossession of the defendants."

Amongst other issues, one was whether the auction-sale and the purchase, having been made *bona fide* could be invalidated or set aside by the modification of the decree, and whether the limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bona fide* purchasers who are no parties to a decree at a sale under execution and

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the decree-holders themselves. In Bacon's Abridgment, Title "Error," it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the terms was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, fourth edition, note to s. 246, Act VIII of 1859. So in this case, those *bona fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree-holders who had purchased, but the defendants who had purchsed *bona fide*, not being [173] parties to the decree. In his judgment he says:—"The limitation period of one year has nothing to do with this case. The cause of action having accrued to plaintiff on the 1st March, 1880, the date when the decision was modified, and as he instituted the claim on 22nd February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the plaintiff had a right to recover, not only as against the decre-holders, but as against the *bona fide* purchaser, who were no parties to the decree under which they purchased, and he decreed the plaintiff's suit. The defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one, as regards the three appellants who were the added defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—" Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants who had appealed, but as regards the other who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge.

Their Lordships therefore will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court, and that being so treated, they ought to be affirmed: and that the decree of the Subordinate Judge should be reversed so far only as it related to the plaintiff's claim against those defendants. Their Lordships also think that the appellant must pay the costs of the respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as [174] decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

Solicitors for the appellants—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents—Messrs, *Oehme and Summerhays.*

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APPELLATE CRIMINAL.

10 A. 174= 8 A.W. (1888) 11.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* POHP SINGH AND ANOTHER. [19th December, 1887.]

Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrates' record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Act I of 1872 (Evidence Act), s. 80.

Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen Empress* v. *Riding* (1) referred to.

[Appr., 18 C. 129 (133)]

THE facts of this case are sufficiently stated in the judgment of Edge, C.J.

Mr. *C. Dillon*, for the appellant.

The *Public Prosecutor* (*Mr. G. E. A. Ross*), for the Crown.

EDGE, C. J.—This is an appeal by Pohp Singh and Jaswant Singh, who were convicted by the Sessions Judge of Agra on the 12th November last, of the murder of Musammat Khamani, and were by him sentenced to death. The principal evidence for the prosecution was that of Suraj Pal, a Brahman of Dhanola, a Chamar, and of Pancham Singh, a Thakur. Those three witnesses deposed to having seen the prisoners kicking the deceased woman, who was apparently fifty-five years of age, and to having seen the woman, after she had been kicked and rendered insensible, dragged or carried by the prisoners to a well and thrown into it by them. [175] The circumstances which led up to the commission of the crime, of which I believe the prisoners to be guilty, were that the deceased woman had held portions of some land as mortgagee, that a Raja had put the prisoners, in possession of that land, and that on the day in question the prisoners, or one of them, was ploughing the land adversely to the rights of the deceased woman; that she objected to their doing so and made an outcry, upon which Suraj Pal came up, when he was assaulted by the two prisoners, Jaswant Singh striking him on the arm with a lathi and Pohp Singh striking him on the head. The old woman came to his assistance, when she was kicked in the manner described by those witnesses to whom I have referred. It appears to me that the story those witnesses told is the true one, and that the deceased woman, after she had been rendered insensible by the violence of the prisoners, was thrown into the well by them with the result that she died. For the defence there were several witnesses called. The first three of those, namely, Ganga Prasad, Gajraj Singh, and Jarra Singh, know nothing about the transaction. The fourth witness, Than Singh, says that the old woman, upon seeing Suraj Pal assaulted, went to the well and threw herself into it, and that Ganga Prasad's wife accompanied

(1) 9 A. 720.

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the old woman to the well. We are told that Ganga Prasad's wife was Musammat Daryayi, who is mentioned in the petition of Pohp Singh; she was not called as a witness on either side. The next witness, Ganesh Prasad, says that after the fight Suraj Pal and Pohp Singh went off to the village, leaving the woman sitting in her field, and that she did not fall into the well in his presence. The evidence of these two witnesses is inconsistent, and I must say I do not believe it. The next witness, Sarawan Singh, says that he heard that Musammat Khamani fell into the well, but he did not know how. In the cross-examination he said:—"I saw Khamani falling into the well." Immediately afterwards he said that he heard she had, and that no one was near her at the time. It is obvious that this witness was not telling the truth. Those last three witnesses are the witnesses for the defendant, who appear to have been, according to their evidence, either at or near the place where the occurrence took place at the time. On behalf of Jaswant Singh an *alibi* was set up, which was supported by Khushal; Surat, and Har [176] Prasad, and also Ganesh Prasad, to whom I have alrealy referred. I believe that Jaswant was present on the occasion in question, and that he was one of the two men who kicked the deceased and threw her into the well, and I do not believe the *alibi*. On the 14th July, the day on which this took place, Suraj Pal made a complaint at the thana. He then, according to the evidence of Ram Dayal, Sub-Inspector of Jeitpura, charged these two prisoners with having beaten the woman and thrown her into the well. I thoroughly agree with the comments of the Sessions Judge on the conduct of Ram Dayal, and in my opinion the attention of the Government should be called to his conduct in this case. I have not a shadow of doubt in my mind that these two prisoners brought about that woman's death under circumstances which render them liable to be convicted of murder. I think they were properly convicted, and I am of opinion that this appeal should be dismissed and the sentences confirmed.

In the course of the argument in this case the deposition of Dr. A. Hilson, Civil Surgeon of Agra, was commented on by the Counsel for the appellants, and that deposition, as printed in the paper book was very properly made use of by that Counsel in support of his contention that the Doctor's evidence was consistent with the defence of suicide, and he also contended that the deposition was at variance with the depositions of Suraj Pal and the other witnesses for the prosecution. I do not see, myself, that it is at variance with the evidence. However, the reason for which I have referred to the deposition has to do with the form in which that deposition has come before us. On examining the record we find two documents bearing the signature of Saiyad Muhammad Mohsin, who was in fact the Deputy Magistrate who committed the prisoners for trial. Now one of those is in the vernacular and appears to be, as far as we can judge, a note or translation of the evidence of Dr. Hilson. It apparently bears the signature of Mr. Saiyad Muhammad Mohsin, with the additional letters "D.C.," which, I suppose, means Deputy Collector. Below the signature are the figures 20-9-87, and below them some hieroglyphics. That document does not purport to have been the deposition of Dr. Hilson taken and attested by the Magistrate in the presence of the accused. The concluding paragraph in that document, as [177] translated reads thus:—"The injury could be caused by a fall from a considerable height." The other document to which I refer bears the heading "Deposition of Dr. A. Hilson, Civil Surgeon of Agra, on S.A." That heading is written

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in black ink. Beneath that heading there is written in blue ink what I suppose was the evidence of Dr. Hilson. This document is described in the list of documents as the deposition of Dr. Hilson. It purports to bear the signature of A. Hilson, M.D., Civil Surgeon, and the signature of Saiyad Muhammad Mohsin. The body of the document is not in Mr. Mohsin's writing. Whether the name A. Hilson, at the foot of the document was written by Dr. Hilson, or by the writer of the body of the document, I am unable to tell. It is quite obvious at any rate that the letters "M.D." and the words "Civil Surgeon" in blue ink at the foot of the document are in the same hand-writing as that at the head of the document in black ink. Now the last paragraph of this document as it stood originally read as follows:—"The injury might have been caused by a fall from a considerable height." As it now appears, that paragraph reads thus:—"The injury had been caused by a fall from a considerable height." The latter is the reading which is relied on for the defence—a reading which is consistent with the sentence immediately preceding it, as well as with the reading of the vernacular document to which I have just referred. How, when, or by whom, this alteration was made there is nothing to show. That alteration is not vouched for or initialled in any way. If it be the fact that this document in English is a translation of the original deposition, the heading is misleading; the heading would lead one to infer that it was the original deposition. Whichever it is, there is nothing to show that it was taken or attested by the Magistrate in the presence of the accused. If either of these had been documents essential as evidence for the prosecution in this case, I should have declined to treat them as evidence against the accused under s. 509 of the Criminal Procedure Code of 1882. That section is as follows:—"The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness. The Court may, if it thinks fit, summon [178] and examine such deponent as to the subject-matter of his deposition." As I have said, there is nothing on the face of either of these documents to show that either was taken or attested by a Magistrate in the presence of the accused. In the case *Queen-Empress* v. *Riding* (1), I rejected a document which was tendered as evidence under s. 509. In that case I was asked to presume that it had been taken and attested in the presence of the accused, and was pressed with s. 114, illustration (*e*) of the Evidence Act. There is a Reporter's note appended to that case. I infer that that note originated in some one having considered that s. 80 of the Evidence Act would apply. I may say that, in my judgment, all depositions of witnesses in criminal cases should be taken and attested by the Magistrate in presence of the accused; but I am not aware of any provisions in these Codes which make the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory by the Codes that such attestation should take place in the presence of the accused, I fail to see how s. 80 of the Evidence Act can be held to apply by any who takes the trouble to read that section with ordinary care. The document may be genuine, and still it may not have been attested by the Magistrate in the presence of the accused. There is no statement on the face of the document as to the circumstances under which the deposition, if it was one, was taken, and as to the

(1) 9. A. 720

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concluding words of s. 80, if there is no obligation imposed upon the Magistrate by the Code to attest the deposition in the presence of the accused, the evidence for statement might have been duly taken, although not attested by the Magistrate in the presence of the accused. I may go further and say that in this case there is nothing to show that what I assume for the moment to be the deposition of Dr. Hilson was either taken or attested by the Magistrate in the presence of the accused. S. 509 of the Criminal Procedure Code does not enact that a deposition of a Surgeon shall be taken and attested by the Magistrate in the presence of the accused. What it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the [179] deposition, make it apparent that he has done so. The second document, to which I have already referred, affords a good example of the danger in the criminal case, involving the life of an accused, of making any such presumption as that which I was asked to make in the case of *Queen-Empress* v. *Riding* (1). The file in this case will be returned under seal to the Sessions Judge of Agra, and he will be requested to enquire into the origin of these two documents, and when and by whom they were signed, and when and by whom the alteration in that which is in English was made, and report to this Court accordingly.

TYRRELL, J.—I entirely concur in the dismissal of this appeal and in directing the sentence to be carried out, and I also concur with what has been said by the learned Chief Justice in respect of the deposition of Dr. Hilson, and I fully adopt the ruling of the learned Chief Justice in *Queen-Empress* v. *Riding* (1), and his remarks on the same subject which have been made in the present case.

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10 A. 179 = 8 A.W.N. (1888) 63.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

DAMODAR DAS AND ANOTHER (*Decree-holders*) *v.* BUDH KUAR AND OTHERS (*Judgment-debtors*).* [4th January, 1888.]

Costs—Mortgagee—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220—Act IV of 1882 (Transfer of Property Act), ss. 86, 87, 94.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held, that the costs awarded could not be considered part of the money due upon the mortgage, and as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda* (2) referred to.

[R., 12 C. P. L. R. 78 (81); 3 N. L. R. 97 (100); 13 C. W. N. 742 (743); D., 35 C. 431 (432) = 12 C. W. N. 364 = 8 C L.J. 152.]

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* First appeal No. 187 of 1887 from an order of Maulvi Mahomed Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 27th May, 1887.

(1) 9 A., 720. (2) 14 C. 185.

1888 JAN. 4. — APPELLATE CIVIL. — 10 A. 179 = 8 A.W.N. (1888) 68.

THE appellants in this case obtained a decree for foreclosure against the respondents on the 9th September, 1886, and it was [180] provided in the decree that in default of payment of the decretal sum due on the mortgage by conditional sale on or before the 9th March, 1887, the defendants should be absolutely debarred of all right to redeem the property. The decree then went on to say :—"And this also is ordered, that the defendants do pay to the plaintiffs Rs. 401-6-0 in respect of the costs of this Court which have been incurred by them." This order was apparently passed under s. 220 of the Civil Procedure Code.

The defendants failed to pay the decretal money within the prescribed period, and accordingly, in execution of the decree, the decree-holders obtained possession of the mortgaged property. Subsequently, they made an application on the 10th May, 1887, in which they claimed to recover the sum awarded to them for costs under the decree of the 9th September, 1886.

The Court executing the decree (Subordinate Judge of Mainpuri) gave judgment as follows, rejecting the application :—

"Certainly no costs will be allowed, because s. 87 of Act IV of 1882 says that if such payment is not so made, the plaintiff may apply to the Court for an order that the defendant be debarred absolutely of all rights to redeem the mortgaged property, and the Court shall than pass such order." The defendants failed to make payment, and the plaintiffs, having taken proceedings under the said clause, obtained possession of the foreclosed property. The plaintiffs have, therefore, no right to recover costs, because two cases are contemplated in the section ; one is that the defendants pay the judgment debt together with costs, and the other is that the plaintiffs obtain possession. In the second case, it does not at all appear from the section that the decree-holder shall, notwithstanding delivery of possession, be entitled to costs. My order in the regular suit was also to the following effect :—"The judgment-debtors either pay the whole amount with costs or be debarred of all rights to redeem. The forfeiture of the rights of redemption is the result of not fully carrying out the condition of the first case, including costs. That case is different in which the Court awards costs personally against the judgment-debtor who continues personally responsible. But when such is not the case, and a general order is made under s 87, the third case does not hold [181] good, that either the right of redemption is barred or payment should be made. There is no case in which the right of redemption is barred for default in paying the principal and interest, and yet costs remain due separately."

The decree-holders appealed to the High Court.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the appellants.

The respondents were not represented.

MAHMOOD, J. (after stating the facts and the conclusions of the lower Court, continued) :—I am unable to accept this view of the law. The decree in the case appears to have been framed in the terms of ss. 86 and 87 of the Transfer of Property Act (IV of 1882) and of s. 94 of the same enactment. It is unnecessary for me to go into the exact effect of these various sections in this case, because the decree of the 9th September, 1886, which I am called upon to interpret, appears to me explicit in terms as to costs.

It is one thing to say that by reason of the money due upon the *bai-bil-wafa* mortgage the mortgage has ceased to be redeemable, and it is another thing to say that the order as to costs contained in the decree

1887 JAN. 4. — APPELLATE CIVIL. — 10 A. 179 = 8 A W N. (1888) 68.

forms a part and parcel of the money due upon such a mortgage. In a suit for foreclosure, the plaintiff may be claiming neither more nor less than what is really and rightly due upon the mortgage and the defendant in resisting the suit would, in order to escape costs, be entitled to show that there was no real dispute or that he had been improperly impleaded. But in a case like the present, in which the suit ended in the decree of the 9th September, 1886, the defendants appear to have disputed the rights of foreclosure and to have failed in such defence. The order as to costs in this case has been dealt with as a separate part of the decree unaffected by the question whether or not the defendants-mortgagors paid the amount due on the *bai-bil-wafa* mortgage. Such, I think, is the general effect of the view adopted by the learned Judges of the Calcutta High Court in *Rutnessur Sein* v. *Jusoda* (1), and in the present case it seems to me that the decree itself is explicit, and the order relating to costs should have been allowed to be executed by the lower Courts.

[182] For these reasons I decree the appeal, and as the amount due for costs is a matter relating to accounts, the proper course is to set aside the order of the lower appellate Court and remand the case under s. 562 of the Civil Procedure Code to be dealt with according to law as stated in this judgment. I order accordingly. Costs will abide the result.

Cause remanded.

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10 A. 182=8 A.W.N. (1888) 55.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ARJUN SINGH (*Opposite party*) *v.* SARFARAZ SINGH (*Petitioner*).*
[9th January, 1888.]

Pre emption—Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.

Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul arz*, bring suits to enforce their rights, in the absence of anything in the *wajib ul-arz* to the contrary, the rule of Muhammadan law must be observed, and however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certion property, each decree being conditional on payment of the pies within thirty days. The Court further directed that in case of either pre-emptor making default of payment within thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both preemptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt.

[Appl., 11 A. 108 (116) ; R., 12 A. 234 (272); 8 P.R. 1904.]

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* Appeal No. 13 of 1887 under s. 10, Letters Patent.
(1) 14 C. 165.

1888 JAN. 9. — APPELLATE CIVIL. — 10 A. 182 = 8 A.W.N. (1888) 55.

THIS was an appeal under s. 10 of the Letters Patent from a decision of Mahmood, J. sitting as a single Judge. The facts of the case are fully stated in the judgments of the Court.

Mr. *J. Simeon*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case are these:—One Ram Kant Misr was the owner of a 5 annas 6 pies share, which he sold under a sale-deed, dated Pus badi 12, 1290 Fasli (1883) to Ganga [183] Mahton and Har Bakhsh Mahton. Upon this sale two pre-emptive suits were instituted one by Arjun and the other by Sarfaraz. Both suits were decreed on the 16th August, 1884, which decrees were upheld in appeal on the 31st October, 1885. The effect of those decrees was that whilst the pre-emptor Arjun was held entitled to pre-empt a three annas share in lieu of Rs 1,308-9-0, the rival pre-emptor Sarfaraz was held entitled to pre-empt the remaining 2 annas 6 pies share on payment of Rs. 1,090-7-0. But it was provided in both the decrees that in case of default of either of the pre-emptors to pay in the amount above specified within a period of thirty days, the other pre-emptor would be entitled to pre-empt the remaining portion of the share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default.

It is therefore clean that the decrees of Arjun and Sarfaraz related to the entire 5 annas 6 pies share, subject to the restriction therein contained as I have mentioned. Such decrees were in full accord with the rule which applies to decrees for pre-emption in cases of rival pre-emptors, as fully stated in the case of *Kashi Nath* v. *Mukhta Prasad* (1), which was approved in *Hulasi* v. *Sheo Prasad* (2). It is also clear that each decree awarded pre-emption in respect of the whole subject of sale. Nor can these decrees be understood to have infringed the fundamental rule of pre-emption, namely, that the bargain of sale cannot be split up with reference to the subject-matter of the sale. This latter proposition is the effect of the ruling in *Durga Prasad* v. *Munsi* (3) and the cases referred to therein.

What appears to have happened here is that neither Arjun nor Sarfaraz deposited their respective sums of money within the thirty days specified in their respective decree. The present dispute, however, has arisen because Arjun, the present respondent, having lost the benefit of his decree, is seeking to obtain the benefit of the decree obtained by Sarfaraz by depositing within fifteen days from the date of default the sum of Rs. 1,090-7-0 as the purchase-money of the 2 annas 6 pies share which had been decreed in favour of Sarfaraz and in respect of which the decree provided [184] that Arjun, the rival pre-emptor, might enforce pre-emption on default of payment by Sarfaraz.

The Court of first instance held that the decree obtained by Sarfaraz could not be executed in this manner in favour of Arjun, who was judgment-debtor of that decree, and that such a partial execution of a pre-emption decree could not be allowed. Upon this ground that Court disallowed the application for execution, which, I may add, was opposed by Sarfaraz also, the holder of the decree under which Arjun claimed. The lower appellate Court, however, has reversed that order, and from that order this second appeal is preferred.

It seems to me clear that the lower appellate Court has misapprehended the case and the rule of law applicable to it. It is admitted that in

(1) 6 A. 370. (2) 6 A. 455. (3) 6 A. 423.

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the decree obtained by Arjun, the vendor, and the vendee, as well as the rival pre-emptor Sarfaraz, were defendants and became judgment-debtors when the claim was decreed. Similarly in the decree obtained by Sarfaraz the vendor and the vendee were defendants, as also Arjun, the rival pre-emptor. Now this being so, the decree of which the decree-holder could avail himself was the decree which he himself obtained, and not the decree which had been passed against him, whatever its terms may have been. The present respondent Arjun allowed his decree for pre-emption to lapse by reason of not having deposited Rs. 1,308-9-0, which that decree required him to do within thirty days, and that decree could not therefore be of any further use to him. Having thus foregone the benefit of his decree, I do not think he is entitled to execute the decree which Sarfaraz had obtained, simply because that decree, with reference to the other decree, allowed Arjun to pre-empt the remaining 2 annas 6 pies share within fifteen days of the default of payment of the purchase-money by Sarfaraz The effect of the ruling of the lower appellate Court would be to split up the bargain of sale, because if Arjun could pre-empt only the 2 annas 6 pies share as he is seeking to do here, the remaining 3 annas would still be left in the hands of the vendees. The view of the law taken by the lower appellate Court is erroneous, because it is opposed, as I have already said, to the very fundamental principles of the law of pre-emption. Mr. *Ram Prasad*, on behalf of the respondent, has [185] indeed argued that in dealing with this case as a Court executing the decree, I am bound by the terms of the decrees, and thus I am precluded from applying the general principles of pre-emption at this stage. As to this contention, it is enough to say that, in the first place, the decrees themselves have for their sole aim and end the exclusion of such a splitting up of the bargain of sale as would result from the order of the lower appellate Court, and in the next place that in interpreting those decrees I cannot disregard the general principles of the law of pre-emption.

I hold, therefore, that the respondent Arjun, by foregoing his own decree by default of payment, is precluded from availing himself of the decree obtained by the rival pre-emptor Sarfaraz. In this view of this case this appeal is decreed, and the order of the lower appellate Court being set aside, that of the Court of first instance is restored. The respondent will pay costs in all the Courts.

From this decree Arjun appealed under s. 10 of the Letters Patent.

Munshi *Ram Prasad* for the appellant.

Mr. *J. Simeon*, for the respondent.

EDGE, C. J.—This appeal has arisen in the execution of a decree in a pre-emption suit. The share-holder in the village sold to a stranger, so far as is material, a 5 annas 6 pies share. Upon that Arjun Singh, the present appellant, brought his action for pre-emption of the whole share. Sarfaraz Singh, who was equally entitled with Arjun to premption, brought his action claiming to pre-empt the whole. These two actions were tried together by the then Judge of Gorakhpur, and he dealt with them in this way :—he passed a decree in Arjun Singh's favour in respect of 3 annas out of the 5 annas 6 pies on payment within thirty days of the date of the decree of Rs. 1,308-9-0, and in favour of Sarfaraz Singh in respect of the remaining 2 annas 6 pies on payment within a like period of Rs. 1,090-7-0, and by both of the decrees it was provided that in case of default on the part of either of the pre-emptors to pay the amount above specified within a period of thirty days, the other pre-emptor would be entitled [186] to pre-empt the remaining portion of the

share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default. What has taken place is this: the two pre-emptors made default of payment within thirty days. Arjun Singh after the expiration of thirty days, and within the further period of fifteen days, paid into the Court the Rs. 1,090-7 0, the pre-emption price decreed in respect of the 2½ annas share, and he now claims in execution to have possession of that 2½ annas share. It appears that by some arrangement to which Arjun Singh was no party, and which is not necessary for me to consider, Sarfaraz Singh, although he made default, got possession of the 2½ annas share. For the purposes of my judgment it is immaterial whether Sarfaraz Singh got possession of the 2½ annas share or not. The Subordinate Judge dismissed Arjun Singh's claim to have execution in respect of the 2½ annas share. The District Judge on appeal allowed that claim. My brother Mahmood, on appeal to this Court for the reasons given in his judgment, confirmed the order of the Subordinate Judge and set aside, the order of the District Judge with costs. From that decree of my brother Mahmood this appeal is brought under s. 10 of the Letters Patent. The case of *Kashi Nath* v. *Mukhta Prasad* (1), that of *Durga Prasad* v. *Munsi* (2) and that of *Hulasi* v. *Sheo Prasad* (3) are clear authorities in this Court if any such authority was required, to show that the rule of the Muhammadan law which applies in pre-emption case is that the person claiming pre-emption must claim the whole property sold and not part only if he has, against the vendee, a pre-emptive right to the whole. Indeed, the case of *Hulasi* v. *Sheo Prasad* (3) shows that that rule applies even to the case of a pre-emptor who brings his action after another pre-emptor has already brought an action in respect of the same share. It is contended before us on behalf of Arjun Singh that we should construe the decree in these pre-emption suits as if they gave Arjun Singh a right to get the 2 annas 6 pies share even if he made default in paying the Rs. 1,308-9 0, the decreed pre-emption price in respect of the 3 annas share which was decreed to him. It is contended that such a decree would have been a good one according to the rulings of this Court. For that proposition three cases have been cited. **[187]** The first of those cases is that of *Salig Ram* v. *Debi Parshad* (4). a Full Bench case of this Court. That case is no authority for that proposition. That case simply decided, that by the settlement administration papers of the village a sharer was entitled to maintin an action for less than the whole share sold. The next case was that of *Mahabir Parshad* v. *Debi Dial* (5). In that case this Court held that the appellants there, on payment of Rs. 200, were entitled to obtain a two-thirds share, and that one Duliman should pay into Court within the same time, that was one month, Rs. 100 and obtain a one-third share, and that if either of the apppellants in that case or Duliman should fail to pay the amount within one month, "the other of them making the further deposit within the time shall be entitled to the share of the defaulter." It is perfectly plain from that judgment that the Court meant that the price of the whole share should be paid, and that not a part only of the price should be paid by some or one of the parties. The last case relied on is unreported. It is Second Appeal from Order No. 4 of 1886 (6). That case is very different from the present case. In that case the person before the Court was not a defaulter; he had in fact paid into Court the amount of money for which, in the result of his appeal, it had been decreed he should obtain a moiety of the share. Now I take it to be the law that

(1) 6 A. 370. (2) 6 A. 423. (3) 6 A. 455.
(4) N.W.P.H.C., 1875, p. 38. (5) 1 A. 291. (6) Not reported

1888 JAN. 9. — APPELLATE CIVIL. — 10 A. 182 = 8 A.W.N. (1888) 55.

in a case such as this, where two rival pre-emptors having each an equal right to claim pre-emption bring their pre-emption suits, and there is nothing in the *wajib-ul -arz* to the contrary, the rule of Muhammadan law must still be observed, and however the share may be divided by the decree of the Court between such successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors or on the default of one by the other, or that neither of them should obtain any interest in the share in respect of which the pre-emption suits arose. To hold otherwise would be to enable the shareholders in a village who did not wish to comply with the rule of Muhammadan law to which I have referred, where it applies, as in this case, to obtain possession of a portion of the share and leave the other portion of the share in the hands of the vendor or vendee. I must apply a reasonable construction to the decree of the Judge of Gorakhpur, and I hold that that decree meant, to take the case [188] of Arjun Singh, that if he within a specified time paid the Rs. 1,308-9 in respect of the 3 annas share, he would be entitled, on default made by Sarfaraz Singh, to obtain Sarfaraz Singh's share on payment within the further period of fifteen days of the Rs. 1,090-7-0. I am of opinion that the judgment of my brothor Mahmood is a right judgment in law, and that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

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10 A. 188 = 8 A.W.N. (1888) 66.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MATA DIN AND OTHERS (*Judgment-debtors*) *v.* CHANDI DIN AND OTHERS (*Decree-holders*).* [31st January, 1888.]

Execution of decree—Civil Procedure Code, ss. 246, 247—*Cross-decrees—Set-off—Limitation.*

Under two decrees of the Sudder Diwani Adawlat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B*'s appeal, the application was struck off. In January, 1867, *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B*'s appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. B at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set off against the amount claimed by *A*.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been dicided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A*'s claim to that extent should be entered up and the balance recovered from *B*; and

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* First Appeal, No. 103 of 1887, from a decree of Pandit Ratan Lal, Subordinate Judge of Banda, dated the 30th April, 1887.

that this course, if not strictly in accordance with the letter, was in accordance with the spirit, of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity. 1888 JAN. 31.

Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off [189] was therefore not barred by limitation; that the order of January, 1867, was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would be a decree, and that s. 246 of the Code could then be applied. APPELLATE CIVIL. 10 A. 188 = 8 A.W.N. (1888) 66.

THE facts of this case are fully stated in the judgment of Straight, J.

Munshi *Hanuman Prasad*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

STRAIGHT, J.—This is a first appeal on the execution side from an order of the Subordinate Judge of Banda refusing an application of the judgment-debtors, appellants, the nature of which I will presently explain. Before doing so it is necessary to state the facts connected with the litigation out of which it arose. In the year 1863 Raghunath and others, the ancestors of the now decree-holders, respondents, brought a suit in the Court of the Judge of Fatehpur against Hatti Dubai and others, now represented by the judgment-debtors, appellants, for a declaration of their right to and possession of certain immoveable property and mesne profits valued at Rs. 76,099-12-1¾, and on the 28th July of that year the Judge gave the plaintiffs a decree in full for their claim. The defendants appealed to the Sadr Diwani Adalat, and that Court, on the 26th November, 1864, so far modified the Judge's decree as to hold the defendants entitled to retain one-third of the property with proportional mesne profits, but maintained it as to two-thirds. Hatti Dubai then appealed from this decision to their Lordships of the Privy Council in regard to the two-thirds as to which the Judge's decree had been sustained, while the plaintiffs rested content; and in the result their Lordships, on the 24th March, 1873, affirmed the decree of the Sadr Diwani. For convenience I will call this decree A.

In 1861 Hatti Dubai, ancestor of the judgment-debtors, appellants before us, had also brought a suit against the ancestors of the decree-holders, respondents, for immoveable property and mesne profits valued at Rs. 49,583-10-6½, which was dismissed by the Principal Sadr Amin of Banda on the 27th of June, 1861. He then preferred an appeal to the Sadr Diwani Adalat, and on the 15th of August, 1863, that Court modified the decree of the first [190] Court by giving the then plaintiff one-third of the property claimed. This decree was also appealed by the plaintiff Hatti Dubai to their Lordships of the Privy Council with regard to the two-thirds dismissed, and this appeal was consolidated with that mentioned as preferred from decree A and was disposed of by their Lordships in the manner I have already indicated. Under the decrees affirmed Hatti Dubai had been declared entitled to mesne profits for the years 1860 (1267 fasli) and thenceforward to date of possession, which were left to be determined on execution. This decree I will call decree B.

Now as to the execution proceedings in regard to decree A. The first application was made in September, 1863, and this was struck off on the 28th March 1864. A second application was made in July, 1864, which was also struck off in March, 1865. In September, 1865, the decree holders were awarded possession of the villages decreed, but an application then pending as to mesne profits was stayed. On the 17th of April, 1866, the decree-holder filed a petition, praying that an account

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might be taken of the mesne profits due to them under their decree B, and "after setting off the amount due to the other on whichever side whatever surplus is found may be realized by the party entitled to it." It would appear from the petition that the amount of *mesne* profits claimed by the decree-holders was Rs. 55,066-9-1½, and as the appeals were pending to the Privy Council, they were called upon to file security for that amount as a condition to their application being allowed, so as to provide for restitution in the event of the appeals succeeding, but according to an order of the 12th September, 1866, this they failed to do and their application was struck off.

As to the execution proceedings with regard to decree B, that was first executed on the 31st March, 1864, and the decree-holders were put in possession of the one-third of the property decreed to them. There were also certain proceedings taken under that decree with regard to mesne profits, and from them it seems that the decree-holders had applied to execute their decree for Rs. 24,159-15-9½ mesne profits, but that this had been objected to by the judgment-debtors, decreeholders of decree A, on the ground that the mesne profits recoverable by them under their [191] decree were much larger. Upon this application the Court granted a stay of execution. By a subsequent proceeding of the 26th January, 1867, in regard to decree B, the Court found that Rs. 18,165-12-9½ was the amount to which the decree-holders of decree B were entitled in respect of mesne profits. This closed the execution proceedings of that stage of the matter. As I have already stated, their Lordships of the Privy Council determined the consolidated appeals in regard to both decrees on the 24th March, 1873. On the 25th February, 1885, the decree-holders of decree A applied for execution of the order of their Lordships to this Court, and in the ordinary course it was sent to the Subordinate Judge for execution. The decree-holders of decree B then filed before the Subordinate Judge an application praying to have the amount of the mesne profits to which they were entitled under the decree applied by way of set-off. The Subordinate Judge refused to do so, and his order was appealed to this Court, which, on the 17th of December, 1886, allowed the appeal in a judgment the terms whereof are set out in the decision of the Subordinate Judge which is now before us in appeal. The Subordinate Judge has now in effect found that as only the two-thirds of the property decreed by decree A and dismissed by decree B was made the subject of the appeals to their Lordships of the Privy Council, while as to the one-third decreed to the appellants and never questioned by the respondents in appeal or by cross-objections the decree of the Sadr Diwani Adalat was left untouched, nothing was due to the appellants under the order of their Lordships, and further, that "inasmuch as there is no decree in existence regarding which the provisions of ss. 246 and 247 may be carried out, the Court cannot grant set-off. If both parties had produced their respective decrees as provided by s. 246, then proceedings would have been taken under ss. 246 and 247. As this has not been done, the Court is helpless and can only execute decree produced before it."

The matter, therefore, seems to stand thus: in 1867, when the appeals by the appellants were pending in the Privy Council, the appellants had obtained possession of the one-third of the villages decreed them and the respondents of their two-thirds, which latter property alone was the subject of the appeal. As to the one-third that had passed beyond the region of controversy, and in any event [192] the appellant was entitled to mesne

profits in regard to it, up to the 26th of January, 1867, to the amount of Rs. 18,165-12-9½. But as to this sum it seems clear to me from what appears in the last sentence of the Sadr Amin's decision of that date that he held over granting execution in respect of it pending the decision of the Privy Council appeals. In other words, the Court decreed the decree-holders of decree B execution of their decree for mesne profits until it had been determined by their Lordships whether the decree-holders of decree A were entitled to the two-thirds of the property as to which they claimed their mesne profits, and indeed this was in accordance with the prayer of the petition put in by them asking for such a stay of execution, which was granted by the order of the 11th July, 1866. It seems to me, therefore, that if there was error in the proceedings, which I am not now determining, that was an error of the Court in which both parties acquiesced and indeed by their own action brought about, and of which neither should be allowed to take advantage to the detriment of the other. As admittedly both parties had obtained possession of their shares in the properties at the time of the Privy Council appeals being perferred, in the proportions which by their Lordships' order affirming the decrees of the Sadr Diwani Adalat were found to be the extent of their legal rights, each of them was entitled to an amount of mesne profits against the other up to the date of such possession being given, and as to the appellants that had found to be Rs. 18,165-12-9½, while in regard to the respondents it was alleged to be Rs. 56,066-9-1½, but the accuracy of this sum was not determined and still remains to be decided. In my opinion this latter question ought to be re-opened at the point at which it was left in 1866, and that when it has been ascertained what the respondents are entitled to if it exceeds the Rs. 18,165-12-9½ declared by the order of the 26th of January, 1867, to be the amount of mesne profits due from the respondents to the appellants, satisfaction of the claim of the respondents to that extent should be entered up and the balance be recoverable from the appellants. This is what it appears to me my brothers Oldfield and Brodhurst contemplated being done when they made their order of the 17th of December, 1886, and even if it is a course not strictly in accordance with the letter of s. 246 or 247 of the [193] Civil Procedure Code, which I am far from conceding, it is certainly within their spirit and under any circumstances, on principles of natural equity, ought to be sanctioned. One point only remains. It is said that the set-off the appellants now claim is barred by limitation, as it was not put forward until more than twelve years from the date of the order of their Lordships had elapsed. It is clear that the respondents were the parties who under the order of their Lordships were released from the stay that had been put upon their proceeding, with execution for mesne profits by the order of the 11th of July, 1866, and that they took this view of the matter is shown by their application of the 25th of February, 1885. It was well known to the appellants that the unascertained amount of the claim of the respondents against them was in any event sure to be considerably in excess of the amount to which they had been declared entitled by the order of the 26th of January, 1867, and until steps were taken by the respondents to have it ascertained, it was useless for them to claim a set-off—indeed the order of the 26th of January, 1867, seemed to contemplate their adopting that course. The respondents are now seeking to open up the question of mesne profits which was hung up by the Sadr Amin in 1866 and 1867, and in regard to which they themselves had recognised the right of the appellants to maintain a set-off

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for the counter mesne profits due to them upon the basis of the order of their Lordships of the Privy Council of March, 1873. Their application for execution, though delayed till almost the last moment, is within time; but until the execution department has ascertained definitely whether the whole of the Rs. 55,066-9-1½ claimed by them in 1866 or what part of it was due, the right of the appellants to maintain their set-off, the amount of which had been ascertained, did not in my opinion arise, and I therefore, cannot hold that any bar of limitation stands in their way. The order of the 26th January, 1867, which they hold, declaring their right to Rs. 18,165-12-9½, is equivalent to a decree for that sum, and in my opinion, when the execution department has in the proceedings out of which this appeal has arisen determined the sum to which the respondents are entitled, that will also be a decree, and thus the provisions of s. 246 of the Civil Procedure Code can be applied.

[194] Such being the view I hold, I decree the appeal with costs, and setting aside the order of the Subordinate Judge, direct him to dispose of the execution proceeding now pending in his Court with advertence to what I have said in the course of this judgment.

BRODHURST, J.—I concur. *Appeal allowed.*

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10 A. 194 = 8 A.W.N. (1888) 53.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ABDUL RAHMAN AND ANOTHER (*Plaintiffs*) *v.* BEHARI PURI (*Defendant*).*
[2nd February, 1888.]

Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchaser not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule not to make suit unmaintainable.

A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation-decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code.

Held, that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable.

[D., 14 A. 358 (359) = A.W.N. 892, 36].

THE facts of this case were as follows:—On the 12th March, 1886, one Mata Ghulam obtained against Ram Din and Gulab Kuar a decree upon a hypothecation-bond by which two palkigaris were hypothecated. The decree contained an order that the two garis were to be sold in satisfaction of the hypothecation. After this, one Goshain Behari Puri, in execution of a money-decree against Ram Din, attached the same two garis and caused them to be advertized for sale, the notification announcing the lien upon the garis under Mata Ghulam's decree. He then purchased Mata Ghulam's decree. At the sale in execution of Behari,

* First Appeal No. 126 of 1887 from an order of Pandit Bansi Dhar, Subordinate Judge of Allahabad, dated the 25th June, 1887.

Puri's original decree, one Nahori purchased one of the garis and afterwards sold it to Abdul Rahman. The other was purchased by Sukun. Behari Puri then proceeded to put in force the decree which he had purchased from Mata Ghulam by attachment of the [195] two garis. To this attachment objections were raised by Abdul Rahman and Nahori, upon which, on the 31st July, 1886, the garis were released. Behari Puri thereupon instituted the present suit under s. 283 of the Civil Procedure Code to establish his right to bring the property to sale in execution of Mata Ghulam's decree.

This suit was instituted in the Court of the Munsif of Allahabad. While it was pending, Ram Din, one of the judgment-debtors under the decree obtained by Mata Ghulam, applied to the Subordinate Judge of Allahabad for a declaration of insolvency, and in his application, under s. 345 of the Civil Procedure Code, he mentioned the decree held by the plaintiff among the pecuniary claims against him. The Court issued notice to the plaintiff among other creditors, and on 20th November, 1886, framed a schedule under s. 352 of the Code, in which the decree was entered among the debts of Ram Din.

At the hearing of this suit the Court of first instance held that the suit was unmaintainable, on the ground that, under s. 352 of the Code, the declaration of insolvency was to be deemed a decree in favour of the plaintiff superseding that which he had purchased from Mata Ghulam, and in respect of which the suit was brought, and that the plaintiff could not seek any remedy apart from the insolvency proceedings. The Court accordingly dismissed the suit. On appeal, the Subordinate Judge set aside the decree and remanded the case for retrial under s. 562 of the Code. The defendants appealed to the High Court from the order of remand.

Pandit *Sunder Lal*, for the appellants.

Munshi *Hanuman Prasad* and Lala *Juala Prasad* for the respondent.

BRODHURST and TYRRELL, JJ.—A few facts may be stated in this matter. Two persons, Ram Din and Gulub Kuar, mortgaged certain carriages to one Mata Ghulam, who, on the 12th May, 1886, brought a suit to recover his money and obtained a decree which declared that the carriages in question were charged with the debt and were liable to sale in satisfaction of it. The respondent here is the assignee of that decree form Mata Ghulam. The respondent was himself a decree-holder against the same Ram Din mentioned above for another debt, and in execution of that decree [196] he got one of the carriages sold, and it was bought by persons who transferred it to the present appellants. The respondent in execution of that decree of Mata Ghulam attempted to enforce his charge against one of the carriages. but was defeated by an order of the Court executing the decree made on the 31st July, 1886, and that order has given rise to the present suit which has been brought under the provision of s. 283 of the Civil Procedure Code. The respondent, against whom the order of the 31st July, 1886, was made, has instituted this action to establish the right which he claimed to the carriage in dispute, and he has coupled with this suit a claim for damages in the event of its being found that the defendants have improperly converted the carriage and made it unavailable in satisfaction of his claim.

The Court of first instance held that this action was not maintainable. The lower Appellate Court reversed that finding and remanded the case for decision under s. 562 of the Civil Procedure Code. There is no doubt

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that that order was correct in one respect; that there were no materials on the record which would enable the Court of first appeal to determine the case for itself. But in this appeal it is contended by the defendant that the present action is unsustainable, inasmuch as the plaintiff (respondent) has had to take action under s. 352 of the Code, and because Mata Ghulam's decretal debt was scheduled in his favour by the Court exercising insolvency jurisdiction at Allahabad, the insolvent in question being Ram Din, one of the judgment-debtors under Mata Ghulam's decree.

Mr. *Sunder Lal* has argued with much force that the effect of the respondent scheduling his decretal claim under Mata Ghulam's decree against Ram Din is that Mata Ghulam's decree has been superseded and put out of existence, and that to allow the respondent to maintain the present action would be to put him in the position that, while holding a new decree in supersession of Mata Ghulam's decree, he might obtain another and independent remedy with regard to the same original debt which was the subject of the decree of the 12th May, 1886.

It seems to us that there is more ingenuity than force in this contention. The scheduling of the respondent's claim under s. 352 [197] with reference to Mata Ghulam's decree, had not the effect of superseding that decree or of creating another decretal right in addition to it or independent of it, and therefore there does not, out of this circumstance alone, arise any impediment to the maintenance of the present action, which, as we said above, is brought under s. 283 of the Code to establish against persons who are strangers to the decree of the 12th May, 1886, the right which the respondent claims to have in the carriage which was the subject of that decree, but has now passed into the possession and control of strangers to that decree.

It seems to us that the present action is founded upon a new and different cause of action, and being brought against persons who are not parties to Mata Ghulam's decree, there can be no question of the competence of the respondents to maintain his present action. The appeal is dismissed with costs. *Appeal dismissed.*

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10 A. 197=15 I.A. 29=5 Sar. P.C.J. 133.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.
[On appeal from the High Court for the North-Western Provinces.]

THAKRO AND OTHERS (*Defendants*) *v.* GANGA PARSAD (*Plaintiff.*)
[13th and 14th December, 1887.]

Shares in village held by wife of former proprietor—Stridhan—Mitakshara—Mutation of names in the settlement record.

A share in a patidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidence by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

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PRIVY COUNCIL.

10 A. 197 = 15 I. A. 29 = 5 Sar. P.C.J. 133.

Appeal from a decree (23rd January, 1883) of the High Court reversing a decree (15th July, 1880) of the Subordinate Judge of Aligarh.

The question on this appeal was whether a widow, whose deceased husband had been in his lifetime a lambardar and pat-[198] tidar in the pattidari village of Shahpur Thator, tahsil Iglas, in the Aligarh district, was herself the owner of shares in the village, recorded in her name in the settlement record, or that husband had been, till his death, the actual proprietor, holding them in the name of his wife. He had gradually acquired all the shares in the mouza, which originally consisted of three thokes, and on his application, by petition filed in 1862, all the shares were entered in the name of his wife.

This petition stated that he, Ganesh Singh, in partnership with his wife, Musammat Thakro, was a shareholder of mauza Shahpur Thator, and applied for the striking out of his name as a sharer in that mauza, and the name of Thakro alone should be entered as the proprietor of all the shares, as the administration paper was then being written. Whether the *dakhil kharij* that followed represented a merely nominal, or an actual, transaction was the question in this suit which was brought by Ganga Parsad, the son of Ganesh Singh, who died on the 12th October, 1872, leaving Thakro, his widow, by whom he had one son, the said Ganga Parsad, and two daughters. He also left another son Dipchand, by another wife, a minor when this suit was brought. He made a will it was said, five days before his death, leaving all his estate to his sons in equal parts. Upon the assumption that the name of Thakro was entered "*ism-farzi*" in respect of this mouza, Ganga Parsad, would have had only a moiety. But he claimed to have inherited the whole mauza, alleging that Ganesh Singh had, by effecting mutation of names, as above stated, exempted it from the operation of his will. The plaint stated that Ganesh Singh acquired the whole of the mauza by taking mortgages of shares of other shareholders, and by purchases, partly in his own name, and partly in Thakro's name; and that in 1862 he caused her name to be recorded as owner of the entire property, although the mauza remained in his possession. That after Ganesh's death in 1872, the mouza remained under the plaintiff's management. Also that the deed of gift executed by Thakro on the 6th May, 1878, in favour of her daughters, was false in describing the mouza as her acquired property and *stridhan*.

The defence insisted on Thakro's having had a beneficial ownership. The defendants' written statement was that Ganesh Singh [199] "had given away his entire share consisting of 679 bighas 2 biswas in the disputed village to his wife Thakro, before the birth of the plaintiff. and put her in proprietary possession. The Musammat herself purchased 636 bighas 13 biswas of the mouza, and thus under two different titles she had been in possession of the entire village for more than 12 years."

On issues framed to question the point, the Subordinate Judge, Saiyed Farid-ud-din Ahmad, Khan Bahadur, found that the whole of the shares were the property of Thakro, and, up to the date of the deed-of-gift by her, had remained in her possession. The first of the three thokes of which the mouza at one time consisted was bought in 1845 in the names of the father and brother respectively of Ganesh Singh, who afterwards obtained *dakhil kharij* in his own name. The second *thoke* was let in farm, as a settlement operation, to Ganesh Singh about 1847: and he, in 1848, bought up the rights of the proprietors in his own name. In the same year the rights of other proprietors of shares were bought at auction in the name of Thakro to the extent of 205 bighas 4 biswas. The shares in the third thoke

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were taken in mortgage in 1847, in the name of Thakro as mortgagee, and afterwards in the same year Ganesh Singh bought up the rights, subject to such mortgage, of seven proprietors, to the extent of 276 bighas 1½ biswas, at a sale in execution of decree. The Subordinate Judge also held that the mouza had become Thakro's stridhan, or separate property, and, as such was transferable by gift. He also having fixed an issue to this effect, "if the mouza be held to have been owned by Ganesh Singh, is the plaintiff entitled to sue for sole possession thereof, when the other son, Dip Chand, is alive?" Held, on this issue, that the plaintiff could not, consistently with claiming an exclusive title, rely on the exclusive title through Ganesh Singh; inasmuch as the fact, if true, that the mouza remained Ganesh's property till his death, would have brought in Dip Chand as entitled to one-half.

The plaintiff appealed to the High Court denying that Thakro had any "exclusive property, or transferable right, in the mouza;" and he again asserted his sole right of inheritance.

The High Court (Straight and Tyrrell, JJ.) held that the plaintiff had made good his appeal "on the ground that the record [200] of his mother's name was of the commonplace *ism-farzi* character, and that she consequently, and in fact, never had any possession of the property in any way adverse to Ganesh Singh, its owner, or to the plaintiff, who, with his half-brother, Dip Chand, was his heir."

The High Court thereupon decreed that the plaintiff should recover possession of the whole of the property, in which he was declared to be only entitled to a half share, the right of the donee from Thakro being declared null and void, and it being further declared that the decree should not affect the rights and interests of the minor son, Dip Chand.

On this appeal,

Mr. *J. Graham, Q.C.*, and *Mr. H. Cowell*, for the appellants, contended that the beneficial ownership of Thakro had been proved; and that her gift was valid, as having been made of her stridhan. The decree of the High Court was erroneous. Dip Chand's interests, if he had any, could not be protected in the way attempted by the decree, which, on the face of it, showed that the case sought to be made out was an inconsistent one. They relied on prior representations made by the plaintiff himself, and on the evidence generally, as showing that the name of Thakro had not been used merely for that of her husband, but as indicating a real ownership.

Mr. *J. D. Mayne*, and Mr. *J. G. With*, for the respondent, relied on the evidence as to the actual management of the land comprised in the shares. This had been throughout in the hands, first of Ganesh Singh and then of his son Ganga Prasad. Thakro had been proprietor in name only; and the judgment of the High Court was right.

The cases referred to on both sides were *Nawab Azimut Ali* v. *Hurdwaree Mull* (1) *Uman Parshad* v. *Gandharp Singh* (2), *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty* (3), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (4).

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

[201] SIR B. PEACOCK.—This is an appeal by Musammat Thakro and other ladies against Ganga Prasad, the respondent. The appeal is

(1) 13 M.I.A. 395.
(2) 14 I.A., 127 = 15 C. 20.
(3) 11 M.I.A. 28.
(4) 6 M. I. A. 53.

from a decree of the High Court of the North-Western Provinces at Allahabad. The suit was brought by Ganga Parsad against Musammat Thakro, his mother, and the other ladies, who were the daughters of Musammat Thakro, in whose favour the mother had executed a deed of conveyance. The plaintiff alleged that his father, Ganesh Singh, "had a large property; that he, on different occasions, by mortgage and private and public purchase, having obtained Mauza Shahpur Thator, in his own name, as well as in the name of Musammat Thakro, plaintiff's mother, himself remained in possession thereof. Subsequently, in 1862 and 1863, the name of the said Musammat was recorded in respect of the entire property in the said mauza, though the said Ganesh Singh continued in possession of it." He then alleged that on the 12th October, 1872, Ganesh Singh executed a will, and "on the 7th October, 1872, died, and that Musammat Thakro, plaintiff's mother, continued to live with him (plaintiff), and the village in dispute, like other paternal estates, remained under the management of the plaintiff." Then he proceeded as follows:—"On the 6th May, 1878, the said Musammat Thakro executed a false deed-of-gift"—by which he meant a deed-of-gift which she had not the power to execute—"of the said mauza in favour of her two daughters, Musammats Radha and Bhawani, describing the said mauza to be her acquired property and *stridhan*, and thus effected the plaintiff's dispossession ever since the Musammat began to live separate, which is the time when the cause of action arose. The village in dispute being the acquired property of the plaintiff's father, who had simply on account of affection caused the name of Musammat Thakro to be entered, the latter was not, under the Hindu law, competent to transfer the property to her daughters. The plaintiff is in every way entitled to get the property. The plaintiff therefore seeks for the following reliefs: (1) that the plaintiff's right may be declared in respect of the disputed property, and the deed-of-gift executed on the 6th May, 1878, by Musammat Thakro, defendant, in favour of Musammats Bhawani and Radha, be declared invalid, void and inoperative, as far as the plaintiff's right is concerned; (2) that both the last-mentioned [202] defendants may be dispossessed of the disputed mauza, and their right as donees declared null and void."

A written statement was put in on behalf of the ladies, and the case being tried by the Subordinate Judge, he raised several issues, the principal one of which was the fourth: "Whether Shahpur, the village in dispute, is wholly or partly the personal property of Ganesh Singh; and he alone remained in possession as long as he lived, and since his death the plaintiff remained in possession thereof till the date of the accrual of the cause of action, and is therefore entitled to possession thereof; or the village in question is wholly or partly the personal property of Musammat Thakro, the widow of Ganesh Singh, deceased, who has been in possession thereof for more than 12 years, and the defendants are in possession from the date of gift, and the plaintiff's claim is therefore barred by lapse of time and he has no right in the property in dispute." Upon that the Subordinate Judge says:—"Just as the defendants have not proved their assertion, so the plaintiff also has not proved that Ganesh Singh fictitiously transferred that amount of land of the village of Shahpur Thator which was in his name to Musammat Thakro." The question really was whether, when the mutation of names was made from the name of Ganesh into the name of his wife, it was his intention to transfer the property into the name of his wife *benami* for him. The Subordinate Judge upon this point says:—"In

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short, a careful consideration of all the oral and documentary evidence and presumptions and probabilities clearly leads the Court to infer that the whole of the village in dispute is the property of Musammat Thakro, and is not the estate left by Ganesh Singh, and that up to the date of the deed-of-gift in question it remained in her possession." The Subordinate Judge therefore found in substance that the mutation of names in 1862 was not for the purpose of putting the property into the name of the wife *benami* for the husband, but for her own benefit.'

Upon appeal to the High Court that Court came to a different conclusion. They held that the property was put by the husband, into the name of the wife to hold it *benami* for him, and that consequently the property remained the property of the husband, and [203] that the wife had no power to assign it to her two daughters although it stood in her name.

A considerable part of this property, as shown by the Subordinate Judge in his judgment, was purchased in the name of Ganesh, the husband, and certain other parts in the name of the wife. The wife gave evidence that that portion of the property which was purchased in her name was purchased for her benefit and with her own money. It is unnecessary to decide whether the part of the property which was purchased in the name of the wife was purchased with her money or with that of her husband, because even if the property which was purchased in the name of the wife was the property of the husband as well as that which was purchased in his own name, the question still remains whether, when the husband allowed the mutation of names from his name into the name of his wife he intended that mutation to operate for his own benefit or for hers.

The wife in her evidence in the cause stated that in the year 1847, when the husband was about to marry a second wife, that portion of the property which had been purchased in the name of the husband was made over to her in consideration of his being about to marry a second wife, and that afterwards the other portions of the property were bought in her name, so as to make the whole her property.

In the Mitakshara, section 11, clause 1, speaking of the nature of *stridhan*, it is thus stated: " what was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so the property so presented becomes her *stridhan* according to the doctrine above laid down. The wife says that in the year 1847, when the husband was about to marry a second wife, he did make her a present of the property which had been purchased in his own name. Although the High Court has found that there was no actual proof of that fact, it is not improbable that the husband, when about to marry a second wife, should have stated to his first [204] wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife. The statement of the wife is corroborated by the fact that in the year 1862 he caused the property to be changed from his own name into that of his wife. On the 4th March, 1862, he says:—" In partnership with my wife Musammat Thakro, I am the lambardar and a shareholder of Mauza Shahpur Bhatai, Pargana Gori. Now, of my own free will, I pray that my name as sharer in the said mauza be expunged, and that of the said Musammat alone be entered

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as proprietor of both the shares, as the village administration paper is being written now. I have no longer any claim." If when he was about to marry the second wife he told his first wife that he would make her a present of the property and did not carry out the gift by an actual deed, and in 1862 caused a mutation of names declaring that he had then no longer any claim to the property, that would not show that he was causing the mutation in order that the wife might hold it *benami* for him. There was a complete mutation of names from the husband of all that he possessed in the village of Shahpur into the name of the wife. The subsequent purchases were made in the name of the wife. If he intended the subsequent purchases, though made with his own money, to be made in the name of his wife, the probability is that he intended the whole of Shahpur to be vested in her as her *stridhan*. The plaintiff claims it as his own property. It is to be remarked that by the second wife his father had another son, Dip Chand. If the property had been transferred in 1862 into the name of Thakro, *benami* for the father, it would have remained the father's property and being the father's property would have descended to his two sons. But the plaintiff does not claim it as being the property of the two sons. He claims it as his own property, and as having been put into his mother's name in order that he might become entitled to the benefit of it; not that it was put into his mother's name in order that it might be held by the mother *benami* for the benefit of the father.

Several documents were put in. There is a copy of a petition "by Ganga Parsad against Musammat Thakro, his mother, and Musammats Radha, and Bhawani, his sisters." That was dated in [205] 1878, after the mother had executed the conveyance in favour of her daughters. In paragraph 3 he says :—The appellant's father caused the name of Musammat Thakro, mother of the appellant, to be entered in respect of the property through some policy. The name of the appellant's mother was entered simply with a view that the children born of the other wife of the appellant's father might not get a share in the property, and that the appellant alone might get it." The father, when he made this transfer of Shahpur into the name of the mother, did not appear to have had any creditors or any particular reason for putting this portion of his property into the name of the mother instead of allowing it to remain in his own name, unless it was for the purpose of giving the mother a benefit. If he had intended to put the property into the hands of the mother in order to conceal it from his creditors, and to make it appear that it was his wife's property instead of his own, the probability is that he would have done the same with regard to his other property, and not only in respect of this particular village.

The representation on the part of the plaintiff show that whatever the object of his father in making the mutation was, it was not to put the property into the hands of the mother to hold it *benami* for the father. If he had put it into her hands with that object, the two sons would have become entitled to it; but the case of the plaintiff is that the object of the father in putting it into the name of the mother was that the issue of the second wife should have no share in it.

Further, a petition of guardianship was put in evidence. It was an application by Ganga Parsad, the plaintiff. He there says :—"My father, Ganesh Singh, died in October, 1872, leaving two sons, *i.e.*, myself and Dip Chand, a minor"—that is, the son of the second wife—"who is now 2½ years old, as his heirs, and we two sons of the deceased are owners in equal shares of the property left by him." If the property remained the

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father's, Shahpur, as well as all the other properties, would have been the joint property of the two sons, Dip Chand and himself; but in a schedule to the petition particularising the property which his father left, he excluded Shahpur. That was either a gross fraud upon his bro- [206] ther, whose guardian and trustee he then was, with the intention of causing it to be believed that Shahpur, which was held, as be alleged, by his mother for the benefit of his father, was not the property of his father, or he must have believed at the time that the property was put into the hands of the mother, not *benami* for the father, but for some other purpose. He afterwards filed a list of the property left by his father, in which Shahpur is excluded, which shows that there was no mistake in the omission of Shahpur. In both these documents Shahpur is excluded as property left by the father, which if left by the father would have belonged to himself and his brother. In his evidence, he says :—"I know and consider Shahpur Bhatai to be my own share and not that of Dip Chand." In the face of these statements he cannot now contend that the property was held by his mother *benami* for his father. He contended at one time that property was put into his mother's name *benami* for himself. If that were so, it was for him to prove the fact, which he was unable to do.

Looking at the conduct of the plaintiff and at the representations which he made, which would have been grossly fraudulent if the property had been in the mother's name *benami* for the father, their Lordships have come to the conclusion that the case of the plaintiff is not made out, *viz.*, that the property was put into the hands of the mother *benami* for the father. Their Lordships do not believe that it was put into the hands of the mother for the purpose of giving the plaintiff the sole interest in the property, or that it was put into the hands of the mother *benami* for the father.

Under these circumstances their Lordships think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the plaintiff, that the property was the property of Thakro and not the property of the plaintiff. The plaintiff even in his plaint does not state that the property was that of himself and Dip Chand, but claimed it as his own property. Dip Chand was no party to the suit, as he ought to have been if the property was that of the father.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed and the decree of [207] the Subordinate Judge affirmed, and that the respondent be ordered to pay the costs of the appeal to the High Court. The respondent must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Ford, Ranken Ford, and Ford.*

Solicitors for the respondents : Messrs. *Pritchard and Sons.*

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APPEL-
LATE
CRIMINAL.

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APPELLATE CRIMINAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* MARU AND ANOTHER. [16th January, 1888.]

Evidence—Witnesses—Competency of persons of tender years—Act I of 1872 (Evidence Act), s. 118—Judicial oath or affirmation—Act X of 1873 (Oaths Act) ss. 6, 13—Omission to take evidence on oath or affirmation.

S. 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation; and, notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *The Queen* v. *Sewa Bhogta* (1) dissented from.

The nature of judicial oaths and affirmations and the history of Indian legislation on the subject discussed.

[Diss.—31 P.R. 1889 Cr; 16 B. 359 (365); R.—11 A. 183 (186)=9 A.W.N. 65; 16 M.; 105=1 Weir 826; 20 P.R. (1902) Cr; 11 C.P.L.R. 16 (17); 2 L.B.R. 322; 10 O.C. 337 (339)=7 Cr. L.J. 89.]

THE facts of this case are stated in the judgment of the Court.

The appellant was not represented.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

MAHMOOD, J.—In this case the two prisoners, Maru and Fatteh, were tried together and both have been convicted. The prisoner Maru has been convicted under s. 363 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, and the other prisoner, Fatteh, has been convicted under s. 368 read with s. 363 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment.

Both prisoners have appealed. So far as Maru is concerned I have arrived at the same conclusions on the evidence as the assessors and the learned Sessions Judge. The substantive offence charged against Maru was that of kidnapping within the meaning of s. 363 [208] of the Penal Code, and the person kidnapped was a girl, Musammat Thakuri, whose father has stated her age to be about nine years. She was examined as a witness for the prosecution, but without any oath or solemn affirmation, and this circumstance has furnished one of the difficulties in the case. Speaking of her the learned Judge remarks:—"She is of tender years and does not understand the obligations of an oath, but was cautioned to speak the truth, and is a competent witness as far as intelligence is concerned."

Again, with reference to the prisoner, appellant Fatteh, the learned Judge goes on to say:—

"As regards Fatteh, two of the assessors think the charge proved, the third does not. The case depends entirely and solely on the evidence of the little girl. Two of the assessors believed it; think it impossible she can have been tutored: third does not believe it."

Again, the learned Judge goes on to say:—

"Why Fatteh, should assist Maru in the concealment is not clear and has formed the chief stumbling-block to the third assessor; but Maru is an old Raipur man and has dealings admittedly with Fatteh. Moreover, if I have not been much mistaken in my observation, Fatteh has from behind his clasped hands held in front of his face been whispering advice to Maru all through the case as to what answer he should give

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(1) 14 B.L.R. 294.

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and what questions put. I agree, therefore, with the assessors in convicting Fatteh.

The conclusions at which the learned Judge arrived are stated in the following paragraph of his judgment :—

"Maru's intent in kidnapping is not shown or Fatteh's in concealment. At the best I am willing to credit it to Maru that he only wished to annoy and distress Ami Chand and perhaps merely extort some advantage from him—such as cattle-lifters in these parts steal cattle—and that Fatteh was abetting him in this. Without exacting anything, the child was restored in a few days, under the influence of fear of prosecution, in so great harm done." (*sic.*)

So far as the case of Maru is concerned, the evidence of the girl Thakuri is of no great consequence, as the rest of the evidence is in itself sufficient to warrant his conviction. But the case [209] against the prisoner, appellant Fatteh, rests entirely upon the testimony of the girl Thakuri ; and it thus becomes important to consider whether her statement is to be accepted as evidence in this case, and if so, whether it is sufficiently trustworthy to warrant the conviction.

The former of these questions depends entirely upon the law relating to the competency of witnesses, and to the obligation of oaths or solemn affirmations to be made by them in judicial proceedings.

First, then, as to the competency of Musammat Thakuri to be a witness. It is important to observe that upon the findings of the learned Sessions Judge, her age must be taken to be eight or nine years, and she must be held to have not attained such maturity of mind as would enable her to realize the solemnity or obligation of an oath or affirmation.

So far as the simple question of age is concerned, I have no doubt that Musammat Thakuri could be called as a witness. Whatever the rule of law or the practice of the Courts may have been antecedent to the year 1855, the Legislature in passing the Evidence Act (II of 1855) of that year laid down a definite rule in s. 14 (clause 1) of that enactment, the effect of which is to declare the incompetency to testify of " children under seven years of age who appear incapable of receiving just impressions of the fact respecting which they are examined or of relating them truly. " The law, however, as it now stands. contains a more comprehensive rule in s. 118 of the Indian Evidence Act (I of 1872) for which we are indebted to the labours of an eminent jurist, Sir James Stephen, now one of Her Majesty's Judges in England. The section lays down the rule that " all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving natural answers to those questions by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind."

The tender age of Musammat Thakuri would not therefore, *ipso facto* render her incompetent to appear as a witness to give testimony. Indeed, the effect of our law seems to me to be the same [210] as the rule of the English Law of Evidence on this particular point, and that rule is nowhere stated better than in s. 1377 of Taylor's Work on Evidence (Vol. II, p. 1170, 8th ed.), where it is stated :—" With respect to *children* no *precise age* is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of *intelligence* and *knowledge* which will render a child a competent witness. In all questions of this kind it must ever depend

upon the good sense and discretion of the Judge; who will do well in remembering the wise rule promulgated by the Indian Evidence Act of 1855, that 'children under seven years of age, who appear incapable of receiving just impressions of the facts' to be deposed to 'or of relating them truly,' ought not to be examined. In practice it is not unusual to receive the testimony of children of *eight or nine years of age* when they appear to possess sufficient understanding; and in *Brasier's* case (1), which was an indictment for assaulting with intent to rape an infant who was certainly under seven years of age, and perhaps only five, all the Judges held that she might have been examined upon oath if on strict examination by the Court she had been found to comprehend the danger and impiety of falsehood. But in *Pike's* case (2) Mr. Justice Park, with the concurrence of Mr. Justice James Parke, promptly rejected the dying declarations of a child of four years of age, observing that however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible."

I must, however, at the risk of prolixity, read another passage from another celebrated work of English law—Roscoe's Criminal Evidence (pp. 115-16-10th ed.)—as much that is contained in that passage will conveniently bring me to the next point as to the legal admissibility of Mussammat Thakuri's evidence in this case. The passage runs as follows:—

"It is said by Gilbert, C.B., that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence, [211] but that the reason and sense of their evidence are to appear from the questions propounded to them and their answers.' Gilb. Ev., 144. At one time their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten: *R.* v. *Traver*, 2 Str. 700; 1 Hale, P.C. 302; 2 Hale, P.C. 278; 1 Phill. Ev., 10th ed., 8. But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted and the competency of children is now regulated not by their age, but by the decree of understanding which they appear to possess. 1 Phill. Ev. 4, 10th ed., 8. In *R.* v. *Brazier*, 1 East P.C., 443, 1 Leach 199, S.C. Blackstone, Nares, Eyre, and Buller, JJ., were of opinion that the evidence of a child five years of age would have been admissible if she had appeared on examination to be capable of distinguishing between good and evil. But others of the Judges, particularly Gould and Willes, JJ., held that the presumption of law of want of discretion under seven was conclusive. Subsequently all the Judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence or one of an inferior nature. According to this rule the admissibility of children depends not merely upon their possessing a competent decree of understanding, but also in part upon their having received a certain share of religious instruction. 'A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may from defect of religious instruction be wholly unable to give any account of the nature of an oath or of the consequences of falsehood (1) Phill. Ev. 9, 10th ed.) In a recent case of trial for murder, where it appeared that a

(1) 1 Lea. 199; 1 East P.C. 443. C. and P. 598.

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girl eight years old up to the time of the deceased's death was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath, but at the trial seemed to have no real understanding on the subject of religion or a future state, Patterson, J., would not allow her to be sworn, observing : " I must be satisfied that this child feels the binding obligation of an oath from the [212] general course of her religious education. The effect of the oath, upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purposes of this trial ; and as it appears that previous to the happening of the circumstances to which this witness comes to speak she had had no religious education whatever and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony. *R.* v. *Williams.* (1) Mr. Pitt Taylor observes upon this case—Ev. 1077, 2nd ed.—Perhaps the language which the learned Judge is reported to have used was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child even when offered as a witness had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been rejected ; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings or merely, to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that at the time when she was called upon to give her evidence she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly in Ireland it has been held that, even on an indictment for murder, an infant might be examined though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness." *R.* v. *Milton* (2) (Ir. Cr. Rep. 61) per Doherty, C. J. In *R.* v. *Nicholas* (3)(2 C. and K. 246) Pollock, C.B., refused to put off the trial in order that a child of six years old might receive instruction, but said that he thought there were cases in which such an application might be entertained ; and that the Judge should act according to his discretion."

Such, then, being the rules of English law, I have to consider how far our law renders an oath or solemn affirmation a condition [213] precedent to the admissibility of the testimony of a witness. And in order to consider the question I intend to go into the history of legislation in British India on the subject. But before doing so, it is somewhat important to bear clearly in mind what an oath or solemn affirmation really means or implies. In Taylor's Work's. 1382, p. 1175, 8th ed.) " *oath* " is defined on the authority of *R.* v. *White* (1 Lea. 403) and the *Queen's Case* (2 B. and B. 185) to be " a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he does not speak the truth." And the learned author, with reference to this definition, goes on to say that it " may be open to comment, since the design of the oath is not to call the attention of God to man, but the attention of man to God ; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so ; still, it

(1) Ev. 1077, 2nd ed. (2) Ir. Cr. Rep. 61. (3) 2 C. and K. 246.

must be admitted that by thus laying hold of the conscience of the witness the law best insures the utterance of truth."

But a much more complete definition of *oath* is given by Bentham (who has been rightly denominated as the father of English jurisprudence). At p. 191 of vol. 5 of his Works he says :—

"By the term *oath*, taken in its largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or *swearer*, as he is called, punishment in quantity and quality, liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do or omitting to do something which he in like manner engages to do. Correlative to the term oath is the term *perjury*, and it conjugates to *perjure, oneself, perjured, perjurious*; among which *perjury* is understood as designation of the conduct, whether positive or negative, which stands in opposition to the conduct engaged for, as above." And the same thinker in considering the efficiency of an oath goes on to say (p. 195) :—

"When the question has been concerning a Muhammadan, a Hindu, a Chinese, or even a Christian, if a Catholic, great doubts have been entertained by pious and learned Church of England **[214]** men—lawyers and non-lawyers—concerning the degree of binding force, which in any such heterodox bosom ought to be ascribed to the ceremony of an oath." The doubts to which this passage refers have, however, been set at rest by the leading case of *Omichund* v. *Barker* (1), where the Lord Chancellor and three other Judges concurred in laying down the rule that the depositions of witnesses professing the Gentoo (Hindu) religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, could be admitted and read as evidence.

In stating the history of the law in British India relating to oaths and solemn affirmations, I do not think it is necessary to go behind Act V of 1840, beyond saying that probably in consequence of the practice adopted by Muhammadan Judges before the advent of the British rule, certain old Regulations passed by the Government of the East India Company required that Muhammadans were to be sworn on the Koran and the Hindus on the Ganges water. So stood the law when Act V of 1840 was passed, and the only provisions of the Act which I wish to refer to are contained in the first section of that enactment. That section runs as follows :—

"Whereas obstruction to justice and other inconveniences have arisen in consequence of persons of the Hindu or Muhammadan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms which are repugnant to their consciences or feelings :

"It is hereby enacted, that except as hereinafter provided, instead of any oath or declaration now authorised or required by law, every individual of the classes aforesaid within the territories of the East India Company shall make an affirmation to the following effect:—

"I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth, and nothing but the truth."

The effect of this alteration of the law was of a very significant character, with reference to the means and guarantees which Courts of justice had for ascertaining the truth from the evidence of native **[215]** witnesses.

(1) 1 Sm. L. C. 381.

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It is not for me, sitting here as a Judge, to consider questions of political import; but I think that it is within my province to say that, so far as the administration of oaths furnishes a guarantee for truth, the provisions of Act V of 1840 were of such a sweeping character as, in the case of most witnesses, rendered that guarantee totally ineffective. For either there is a use in an oath or a solemn affirmation, or there is no such use; and what is the use of an oath or affirmation which is not binding upon the conscience of native witnesses, whether Hindu or Muhammadan? My own past experience both as a member of the Bar and as a Judge of the Court of first instance warrants my saying that in the vast majority of cases the solemn affirmation introduced by Act V of 1840 in lieu of the older form of oath is not treated or felt by native witnesses as binding upon their conscience. And in view of the circumstance, it is a question of great importance how far our law of perjury in the apportionment of punishment should be applied to cases in which a native witness, to whom no such oath as is binding upon his conscience has been administered, has not spoken the truth after the solemn affirmation provided by the law, and which affirmation he feels not binding upon his conscience. I am aware of the reasons which induced a philosophical jurist of the eminence of Jeremy Bentham to object to the whole theory of administering oaths, but with all the veneration and respect which I entertain for him, I, whilst not prepared to dissent from his views in the abstract, cannot help feeling that the sweeping alteration of the law by Act V of 1840 went too far with reference to the religious and social conditions of India, and that the desired results could have been probably achieved without abolishing the old forms of oaths altogether in the case of Hindus and Muhammadans. And it is with due respects for the wisdom of the Legislature that I say that the Act V of 1840 seems to proceed upon the theory of taking exceptional cases as the basis of that legislative measure, and that it does not seem to have taken into account the effect of the change on the vast majority of native witnesses.

It is, however, now perhaps too late to re-open the question; and because *judicis est jus dicere non dare*, I must proceed with the history of legislation in British India upon this subject. We find, then, the provisions of Act V of 1840 were extended by s. 9 of Act [216] XVIII of 1863 to the High Courts also, and the law stood so in 1872 when Act VI of 1872 was passed. The effect of that Act can best be represented in the words of Lord Hobhouse, who was then the Legal Member of the Viceroy's Legislative Council and is now one of the Lords of the Judicial Committee of Her Majesty's Privy Council. Referring to Act VI of 1872 he went on to say:—

"That Act introduced two very important alterations. One was this, that every witness who objected to take an oath might, instead, make a simple affirmation; and the other was that, notwithstanding any irregularity in the administration of any oath, or any irregularity in the making of an affirmation, or, in fact, any irregularity in the former method of taking evidence, the proceedings should be valid. Another alteration was introduced, probably of less importance, because Mr. Hobhouse imagined it applied only to a few cases. Act V of 1840, which was the Act that prohibited the administration of oaths to Hindu and Muhammadans, was modified in this way: it was provided that, if a witness was willing to take an oath in a form peculiarly binding upon his own conscience, it should be competent to the Court to administer such an oath. That was the present state of the law. The general rule, if anything could be called

general which excepted Hindus and Muhammadans, remained the same as before. With regard to Hindus and Muhammadans, it was forbidden to administer oaths to them, except in those special cases in which witness himself was willing to take an oath; and it was provided that irregularity should not affect the validity of the proceeding."

Then came the present Indian Oaths Act (X of 1873) with which I am immediately concerned in this case. That Act by s. 6 maintained the solemn affirmation which had been substituted for oath by its predecessors, Act V of 1840 and Act VI of 1872, so far as Hindu or Muhammadan witnesses were concerned. The section provides that "where the witness, interpreter, or juror is a Hindu or Muhammadan, or has an objection to making an oath, he *shall*, instead of making an oath make an affirmation;" and that "in every other case the witness, interpreter or juror shall make an oath." S. 13 of the enactment in reproducing the **[217]** provisions of s. 5 of Act VI of 1872 enunciates the following rule:—

"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

The law stood thus, as indeed it stands now, when the case of *The Queen* v. *Anunto Chuckerbutty* (1) came before a Division Bench of the Calcutta High Court, and in that case the learned Judges (Kemp and Birch) held that s. 13 of Act X of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation. A similar question arose in the case of *The Queen* v. *Sewa Bhogta* (2), in which a Full Bench of the same Court, consisting of Couch, C.J., and Kemp, Jackson, Phear and Markby, JJ., were concerned, and in which the Bench, with the exception of Jackson, J., laid down the rule that the word "*omission*" in s. 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omissions. Both these cases have been relied upon before me by the learned Public Prosecutor on behalf of the Crown, and I have no doubt that they support the case for the prosecution so far as the admissibility of the evidence of the girl Musammat Thakuri is concerned.

But these rulings have been to me the main reason for having considered this question at such length. The broad question is whether in the case of a witness who by reason of tender age and by want of previous instruction has no conception of the obligations of an oath or solemn affirmation, whether with respect to the future life or as to the punishment for perjury, can give legal testimony in a judicial proceeding for purposes of adjudication. This question I shall consider now, because it is on the determination of this question that the case for the prosecution against the prisoner-appellant Fatteh almost entirely depends.

[218] The practice of the English Court is well stated in Roscoe's Criminal Evidence (p. 116):—

"Where a case depends on the testimony of an infant, it is usual for the Court to examine him as to his competency to take an oath previously to his going before the grand jury, and if found incompetent

(1) 14 B. L. R., 295, note. (2) 14 B. L. R. 294.

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for want of proper instruction, the Court will, in its discretion, put off the trial in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. (Stark. Ev. 94, 2nd ed.) This was done by Rooke, J., in the case of an indictment for a rape, and approved of by all the Judges : 1 Leach, 430 (n) ; 2nd Bac. Ab. by Gwill, 577 (n). An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury, at all events before the trial has commenced, for if the jury are sworn, and the prisioner is put upon his trial before the incompetency of the witness is discovered, the Judge ought not to discharge the jury upon this ground : I Phill. Ev. 19, 10th ed., citing *R.* v. *Wade, post, tit, Practice.* There the witness was an adult, but the principle seems to apply equally to the case of a child. If a child is from want of understanding incapable of giving evidence opon oath, proof of its declaration is inadmissible : *R.* v. *Tucker*, 1808, M. S. ; I Phill. Ev. (10), 10th ed., *Anon*, Lord Raym cited 1 Atk. 29."

So far as the Indian Courts are concerned, the earliest trace of the practice appears from a circular order of the late Nizamat Adalat, No. I, dated 1st February, 1828, which has been published at p. 28 of *Skipwith's Magistrate's Guide.* The circular runs as follows :—

" Any children who may not appear to have a sufficient sense of the nature and obligation of an oath shall not be examined at all in any criminal trial ; their depositions may, however, be taken in preliminary enquiries and be placed among the records of the office in which they may be taken, not as evidence in themselves, but to be used as a clue to evidence."

It does not appear how this provision could have had the force of law, but we find that the Legislature in passing Act II of 1855 made the following provision in s. 15 of that enactment :—

"Any person who, by reason of immature age or want of religious belief, or who, by reason of defect or religious belief, ought not, [219] in the opinion of such Courts or persons, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth."

No provisions to this particular effect as to the immature age of the witness with reference to the conception of the obligation of an oath or solemn affirmation appear to have been reproduced either in the Oaths Act (VI of 1872) or in the present Oaths Act (X of 1873), and if there exists any definite legislative provision on the subject, it must be devolved out of s. 118 of the Evidence Act (I of 1872) or s. 13 of the Oaths Act (X of 1873).

The question then is, what is the effect of these provisions of the law? In other words, does the law dispense with oath or solemn affirmation in the case of witnesses who, by reason of tender age and want of instruction, are totally incompetent either to comprehend the spiritual obligations of an oath or the temporal punishment awarded by the law in the cases of perjury?

To this question, as I have already said, the answer of the Calcutta Court is that omission to administer an oath or solemn affirmation does not vitiate the evidence of the witness, even though such oath or solemn affirmation was deliberately omitted, and omitted not by accident or negligence, but because of the immature understanding of the witness for comprehending the solemnity of the oath or solemn affirmation.

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It seems to me, with profound deference to the majority of the Calcutta Full Bench in the *Queen* v. *Sewa Bhogta* (1), that the rule therein laid down has the effect of virtually abolishing the whole of the principle of oaths and solemn affirmations as guarantees for securing true statements by witnesses. Indeed, such was the view taken in that case by an eminent Judge, Sir L. Jackson, who, in dissenting from the opinion of the majority of the Court, went on to say:—

"It seems to me that, in framing the 13th section of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates, to render the [220] whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation."

This is exactly the view which I hold in this case with reference to the statement made in the witness-box by the girl Musammat Thakur, to whom neither an oath nor a solemn affirmation was administered, and deliberately not administered because the learned Judge found that she had not attained sufficient maturity to comprehend either the spiritual or temporal consequences or obligations of making a true statement in the witness-box. The question, then, is whether the girl's evidence is admissible in law for the purposes of this case. To use the words of Sir L. Jackson, "it seems to me therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness has been examined contrary to law and the evidence is inadmissible." Whether oaths or solemn affirmations have any intrinsic utility is a question which it would be out of place to discuss here. All I need say is that the Indian Legislature has never yet accepted the entire theories of Jeremy Bentham on this point, and that to this day oaths and solemn affirmations are regarded by our law as guarantees against perjury; in other words, as a means of securing ascertainment of truth. Nor is the case different in England, because even there encroachments upon the maxim *in judicio non creditur nisi juratis* have not gone so far as to dispense with the sanction of an oath or solemn affirmation. To illustrate this I will only read a passage from Taylor on Evidence, s. 1380 (8th ed.): "Again though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour and was also permitted, under the old law, to answer a bill in Chancery upon his protestation of honour and not upon his oath, he cannot be examined as witness in any cause, whether civil or criminal, or in any Court of Justice, whether it be an inferior Court or the House of Lords, or in any manner, whether *viva voce*, or by interrogatories, or by affidavit, unless he be first sworn; for the respect which the law shows to the honour of a Peer, does not extend so far as to overturn the settled maxim, that *in judicio non creditur nisi juratis*. If, therefore, he refuses to take the necessary oath or affirmation he will, notwithstanding the privi-[221] leges of peerage or of Parliament, be guilty of a contempt, for which he may be committed and fined."

The history of the Indian legislation, as already stated by me, does not warrant the conclusion that the Legislature intended to make a radical departure in this respect. Indeed, the broad conclusions which I draw from the various changes which the Indian Statute Law has undergone on the subject are:—

(1) 14 B.L.R. 294.

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First—that whilst the limit of age as to the competency of witnesses was removed, the general principle that they should be competent to give "rational answers" to questions was affirmed; as shown by s. 118 of the present Evidence Act (I of 1872);

Secondly—that the necessity of oaths or solemn affirmations was maintained and imperatively required, as shown by s. 6 of the Indian Oaths Act (X of 1873);

Thirdly—that omissions or irregularities in the administration of oaths or solemn affirmations were to be overlooked in certain cases contemplated by s. 13 of the Indian Oaths Act (X of 1873).

Adopting the opinion, as I have done, of Sir L. Jackson, I cannot but hold that the statements made by Musammat Thakuri in the witness-box were not admissible as evidence. The words of s. 6 of the Oaths Act (X of 1873) seem to me to be not merely directory but imperative, and I hold this view because the object of the statute naturally aims at security of justice and guarantees as to the liberty of the subject. I believe that this is the manner in which statutes of this description are interpreted by Courts of Justice in England. To say, then, that the object of s. 13 of the Oaths Act (X of 1873) was to practically nullify the whole of the enactment itself is a proposition which, with profound respect for the majority of the Full Bench of the Calcutta High Court, I find myself unable to accept. And my difficulty in endeavouring to accept that proposition is in no small degree enhanced by the fact that the very next clause of that same statute, *viz.*, s. 14, provides that "every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject;" and whilst s. 191 of the Indian Penal Code provides that "whoever [222] being legally bound on an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence," s. 193 of the same enactment provides a punishment of seven years' imprisonment. How a person who by reason of tender years is unable to comprehend either the spiritual or the legal obligations of an oath or solemn affirmation can be regarded as competent to give evidence legally admissible, and to be understood to be liable to such penalties under the law, is a matter the reasons wherefor I find myself unable to conceive. Yet such is the practical effect of the ruling of the majority of the Court in the Calcutta Full Bench case; and with all the respect which I feel is due to such an authority, I cannot help feeling that if the principles of oaths and solemn affirmations were intended to be repudiated by the Legislature, the simplest course would have been, not to have passed a statute such as the Indian Oaths Act (X of 1873), but to have simply repealed the earlier enactments which required oaths or affirmations as a condition precedent to admissibility of the evidence of witnesses in judicial proceedings.

In the case now before me the case against the prisoner-appellant Fatteh depends entirely, as the learned Sessions Judge points out, upon the evidence of the girl Musammat Thakuri, to whom neither an oath nor a solemn affirmation was administered, for the simple reason that she had not attained sufficiently mature intelligence to comprehend the spiritual sanctity or legal obligations of an oath or solemn affirmation.

Holding this view of the law as to the inadmissibility of Mussammat Thakuri's evidence, it is not necessary for me to say what degree of credit I would attach to her statement as a matter of weighing the evidence in

the circumstances of this case. I need only repeat what has been said by Blackstone in his Commentaries on the English Law, that "where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact, and that the conviction should not be grounded solely on the unsupported [223] testimony of an infant under years of discretion." And because in this case the evidence against the prisoner-appellant Fatteh is inadmissible in law, I hold that the prosecution has failed to make out the case against him. I therefore decree his appeal, and, setting aside the conviction and sentence passed upon him, direct that he be released.

As to the prisoner-appellant Maru, I have already said enough to indicate that there is sufficient evidence, irrespective of the statements of the girl Musammat Thakuri, to warrant his conviction. The provisions of s. 167 of the Evidence Act (I of 1872) therefore apply to his case, and I dismiss his appeal and confirm the conviction and sentence passed upon him.

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10 A 223 (F.B.) = 8 A.W.N. (1888) 98.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

MUHAMMAD HUSAIN AND OTHERS (*Defendants*) v. KHUSHALO (*Plaintiff*).* [23rd January, 1888.]

Civil Procedure Code, ss. 32, 365, 366, 367, 368, 582, 587—*Death of plaintiff-respondent pending appeal—Substitution of alleged legal representative on her own application—Application by defendants-appellants to substitute another person as true legal representative—Power of Court to determine which of such persons is the true legal representative.*

In a suit for declaration of title to, and for possession of, a share in alleged ancestral property with mesne profits, the plaintiff obtained a decree in the lower appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased plaintiff-respondent's true legal representative.

Held by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may be" and "as far as may be" in s. 582 of the Civil Procedure Code, ss. 365, 366 and 367 might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the [224] earlier words of the section so as to make s. 368 the only provision applicable to the case; that the Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly.

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* Second Appeal No. 1800 of 1885, from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June, 1885, reversing a decree of Maulvi Samiullah Khan, Subordinate Judge of Aligarh, dated the 30th June, 1883.

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Held also by the Full Bench (MAHMOOD, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent.

Held by MAHMOOD, J., *contra*, that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and the deceased respondent in that of a defendant for the purposes of array of parties; that, consequently the provisions of ss. 363, 364, 365, 366 and 367 had no application that, applying s. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying s. 32, the widow occupied a position which gave her a sufficient *prima facie* status to be impeladed as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both.

Narain Dass v. *Lajja Ram* (1), *Har Narain Singh* v. *Kharag Singh* (2) *Lakshmibai v. Balakrishna* (3) *Rajmonee Dabee* v. *Chunder Kant Sandel* (4) *Naraini Kuar* v. *Durjan Kuar* (5) ann *Athiappa* v. *Ayanna* (6) referred do.

[F., 10 A. 270, R., 10 A. 260 ; 66 P.R. 1894 ; 1 S.L.R. 41 (42).]

THE plaintiff in this case, Dipchand, a member of a joint Hindu family, sued Muhammad Husain and others for a declaration of title to and possession of a one-sixth share of alleged ancestral family property, namely, a three-biswas share of mauza Pekhlani with mesne profits. The defendants had purchased the rights and interests of the plaintiff's grandfather, Duli, in the property at a sale in execution of simple money-decree which was dated the 19th March, 1860.

The plaintiff alleged that this decree "was not for a debt contracted for the benefit of the family, and therefore the sons and grandsons were not bound to satisfy it, nor were their shares in the ancestral property transferable in satisfaction thereof." The plaintiff was born about three months after the passing of the decree, and the ancestral property was sold about fifteen months [225] after the plaintiff's birth. The Court of first instance (Subordinate Judge of Aligarh) on the 30th June, 1883, dismissed the suit on the ground, *inter alia*, that the debt for which the property had been sold was one in respect of which the whole family estate was liable. On appeal by the plaintiff, the District Judge of Aligarh on the 15th June, 1885, held that the plaintiff's interest in the property did not pass by the sale to the defendants, and gave him a decree for possession of the share claimed.

On the 9th December, 1885, the defendants appealed to the High Court. On the 7th May, 1886, while the appeal was pending the plaintiff Dipchand, died, and on the 17th July, 1886, his widow, Musammat Khushalo, was on her application dated the 30th June, 1886, made respondent in his place by an order of Straight, J. The appeal came for hearing before Oldefield and Mahmood, JJ., when it was contended for the appellants that the appeal should be decreed and the suit dismissed, as on the death of Dipchand the right to sue did not survive. The Division Bench referred the questions involved in this contention to the Full Bench for decision ; and the Full Bench held that the benefit of the lower appellate Court's judgment would survive to the legal representative of the deceased plaintiff, expressing no opinion whether such representative could enforce the whole of the judgment or not (7).

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(1) 7 A. 693. (2) 9 A. 447. (4) 4 B. 654.
(4) 8 C. 440 = 10 C.L.R. 437. (5) 2 A. 738. (6) 8 M. 300. (7) 9 A. 131.

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On the 2nd July, 1886, the following application was made by Pandit *Sunder Lal* on behalf of the defendants-appellants:—"In the above case the respondent died on or after the 5th May, 1886. He has left no issue. He was living with his father Sita Ram, and, so far as the petitioners know, Sita Ram, his father (if anybody is at all), is heir and legal representative to the deceased respondent. It is therefore prayed that the name of Sita Ram be entered of the record as respondent in place of the deceased respondent."

On the 25th March, 1887, the appeal came for hearing before Edge, C. J., and Mahmood, J. It was contended on behalf of the defendants-appellants that Khushalo had been wrongly substituted as respondent by the order of the 17th July, 1886, and that the proper person to be substituted as the legal representative of the deceased Dipchand was his father Sita Ram. It was agreed be-[226] tween the parties that either Sita Ram alone or Khushalo alone was the true legal representative of the deceased. No objection was raised on behalf of Sita Ram to the effect that he was not the legal representative of Dipchand.

With reference to this contention and with the consent of the parties the Division Bench ordered that the appeal and the application made by the defendants-appellants on the 2nd July, 1886, to substitute Sita Ram as respondent should be heard together by a Full Bench of the Court. The appeal came for hearing before the Full Bench on the 4th April, 1887.

The Hon. Pandit *Ajudhia Nath*, for the appellants.—Dipchand was a member of a joint Hindu family, and his widow could have no interest beyond a right to maintenance. We do not, however, object to the widow remaining on the record as respondent so long as the deceased's father, Sita Ram, who is the true legal representative, entitled to execute the lower appellate Court's decree, is added.

[Mr. *C. H. Hill*, for Musammat Khushalo.—This is a complete change of front. Till now it has always been contended on the other side that Khushalo was wrongly added as respondent and that Sita Ram should be substituted for her.

EDGE, C. J.—I do not see how two respondents with divergent interests can both remain upon the record, or how in that case the Court's decree could be executed.]

Then I say that Khushalo's name should be struck out. Under s. 587 of the Code the provisions of s. 582 apply to this appeal. By reason of s. 582, Chapter XXI applies to the case and also ss. 28 and 32. These sections show that the parties are in a different position in appeal from that which they occupied in the original suit, and that for the purposes of substitution of parties the defendants-appellants should be treated as plaintiffs. If I am wrong, then s. 367 applies, and the Court may either now itself determine who is the legal representative of the deceased plaintiff or stay proceedings until the fact has been determined in another suit.

[227] [MAHMOOD, J.—Why should you implead any one as respondent? Does not *Narain Das* v. *Lajja Ram* (1) decide that if you do not do so your appeal will not abate?]

The Full Bench in that case did not deny that we were at liberty to apply for substitution if we chose to do so. The limitation for such an application is that provided by art. 178 of the Limitation Act.

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(1) 7 A. 693.

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[EDGE, C. J.—*Narain Das* v. *Lajja Ram* (1) only decided that the appeal would not abate if the defendant-appellant did not apply for substitution within sixty days from the death of the plaintiff-respondent. It did not decide that the defendant-appellant could proceed with the appeal without any respondent being added. If the appeal succeeded, how and against whom could it be drawn up or executed ?]

It is difficult to answer that question, having regard to the decision of the Full Bench. My chief difficulty is caused by the wording of art. 171 B of the Limitation Act, which omits all reference to the death of a respondent. The view expressed by Straight, J., in reference to that article has been concurred in by the Calcutta High Court in *Udit Narain Singh* v. *Harogouri Prosad* (2) and by the Madras High Court in *Lakshmi* v. *Sri Devi* (3). S. 582 of the Code does not necessarily prevent the application of s. 367 to this case. The words "so far as may be" and "include" (not "mean") show that a plaintiff-respondent may be treated either as a plaintiff or as a defendant as occasion requires. I contend, therefore, that, reading together ss. 368 and 582, we are entitled to have Sita Ram placed on the record as respondent ; and that, if not under s. 367, the Court has power to decide whether Sita Ram or Khushalo is the true legal repressentative of Dipchand.

Mr. *C. H. Hill*, for Mussammat Khushalo.—Our application was made under s. 365 of the Code within the time limited. The second paragraph of s. 366, therefore, does not apply, and the Court has no power to allow any application on behalf of the defendants for adding another person as legal representative.

[MAHMOOD, J., referred to *Lakshmibai* v. *Balkrishna* (4).]

[228] The Legislature in framing s. 582 of the Code did not intend that an appellant should occupy the position of a plaintiff and a respondent that of a defendant absolutely. In *Narain Das* v. *Lajja Ram* (1), the only question was whether the appeal had abated because no application was made within sixty days after the respondent's death. Everything in the judgments relating to other questions is *obiter*. A plaintiff does not cease to be plaintiff after an appeal has been instituted. The effect of s. 582, is not that the word "plaintiff" is to be read out of s. 365, but that the word "appellant" is to be read into that section when necessary. S. 367 only applies to cases arising under s. 366, that is to say, to cases were an application has been made within time by the legal representative of the deceased plaintiff. On general principles the sections relating to the death of a plaintiff ought to be held applicable to plaintiffs even after the institution of an appeal in which the plaintiff is respondent. The appeal is virtually a rehearing. From beginning to end the question is whether the plaintiff's suit shall succeed or not. The appeal merely gives a second opportunity to the defendant.

[MAHMOOD, J.—Take the analogy of the House of Lords, where the appeal abates upon the death of either party pending appeal, and the practice is to obtain an order of revivor. The representative of the plaintiff-respondent would not apply for revivor ; having his decree, he would not be interested in making such an application. It would be made by the defendant-appellant, who wanted to get rid of the decree.]

Here the appeal does not abate and the analogy would not hold good. The words in s. 582 "as far as may be" mean so far as may be necessary

(1) 7 A. 693. (2) 12 C. 590. (3) 9 M. 1. (4) 4. B. 654.

for the purposes of justice. Surely it would defeat the ends of justice to forbid the person who holds the decree of the first Court to obtain the benefit of it, and to allow the defendant-appellant who has lost in the Court below to appoint any person he pleases to support the lower Court's decree.

[EDGE, C.J.—Supposing that we refused to allow the defendant's application and set aside the lower Court's decree, and your client turned out not to be the true legal representative of Dipchand, the real legal representative would not be bound by our decision, nor would the lower Court's decree held by the real [229] legal representative be in any way affected. In that case, assuming the appellant to have acted under a *bona fide* mistake, is he to bring a fresh appeal? Such an appeal might be out of time. It comes to this; either an appellant who succeeded against a wrong respondent might get execution under s. 583, or he might lose his appeal altogether by the respondent being brought on the record against his will.]

I contend that s. 365 applies and that, therefore, ss. 366 and 367 (which must be read together and which refer only to cases where no application under s. 365 has been made within time) do not apply; but if the Court should rule otherwise, then I ask it to determine the question at issue under s. 367.

The Hon. Pandit *Ajudhia Nath*, for the appellants, in reply.—S. 365 does not apply. We deny that Khushalo is the "legal representative" of the deceased. We can apply either under s. 366 or under s. 368. The word "or" in s. 366 should be read disjunctively from the preceding words, and the second paragraph of that section is not limited to cases where no application has been made by the representative of a deceased plaintiff.

EDGE, C.J., and STRAIGHT, BRODHURST and TYRRELL, JJ.—In this case one Dipchand brought a suit against Khwajal Muhammad Husain and others, in which he claimed a declaration of title to a share in alleged ancestral property in mouza Pekhiani, possession and mesne profits. It is not necessary on the present occasion to consider the questions raised by the defendants in defence. Dipchand's suit was, on the 30th of June, 1883, dismissed by the then Subordinate Judge of Aligarh. From that decree Dipchand appealed, and on the appeal the Officiating Additional Judge of Aligarh, on the 15th of June, 1885, made a decree in favour of Dipchand for proprietary possession of the share claimed by him, for Rs. 624 profits against the defendants with costs in both Courts, and for mesne profits from the date of the institution of the suit to the date of the delivery of possession of the share. From that decree the defendants brought an appeal under s. 584 of the Code of Civil Procedure to this Court.

After the appeal to this Court had been filed, Dipchand, who was the respondent, died childless. After the death of Dipchand [230] his widow, Musammat Khushalo, was her own application brought upon the record as the legal representative of the deceased respondent, Dipchand. Subsequently the appellants applied to the Court to have Sita Ram, the father of Dipchand, brought upon the record as the legal representative of Dipchand, alleging that Sita Ram and not Mussammat Khushalo was the heir and legal representative of the deceased respondent, and contending that Sita Ram, and he only, should be on the record as the legal representative of the deceased respondent. Sita Ram has not objected, and we

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understand that he does not intend to object that he is not the legal representative of the deceased respondent. As it appeared to the Judges composing the Bench before which the appeal then was, and to which the application was made, that the application of the appellants raised questions of great importance upon which those Judges were not agreed, it was, with the consent of the parties, ordered that the appeal and the application of the appellants should be heard by the Full Bench. The application of the appellants has been heard by the Full Bench, and as it raised questions to be decided preliminary to the consideration of the appeal, upon which questions the Full Bench was not agreed, we took time to consider our judgments.

On the part of the appellants it has been contended that as they allege that Sita Ram is the legal representative of the deceased respondent, Dipchand, and as they desire that Sita Ram should be made the respondent to the appeal in the stead of the deceased respondent, they are entitled by virtue of ss. 368 and 582 of the Code of Civil Procedure to have the Court enter the name of Sita Ram as that of the legal representative of the deceased respondent upon the record in the place of the deceased respondent and to the exclusion from the record of Musammat Khushalo, and this without the question being considered as to whether Sita Ram or Musammat Khushalo is in fact the legal representative of the deceaeed respondent. It is common ground that the legal representative of the deceased respondent is either Sita Ram or Mussammat Khushalo, and that both of them are not legal representatives of the deceased respondent. On the part of Mussammat Khushalo it has been contended that she is entitled to show that she and not Sita Ram is the legal representative, and, as such, the only person [231] to be on the record as the legal representative of the deceased respondent; and in any event that as her name has been entered upon the record as that of the legal representative of the deceased respondent, her name cannot now be removed from the record and that she is entitled to be heard upon the appeal.

It has been contended that the question has been concluded by the ruling of the Full Bench of this Court in the case of *Narain Das* v. *Lajja Ram* (1). The point decided by the majority of the Court in that case was that the appeal of a defendant appellant does not abate by reason only of his omission within sixty days of the death of a plaintiff-respondent to make application to the appellate Court for bringing on the record the legal representative of the deceased plaintiff-respondent; or in other words, that arts. 171, 171-A and 171-B of the second schedule of the Indian Limitation Act, 1877, do not apply to such a case. An examination of the order of reference shows that that, and that only, was the question referred to the Full Bench for decision. The judgment of Straight, J., in that case, at page 697, shows expressly what he considered, and we think rightly, to be the sole question before the Full Bench. In the course of his judgment he said : "The whole question which we have to consider is whether, in a case where a plaintiff-respondent has died, and the defendant-appellant has failed to make an application that the name of the plaintiff's legal representative be entered on the record as respondent in his place, the appeal in consequence of such failure abates." It is true that in their opinions recorded in that case Petheram, C.J., and Mahmood, J., gave expression to certain *obiter dicta*.

Petheram, C.J., thought that the provisions of s. 368 of the Code

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of Civil Procedure are "inapplicable to the case of a defendant-appellant who claims no debt or damages, but only to have a decree which has been passed against him reversed." This expression of opinion of the learned Chief Justice may, in our opinion, be treated as *obiter*. He also held, and this was the question in the reference, that the word "defendant" in art. 117-B of the second schedule of the Indian Limitation Act must be construed strictly as defendant only and is not to be read as "including a respondent," *non obstante* the language of s. 582 of the Code of [232] Civil Procedure. On the other hand it was held by Mahmood, J., at pages 700 and 701 that "the word 'defendant,' therefore, as it occurs in art. 171-B of the Limitation Act, must be taken to include a respondent, and there is nothing to suggest that any distinction is intended between a plaintiff-respondent and a defendant-respondent. Now there is one more consideration in favour of my view. There is nothing, either in the Civil Procedure Code or in the Limitation Act, which provides for or imposes the duty on the legal representative of a deceased respondent (whether plaintiff or defendant in the original action) to apply to the Court for having his name placed on the record in substitution for the deceased party. It is unnecessary to determine whether such an application could be entertained, and, if so, what limitation would govern such an application."

The Full Bench of the High Court at Calcutta in the case of *Udit Narain Singh* v. *Harogouri Prasad* (1) to which reference was made in the argument, decided only that the word "defendant" in art. 171-B of the second schedule of the Indian Limitation Act does not include a respondent, and expressed the opinion that s. 582 of the Code of Civil Procedure was intended to affect only proceedings under that Code.

In *Lakshmi* v. *Sri Devi* (2) the question before the Full Bench of the High Court at Madras was whether art. 171-B of the second schedule of the Indian Limitation Act applied to the case of a deceased respondent to an appeal. The questions which we have to consider are not questions which it was necessary to consider in any of the Full Bench cases to which we have referred.

S. 582 of the Code of Civil Procedure enacts that "the appellate Court shall have, in appeals under this chapter, the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under chapter V; and in chapter XXI, so far as may be, the words 'plaintiff,' 'defendant,' and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal. The provisions [233] hereinbefore contained shall apply to appeals under this chapter, so far as such provisions are applicable.

The first point to be noticed is that, in appeals under chapter XLI of the Code, the appellate Court has and can "perform, as nearly as may be, the same duties as are conferred and imposed by the Courts of original jurisdiction in respect of suits instituted under chapter V." The words which we have just quoted, unless there be something in the section to limit their application, confer and impose upon an appellate Court very wide powers—powers the conferring of which, we think, impliedly authorises, even if the words do not expressly authorise us, as an appellate Court, to decide for the purposes of the prosecution of this appeal, or to have it

(1) 12 C. 590. (2) 9 M. 1.

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determined by an independent suit, whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent as a preliminary question.

If the words in s. 582 "and in chapter XXI, so far as may be, the words 'plaintiff', 'defendant,' and 'suit' shall be held to include an appellant a respondent, and an appeal, respectively in proceedings arising out of the death," &c., mean or are to be read as "provided that in chapter XXI, so far as may be, for the words 'plaintiff', 'defendant,' and 'suit' shall be read appellant, defendant, and appeal, respectively, in proceedings arising out of the death," &c., then undoubtedly the earlier words of the section are limited, and s. 368 of the Code is the only section which applies to the case, and with some startling possible result in cases in which plaintiff-respondent has died pending an appeal.

To take a possible case, a defendant appeals against a decree passed against him. Afterwards and before the appeal has come on for hearing, the respondent dies, and in the mean time the appellant has obtained, as here, a stay of execution. The appellant, we will assume, knows that he has no case in appeal and has appealed only to gain time. If s. 368 is the only section which applies, what is there to prevent such an appellant nominating as the legal representative of the deceased respondent a creature or friend of his with whose collusive assistance he could postpone upon one pretext or another the hearing of the appeal, and so keep the true legal representative of the deceased respondent out of the fruits of the decree which [234] the deceased respondent had obtained below? If s. 368 alone applies, such an appellant need only make an application to the Court, specifying the name, description, and place of abode of *any person whom he alleges to be the legal representative of the deceased respondent* and whom he desires to be made the respondent in his stead. The actual legal representative of the deceased respondent could not, if s. 368 alone applies, get upon the record, and would not be entitled to be heard; and could not even inform the appellate Court with any effect that it was proceeding with the hearing of an appeal in which it had not before it the proper parties to the litigation. In such a case the actual legal representative of a deceased respondent might have in his hand the probate of the will in his favour of the deceased respondent granted by the very appellate Court before which the appeal was pending ready to be produced to the Court; and might be able to show by the very record of the case under appeal that it was an undisputed fact that the person nominated by the appellant was not, and could not be the legal representative of the deceased respondent, and that he, the applicant, was the legal representative. Is the Court in such case to add a mere dummy to the record and proceed, with the knowledge of that fact, to go through the farce of hearing and determining an appeal in which the Court is aware that the decree which it may pass can have no binding effect upon the real representative of the deceased respondent? We cannot come to the conclusion that the Legislature intended to compel a High Court, or any other Court, to waste its time in the hearing and determining of an appeal, its decree in which the Court knows, or has the means, if it may appeal them, of knowing, can have no possible binding effect upon the legal representative of the deceased respondent. We must put a reasonable interpretation upon the Act and assume that the Legislature, or those who may have been responsible for the framing of s. 582 of the Code, intended at the time when that section was framed to facilitate and not to obstruct the administration of the law and of justice. In our opinion, this Court, as the appellate Court dealing with this appeal and the application of the

appellant, has the power to ascertain under the circumstances, as a preliminary question, whether Sita Ram or Musammat Khushalo is, for the purposes of the decree which it may have to pass, the legal representative of the deceased respondent.

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[235] If we are mistaken as to the extent of our power, it will be easy for the Legislature, in the contemplated Bill for amending the Code of Civil Procedure, to enact that an appellate Court must, in the case of the death of a respondent, bring upon the record, as the representative of such deceased respondent, any person who does not object and who is nominated by the appellant, and such person only, notwithstanding that it appears to it that such person is not, and cannot be, the legal representative of the deceased respondent, and notwithstanding that the actual legal representative of the deceased respondent desires to be brought upon the record to protect his interests under the decree appealed against (1). Probably such a question as the present could not have arisen if the powers which an appellate Court should exercise had been in the Code specifically dealt with and not by reference.

It has been suggested on the authority of the case of *Athiappa* v. *Ayanna* (2), and our brother Mahmood so considers, that s. 32 of the Code of Civil Procedure would apply to this case. We may say, with all deference to the opinion of our brother Mahmood, that in our judgment s. 32 does not apply ; if it does apply then that it is the duty of the Court to decide whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent. The material part of that section, so far as this question is concerned, is as follows :--

"And the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence [236] before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It could not be suggested that under that section, if it applied, a person who is not the legal representative of the deceased respondent is "a person who ought to have been joined" as the legal representative of the deceased respondent. Nor, in our opinion, could such a person who has no interest whatsoever, representative or otherwise, in the suit or in the appeal, be said to be in any sense "a person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" or in the appeal. If it be contended that such a person is a necessary party to the appeal, it can only be on the ground that one of the

(1) Act VII of 1888 ("An Act to amend the Code of Civil Procedure, the Indian Registration Act, 1877, and the Indian Limitation Act, 1877") received the assent of the Governor-General on the 23rd March, 1888, and will come into force on the 1st July, 1888. S. 32 (3) provides as follows:—To s. 368 the following shall be added, namely : The legal representative of a deceased defendant may apply to have himself made a defendant in place of the deceased defendant and the provisions of this section, so far as they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon." S. 53 (1) provides as follows:—"In s. 582, for the words 'the words plaintiff-defendant, and suit shall be held to include an appellant, a respondent, and an appeal, respectively, the following shall be substituted, namely, "the word plaintiff shall be held to include a plaintiff-appellant or defendant-appellant, the word defendant a plaintiff-respondent or defendant-respondent, and the word suit an appeal.".

(2) 8 M. 300.

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questions which the appellate Court has to adjudicate upon is as to whether or not he is, as in this case, the legal representative of the deceased respondent. If that were a question to be adjudicated upon and settled in the appeal, it would be the duty of the Court to decide the question, and not as we infer is our brother Mahmood's opinion, to leave it undecided. To leave it undecided would be, in our opinion, to show that such a person was not a necessary party to the appeal.

If Sita Ram is to be brought on the record as the legal representative of the deceased respondent, and if Musammat Khushalo is to remain on the record also as the legal representative of the deceased respondent, which of them is entitled to be heard in support of the decree below? As the deceased respondent has admittedly only one legal representative, on what principle or rule of practice should we hear two persons as his legal representatives in argument on the appeal? And further, what is the decree which the Court should make in case we dismiss the appeal? The decree in such a case, if we are not to ascertain which of those two persons is the legal representative of the deceased respondent, would be dismissed with costs to the respondents. It would be unjust to dismiss it with a double set of costs—one set for the respondent who was not brought upon the record at the instance or with the consent of the appellants, and the other set for the respondent who was brought on the record on the appli-[237]cation of the appellants. If the appeal be one which ought to be dismissed with costs, the only course for the Court to adopt would be to dismiss the appeal with one set of costs to the respondents; and in that event the real legal representative, instead of getting one full set of costs, would only get a share in the full set. It cannot be doubted on the authorities that the decree to be executed would be the decree of this Court. How could it be executed? It may be doubted whether s. 231 of the Code of Civil Procedure was intended to apply to such case. If Sita Ram be the mere creature of the appellants—we do not say that he is—he would not join in an application for the execution of the decree, nor would he apply for the execution of the decree for the benefit of himself and Musammat Khushalo. If Musammat Khushalo applied for execution of the decree for the benefit of herself and Sita Ram, what would be the interests of Sita Ram which it would be necessary for the Court by its order under s. 231 to protect They would in fact be the interests not of Sita Ram but of the appellants, and the protecting of the interests of Sita Ram would in effect deprive Musammat Khushalo of a moiety of the costs to which, if she be the legal representative of the deceased respondent, she would be entitled. S. 32 of the Code of Civil Procedure was considered by a Bench of this Court in the case of *Har Narain Singh* v. *Kharag Singh* (1), and the corresponding section of Act X of 1877 was considered by a Bench of this Court in the case of *Naraini Kuar* v. *Durjan Kuar* (2). We dissent from the view taken by the High Court at Madras in *Athiappa* v. *Ayanna* (3) and are of opinion that s. 32 of the Code does not apply to a case like this. We have pointed out what might be the result of holding that we have no power to have determined in another suit the question of which of these two persons, Sita Ram and Musammat Khushalo, is the legal representative of the deceased respondent, or to decide that question for the purposes of the prosecution of this appeal.

Different considerations arise in the case of the death of a defendant before decree in the Court of first instance. A person does not as a rule

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(1) 9 A. 447. (2) 2 A. 738. (3) 8 M. 300.

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bring an action against another person unless he has, or believes he has, a cause of action; and in the case of the death of his defendant before decree, he would not, except [238] through mistake, nominate, under s. 368 of the Code, as the legal representative of his deceased defendant, a person who did not represent his deceased defendant or his estate. If he did, no possible harm could come to the real legal representative of the deceased defendant, except possibly having to show in subsequent proceedings that he was the legal representative. A plaintiff would make such an application at his own risk, and he may be safely left to put upon the record his nominee as the legal representative of the deceased defendant. But the case is otherwise when a person claiming to be the real legal representative of a deceased respondent desires to be put on the record to protect the decree obtained by the deceased respondent, and to obtain the fruits of that decree as speedily as possible. If a judgment-debtor dies before the decree has been fully executed, the holder of the decree must, under s. 234 of the Code, "apply to the Court which passed it to execute the same against the legal representative of the deceased." In that case the decree-holder would have to satisfy the Court, either by proof or admission, that the person whom he proposed to proceed against was the legal representative of the deceased judgment-debtor. An appellant would have no greater difficulty in ascertaining who is the legal representative of the deceased respondent and bringing him before the Court than would a decree-holder have in ascertaining who was the legal representative of his deceased judgment-debtor and bringing him before the Court. Ss. 365, 366 and 367 of the Code may, in our opinion, having regard to the words "as nearly as may be" and "as far as may be" in s. 582, be held to be applicable and be applied, in any event analogically, to this case to enable the real legal representative of the deceased respondent to get or be brought upon the record, and to enable this Court to ascertain whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent, and, as such, entitled to be heard in support of the decree obtained below. Assuming for the moment that there are no words in s. 582 to support the view we hold and have expressed, we would be prepared to hold that there must be an inherent power in a Court of record to ascertain whether or not it has before it the proper parties to a first or second appeal if the question be substantially raised. It is clear to us that when a respondent to an appeal has died, there [239] can be no hearing and determining of the appeal that can have a binding effect upon the legal representative of such deceased respondent if such legal representative be excluded from the record without having been heard to show, if he can, that he is the legal representative; and it is equally clear to us that an appellate Court is not bound to hear and determine an appeal in which it has not on the record a respondent. In the latter case, it would not be contended that any decree which might be passed, except one dismissing the appeal, would be other than fruitless. So far as the legal representative of a deceased respondent or the estate of a deceased respondent would be concerned, we can see no difference between a case in which the legal representative who applies to be put on the record is excluded from the record without having been heard and one in which there is no respondent in appeal on the record. We may observe that the High Court at Bombay in *Lakshmibai* v. *Balkrishna* (1) and the High Court at Calcutta in *Rajmoonee Dabee* v. *Chunder Kant Sandel* (2) considered that they might in those cases apply the principle of anology.

(1) 4 B. 654.

(2) 8 C. 440 = 10 C.L.R. 437.

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We have had the opportunity of considering the draft judgment of our brother Mahmood and the cases referred to in it. We regret that we cannot agree with that judgment. In our opinion we can and should, either before or at the hearing of this appeal and as a preliminary question, ascertain and determine for the purposes of the prosecution of this appeal the question as to whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent, and should act accordingly.

MAHMOOD, J.—The preliminary question which requires determination in this case has arisen from the following facts:—On the 20th of December, 1881, one Dipchand sued the present defendants-appellants for possession of certain zamindari shares together with mesne profits. The suit was dismissed by the Court of first instance on the 30th June, 1883, and from that decree an appeal having been preferred by Dipchand, the lower appellate Court, reversing the decree of the first Court, decreed the claim on the 15th June, 1885. From that decree the defendants preferred this appeal on the 9th December, 1885, and the appeal was admitted and is still pending in this Court. On or about the 5th May, 1886, [240] the plaintiff-respondent died childless, leaving his father, Sita Ram, and a widow, Musammat Khushalo, and it does not appear whether there is any other person claiming to be the legal representative of the deceased. On the 30th June, 1886, an application was presented to this Court by Musammat Khushalo, claiming to be the legal representative of the deceased and praying that her name might be substituted as respondent to the appeal, and this prayer was granted by order of my brother Straight on the 17th July, 1886. On the 2nd July, 1886, an application was made on behalf of the defendants-appellants, stating that the respondent, Dipchand, died childless on or after the 5th May, 1886, and that, so far as the defendants appellants (petitioners) were aware, the sole heir of the deceased was his father, Sita Ram, and praying that his name might, therefore, be substituted for the deceased as respondent to this appeal. This application has not yet been granted, and has given rise to one of the points which require determination in this case. The appeal originally came on for hearing before a Division Bench of the Court consisting of Oldfield, J., and myself, and, for the reasons stated in the order of 30th July, 1886, the Bench referred the case to the Full Bench for consideration of the legal effect of Dipchand's death as to the question whether the cause of action survived in favour of his legal representative. The question was decided in the affirmative by the Full Bench, and the appeal coming on for hearing before the learned Chief Justice and myself, it was contended on behalf of the defendants-appellants that Musammat Khushalo had been wrongly substituted as respondent to the appeal, and that the proper person who should have been substituted as the legal representative of the deceased Dipchand was his father, Sita Ram, whom the defendants-appallants had by this application sought to implead as respondent to the appeal. In view of the points raised by this contention, the learned Chief Justice, by his order of the 25th March, 1887, directed that the case was to be heard by a Full Bench of this Court. The case has accordingly been heard by the whole Court so far as the preliminary question is concerned, and in dealing with that question it is necessary with reference to the arguments addressed to us at the bar, to consider the following points:—(1) Whether the order of 17th July, 1886, whereby Musammat Khushalo's [241] name was brought upon the record as the legal representative of the deceased plaintiff-respondent, Dipchand, can be interfered with by us at this stage. (2) If so, whether she has been rightly brought upon the record

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as such representative, and should occupy that position for the purposes of this appeal, notwithstanding the objection of the defendants-appellants. (3) Whether the defendants-appellants are either required by law or entitled to make the application whereby they pray that the name of Sita Ram may be brought upon the record as the sole legal representative of the deceased plaintiff-respondent, Dipchand. (4) Whether both Mussammat Khushalo and Sita Ram should be impleaded as respondents to this appeal. (5) Whether the law requires that, as a condition precedent to the further hearing of the appeal, the Court should decide the question whether Mussammat Khushalo or Sita Ram is the true representative of the deceased plaintiff-respondent, Dipchand.

As to the first of these points, it is enough to say that the order of the 17th July, 1886, whereby Mussammat Khushalo was substituted for the deceased Dipchand as plaintiff-respondent, was passed *ex parte* by a single Judge, and that the *ratio decidendi* upon which the Full Bench ruling of this Court in *Dubey Sahai* v. *Ganeshi Lal* (1) proceeded applies to this case, and that it is, therefore, open to us, as the Bench required to dispose of the appeal, to consider and decide whether the lady has been properly brought upon the record. The remaining four points as enunciated by me can be conveniently dealt together, because they form elements of one and the same question and require consideration of the same portions of the Civil Procedure Code. That question is, whether, for the purposes of the array of the parties incident upon the death of either of the parties to an appeal, the provisions of s. 582 are such as require us to apply the provisions of Chapter XXI of the Code, regardless of the position which either party held in the Court of first instance—that is, regardless of the question whether the party was plaintiff or defendant in the original suit. I confess that in considering this question as a member of the Full Bench of this Court, my difficulty does not arise so much out of the provisions of the Civil Procedure Code itself as from the con-**[242]**flicting state of the case-law upon the subject, and this circumstance renders it necessary for me to consider the exact effect and bearing of the various rulings which were cited and relied upon at the hearing of this case, with reference to the changes which s. 582 of the Civil Procedure Code has undergone since it first appeared in the Code of 1877. The section as it originally appeared in the Code of 1877 ran as follows: "The appellate Court shall have the same powers in appeals under this chapter as are vested by the Code in Courts of original jurisdiction in respect of suits instituted under Chapter V. The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable." By s. 88 of Act XII of 1879 the following words were added to the first paragraph of the section :—"and in ss. 363 and 365 the word 'plaintiff' shall be held to include an 'appellant.' Whilst the section stood thus, the Calcutta High Court in *Rajamonee Dabee* v. *Chunder Kant Sandel* (2) held that, notwithstanding that s. 582 of the Code of Civil Procedure does not expressly direct that the word 'plaintiff' occurring in s. 366 shall be held to include an "appellant," yet the power conferred by s. 366 on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may by analogy be taken to be conferred on the appellate Court. And in laying down this rule the learned Judges of the Calcutta High Court followed the ruling of the Bombay High Court in *Lakshmibai* v. *Balkrishna* (3), in which, with reference to ss. 363, 365,

(1) 1 A. 34. (2) 8 C. 440=10 C. L. R. 437. (3) 4 B. 654.

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368, and 582 of the Code of 1877, it was held that a procedure analogous to that laid down in s. 368 of the Civil Procedure Code (Act X of 1877) in respect to the death of a *defendant* must be applied in the case of the death of a *respondent*; and that, therefore, where a respondent dies during the pendency of an appeal, it is for the appellant to take the initiative, and he is at liberty to select one or more persons to defend the appeal; and no person other than the person so selected has a right to force himself into the proceedings and to claim to have his name entered as representative of the deceased respondent against the appellant's consent. It was also held in the same case that persons so introduced on the record may or may not be the real representatives of the deceased respondent; [243] but the merits of their claim to be such, on the ground of any right or status, such as that of adoption, is immaterial to the determination of the appeal.

Both these cases are strong authority for showing that, even as the law then stood, a defendant-appellant was dealt with as plaintiff for the purposes of the array of parties in proceedings arising out of death, &c., although s. 366 was not specifically referred to in s. 582 of the Code as it then stood. In the Calcutta case just cited Mr. Justice Mitter entertained no doubts in the matter, but Garth, C.J., in delivering his judgment in the case, went on to say :—

"S. 582 of the Code has provided that in ss. 363 and 365 the word 'plaintiff' shall be held to include an 'appellant.' If the provision had been made with regard to s. 366, all difficulty in this case would have been removed; but the express mention of ss. 363 and 365 and the omission of s. 366 would rather lead to the supposition that the Legislature did not intend a respondent to have his costs under such circumstances. As my learned brother, however, is disposed to put a more liberal interpretation upon s. 582, and as the view which he takes appears to be supported by the Bombay High Court in the case to which he has referred, I shall not differ from him on this occasion, more especially as, in my opinion, the justice of the case is entirely in accordance with that view. We trust that the omission, if it is one, may be supplied in the Bill to amend the Civil Procedure Code, which is now before the Legislative Council."

The Bill to which the remarks referred was the one which on passing has become the present Civil Procedure Code of 1882, and it was probably in consequence of this suggestion that s. 582 was amended. The words inserted by s. 88 of Act XII of 1879, as addition to the first para of s. 582 of the Code were cut out and the following words substituted therefor: "And in Chapter XXI, so far as may be, the words 'plaintiff,' 'defendant,' and 'suit,' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal." The main question, therefore, before us is, what is the effect of these alterations upon the facts of a case such as this? In other words, the question is whether [244] the *defendants*-appellants in this case are or are not exactly in the same position *as to the array of parties* as they would have been if they had been plaintiffs in the original suit and the death of the *defendant* had occurred during the pendency of the suit.

I should have had no difficulty in answering this question in the affirmative but for the fact that in the Full Bench ruling of this Court (1) in *Narain Das* v. *Lajja Ram*, in which I had the misfortune of being

(1) 7 A. 693.

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in the minority of one, there is a great deal in the *ratio decidendi* adopted by the majority of the Court which clashes with my views upon this point. The general effect of the view adopted by the majority of the Court in that case is that, even for the purposes of the array of parties to an appeal arising out of the incident of the death of one of the parties, a *plaintiff* continues to be a plaintiff and a *defendant* a defendant for the purposes of Chapter XXI of the Civil Procedure Code, notwithstanding s. 582 of the Code of 1882. In other words, the effect of the *ratio decidendi* of that ruling is to hold, as I pointed out in *Rameshar Singh* v. *Bisheshar Singh* (1) and again in *Grant* v. *The Oudh and Rohilkhand Railway Company* (2), that it is not the duty of a *defendant*-appellant to implead any one as respondent upon the death of a *plaintiff*-respondent. In the last-mentioned case (which has not been reported in the authorised reports) I said: "Cases have occurred within my own experience, in which, during specially unhealthy seasons, both the appellant and the respondent have died, and in which there is some difficulty in knowing how to act. In this case the difficulty would have been considerably enhanced if the plaintiff were not also the applicant and if the defendant had not occupied the same defensive position before us as he occupied in the Court below. This would be the result of the ruling of the Full Bench in *Narain Das* v. *Lajja Ram* (3) to which I was a party, but in which I had the misfortune to differ from the late learned Chief Justice and my other learned colleagues regarding the interpretation to be placed upon a clause of s. 582, Civil Procedure Code, which happens to have been drafted and submitted by myself to the Legislature word for word as it now stands. The effect of the judgment of the majority of the Court in that case, as I pointed out in *Rameshar Singh* v. *Bisheshar Singh* (1) is that the appeal by a defendant is absolutely [245] free from abatement, if he chooses to decline to implead any person to represent the deceased *plaintiff*-respondent, and the appeal would go on for ever upon our file if no one volunteered as representative of the deceased *plaintiff*-respondent. Such is not the interpretation which the authors of the clause either intended or could accept; and I still think, with due reference to the Full Bench ruling of the majority of the Court, that the ruling will probably have to be reconsidered as soon as we have a case where the *defendant*-appellant neglects—or, to put the point more strongly—deliberately declines to implead any person as representing a deceased *plaintiff*-respondent, and the representative of the latter makes no endeavours to appear. And I may respectfully say that I still think that just as it is the duty of a defendant against whom a decree is passed when filing his appeal to implead the plaintiff as respondent, so it is his duty to implead the representatives of the plaintiff who dies *before* the appeal is instituted, for it is obvious that in such a case no appeal could be instituted *ex parte*, and no Court would admit an appeal which did not name any respondent at all or named a respondent who was admittedly no longer alive. Nor am I aware of any juristic reason why this duty of impleading the opposite party imposed upon the appellant should vanish simply because the plaintiff-respondent has died *after* and not *before* the appeal is preferred. Notwithstanding the high authority of Petheram, C.J., and the learned Judges who followed him, I humbly venture to think that the views expressed by me are in accord with the practice of the House of Lords in appeal where such questions arise, if not also of the other Courts

(1) 7 A. 734. (2) A.W.N. (1886) 90. (3) 7 A. 693.

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of appeal in England itself. In the absence of books of reference on this subject in the library of this Court I have not been able to study the matter, and I have indulged in these *obiter dicta* principally to place upon record the views I entertain in the hope that when the Legislature thinks fit to amend the Civil Procedure Code, they may perhaps take these observations into consideration."

It is just possible that it was in consequence of these observations, as also the remarks which I made in my dissenting judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (1), the Legislature in accepting Bill No. II of 1887 (now pending before the Legislature) to amend the Code of Civil Procedure, proposed in [246] s. 48 of the Bill to alter the language of s. 582 of the Code in the following manner: "In s. 582, for the words 'plaintiff,' 'defendant', and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, the following shall be substituted, namely, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal" (2).

I have quoted this proposed section, not because it can be utilised as a means of interpreting the Code as it now stands, but because it formulates in specific language the law as it already stands, subject of course to such difficulties as have arisen out of the case-law. Some of the cases which have given rise to the difficulties have already been cited by me, and although I have no intention of repeating what I said in my dissenting judgment in the case of *Narain Das* v. *Lajja Ram* (1), I shall deal with that case as the central point from which this Court sitting in Full Bench should view the rulings of the other High Courts bearing upon the point now before us.

I have already mentioned what the Bombay High Court ruled in *Lakshmibai* v. *Balkrishna* (3) with reference to the Code of 1877; and I may add that a similar rule was laid down by that Court under the present Code in *Bai Javer* v. *Hathi Singh Kesri Singh* (4) where it was held that, under s. 368 of the Civil Procedure Code (XIV of 1882), a plaintiff may have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them; but there is no section which allows the representatives of a sole defendant who has died to be placed on the record at their own request; that consequently s. 582 gives no authority to a civil Court to place on the record at their own request the representatives of a deceased sole respondent, and that such an application cannot be entertained. It is clear that both these cases are not only consistent with what I said in the case of *Narain Das* v. *Lajja Ram* (1), but go somewhat too far according to my view of the law. The next case which I wish to cite is *Soshi Bhuson Chand* v. *Grish Chunder Taluqdar* (5) where the [247] Calcutta High Court laid down a rule wholly in accord with what I said in the Full Bench case of this Court, because the learned Judges (Field and Beverley, JJ.) held that, having regard to s. 3 of Act XIV of 1882, it is clear that the word 'Code' in sch. ii, art. 171-B of Act XIV of 1877, applies to the present Code of Civil Procedure (Act XIV of 1882), and that, therefore, the word "*defendant*" in s. 368 of that Code when read with s. 582 must be held to include "*respondent*."

This view was, however, repudiated by the Full Bench of the same

(1) 7 A. 693. (2) See Act VII of 1888, s. 53 (1). (3) 4 B. 654.
(4) 9 B. 56. (5) 11 C. 694.

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Court in *Udit Narain Singh* v. *Harogouri Prosad* (1), and in doing so the learned Judges followed the ruling of the majority of this Court in the Full Bench case of *Narain Das* v. *Lajja Ram* (2), though judging from the report of the case I cannot but feel, with due deference, that the attention of the learned Judges was not called to my dissentient judgment. Nor can I help feeling that the learned Judges of the Full Bench of the Madras High Court in dealing with a similar question in *Lakshmi* v. *Sri Devi* (3) had not directed their attention to the reasons upon which my humble judgment in *Narain Das* v. *Lajja Ram* (2) proceeded ; and I make this special reference to what I said at pp. 700 and 701 of the authorised report.

It is of course clear that like the Full Bench case of this Court in *Narain Das* v. *Lajja Ram* (2) some of the cases before the other High Courts, which I have just cited, turned upon the interpretation of a clause of the Limitation Act (XV of 1877) as amended by s. 108 of a later statute, namely, Act XII of 1879. I suppose no one who has studied the rulings in those cases will deny that in interpreting s. 582 of the present Code of Civil Procedure (Act XIV of 1882), they have been materially influenced by the terms of an earlier statute, namely, the Limitation Act (XV of 1877) as amended by Act XII of 1879. I have cited these cases out of deference to the learned Judges who delivered judgments in those cases in this Court, as also in the High Courts of Calcutta and Madras, though I have felt, and still feel, very great difficulty in either regarding the statutes of limitation as *in pari materia* with the Civil Procedure Code, or in holding that a later statute, such as this present Civil Procedure Code, is to be interpreted and governed by an earlier statute which deals with a different department of adjective law.

[248] Having so far dealt with the most important cases bearing upon the question now before us, I wish to state what seems to me to be a simple proposition of law, consistent as it is with juristic reasoning. We all know that the maxim *ubi jus ibi remedium* is a fundamental principle of our law, and that primarily it applies only to causes of action which have to be dealt with by Courts of original jurisdiction, that is, Courts of first instance. But the principle upon which the maxim is based is applicable as much to Courts of appeal as it is to Courts of first instance, that is to say, that whilst in the Court of first instance the plaintiff complains of an injury *ante litem motam*, in a Court of appeal the main complaint of the appellant is that injury has been done to him, not only by the act of the opposite party, but by a wrongful exercise of jurisdiction by the lower Court. As a matter of juristic reasoning, there is no substantial difference between the position of a plaintiff in the original Court and that of an appellant before the Court of appeal, whether such appellant was plaintiff or defendant in the original Court. The juristic reason is simple, namely, that the maxim *amnia praesumuntur rite esse acta* is comprehensive enough to include not only acts *ante litem motam*, but also the acts of a Court. There is, therefore, no more reason to presume that a defendant has committed an injury than there is to presume that a *plaintiff*-respondent has obtained a wrong decree because of the error of the lower Court. In both cases the presumption of law is that, till the contrary is proved, acts which have actually occurred, whether done by a party to the litigation or by a Court of justice, were rightly done. And if I am right so far, for whom is it in a case of appeal

(1) 12 C. 590. (2) 7 A. 693. (3) 9 M. 1.

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to show that the decree of the lower Court was wrongly passed? Surely it is not for him who was obtained a judgment in his favour, but for him who impugns that judgment, to show that the judgment is wrong; and I find it extremely difficult to conceive how an appellant can be exonerated from this duty by dint of the simple fact that he happened to be defendant in the original Court. And if this is so I fail to see any reason, either in jurisprudence or law, why a *defendant*-appellant in the Court of Appeal should be placed upon a footing different from that of a plaintiff in the original Court, with reference to the array of parties, for the purposes of obtaining his remedy. Such remedy [249] in the Court of first instance would of course be obtaining a decree or an injunction, and in the Court of appeal the remedy aimed at would be the reversal of a judgment, decree, or injunction, for, whichever the case may involve, the principle remains that *omnia praesumuntur rite esse acta.*

Now, dealing with this point somewhat concretely, I suppose nobody would deny that a defendant against whom a decree has been passed is the person who must complain of the decree if he chooses to impugn it. Nor do I think any one would deny that under our Code of Civil Procedure it is not the duty of the successful plaintiff, but of the defendant, to implead some one as a respondent to the appeal. But the successful plaintiff may have died *before* the appeal is filed. Whose duty then would it be to bring the proper parties before the Court of appeal to enable that Court to adjudicate upon the appeal? Surely it would not be the duty of the successful plaintiff to impugn the judgment which is in his favour. And if this is so, the party who could or would appeal would in the case supposed be the defendant who had been unsuccessful in the Court below. It is accepted as a sound principle of adjudication by all civilised nations that *audi alteram partem*, and how is the appellate Court to hear the appeal of a *defendant*-appellant without hearing the other side? And how is it to hear the other side if the *defendant*-appellant either names a dead person (a *plaintiff*-respondent) or does not name any living person as the legal representative of the deceased?

It seems to me, therefore, to be the undoubted duty of the appellant, be he plaintiff or defendant in the original action, to implead some one as respondent, and, if the opposite party is dead, to implead some one as the legal representative of the deceased. Such, no doubt, would be the case if a plaintiff-respondent died before the filing of the appeal by the defendant-appellant. And for what reason can this duty vanish if the death of the plaintiff-respondent takes place not *before* the institution of the appeal but during the period of its pendency? The effect of the *ratio decidendi* of the ruling of the Full Bench of this Court in *Narain Das* v. *Lajja Ram* (1) can suggest only one answer, namely, that the appeal must remain pending for ever, or at least till so long as the legal [250] representatives of a deceased *plaintiff*-respondent do not apply to have their names substituted as respondents. To the question arising from such a state of things the ruling of the Bombay High Court in *Lakshmi Bai* v. *Balkrishna* (2) and in *Bai Javer* v. *Hathi Sing Kesri Sing* (3) would furnish the answer that the legal representatives of the deceased *plaintiff*-respondent have no *locus standi* to make an application to be substituted as representatives of the deceased; and the Full Bench ruling of the majority of this Court, as also the Full Bench ruling of the Calcutta High Court and Madras High Court would lead to the conclusion that a defendant-appellant can choose his

(1) 7 A. 693. (2) 4 B. 654. (3) 9 B. 56.

own time for making an application to implead the legal representatives of a deceased *plaintiff*-respondent, the appeal in the meantime being free from liability to abatement.

I confess that I find it extremely difficult to hold that such was the intention of the Legislature. I made this observation, of course, with profound respect for the rulings which I have cited; and with equally profound respect I may observe that the whole difficulty in connection with the array of parties has arisen out of a misapprehension of the juristic principles upon which our Code of Civil Procedure is based. A due consultation of the various parts and Chapters into which the Code is divided will show that the essential rules governing the procedure of the Courts of first instance from the body of the statute, and those same provisions, *mutatis mutandis*, have been rendered applicable, not only to the first appellate Court, not only to the second appellate Court, but also to the Courts exercising civil jurisdiction in miscellaneous cases. Such, stating the matter briefly, is the effect of ss. 582, 587 and 647 of the Code; and speaking for myself, I cannot conceive how a workable Code could be framed upon better principles. The Code is, as we all know, the outcome of the labours of one of our most eminent jurists, Lord Hobhouse, now one of the Lords of the Privy Council, with the co-operation and assistance of another great jurist, Mr. Whitely Stokes, who, in the position of Law Member of the Legislature, is no doubt mainly responsible for s. 582 of the Code of 1882 as it now stands. The Code so framed, is, to my mind, perfectly clear, and if difficulties [251] have arisen in this Court, as also in the other High Courts, over the matter now before us, it is due, as I humbly and respectfully think, to some misapprehension of the method upon which the Code has been framed. I have said so much because the policy upon which the Legislature has framed s. 582 of the Code cannot be fully realised, unless it is accepted that, as a pure matter of codification and drafting statutes, it would be nothing more nor less than clumsy to reproduce or repeat in the appellate chapters, or in the chapter relating to miscellaneous proceedings, the provisions of the procedure already well defined and accurately expressed in the earlier chapters of the Code, and which provisions, as matters *ad litis ordinationem*, are as suitable for appeals and miscellaneous proceedings as for regular original suits.

This is in effect what I said in one of the cases to which I have already referred; and since I am sitting again as a member of the Full Bench of this Court, which can overrule the *ratio delidendi* of the Full Bench ruling in *Narain Das* v. *Lujja Ram* (1), I must, with due difference to the majority of the Court as then constituted, repeat what I held in that case, namely, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of chapter XXI, as also to make them applicable to appeals, and the words "appellant" and "respondent," as used in the section, include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that chapter XXI applies to cases where a *plaintiff*-respondent had died; and that in such a case, and where no application has been made within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

To this view I still adhere; and I may respectfully say that I do so

(1) 7 A. 693.

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partly because in the reports of the cases already cited by me laying down a different rule, I have failed to trace any attempt to meet the reasons which my judgment in the case just cited relied upon. Holding these views still, I need only say that not only s. 582 but the provisions of the whole Code of Civil Proced-[252]ure, far from presenting difficulties of interpretation, become wholly intelligible and consistent when s. 582 is read in the sense in which I respectfully think it was framed. That sense is best enunciated in the second paragraph of the present Bill to amend the Code, namely, that "*the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal.*"

In this view of the matter, the points before us become very simple because, for the purposes of the array of the parties, s. 582 read with s. 587 of the Civil Procedure Code renders the provisions of chapter XXI of the Code relating to incidental proceedings arising from the death of parties applicable to this case in such a manner that the appellant, whether *plaintiff* or *defendant* in the original Court, must be dealt with as *plaintiff* for the purpose to which that chapter relates. And if I am right so far, I need only refer to the provisions of that chapter for stating my view of the law. S. 368 which occurs in that chapter lays down *inter alia* that in case of the death of one of several defendants or of the sole defendant, " the plaintiff may make an application to the Court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead." The section further goes on to say that " the Court *shall* thereupon enter the name of such representative on the record in the place of such defendant, and *shall* issue a summons to such representative to appear on a day to be therein mentioned to defend the suit; and the case *shall* thereupon proceed in the same manner as if such representative had originally been made a *defendant* and had been a party to the former proceedings in the suit, provided that the person so made defendant, may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative."

In the present case, whilst the *defendants*-appellants insist upon impleading Sita Ram as the legal representative of the deceased Mussammat Khushalo, as the widow of the deceased, far from objecting to be impleaded as respondent, has applied to be so [253] impleaded, though the application is objected to by the *defendants*-appellants. Now, in dealing with such a state of things, the law ceases to present any difficulties if we interpret s. 368 of the Code in the sense in which s. 582 of the Code intends that section to be interpreted. In other words, the provisions as to the impleading of *defendants* become applicable to the impleading of respondents, whether such respondents were *plaintiffs* or *defendants* in the original suit. And, indeed, I am prepared to go further and say that reading s. 582 of the Code as a whole, the section confess upon the appellate Court all the powers conferred upon the Courts of original jurisdiction in connection with such matter; and those extensive powers have also been conferred upon the Courts of second appeal by s. 587 of the Code. Thus not only s. 368 of the Code become applicable to this case, but also the all other sections of the Code as to the array of the parties, such as s. 22.

To put the matter more concretely: the *defendants*-appellants must in case be treated as *plaintiffs* and the plaintiff-respondent Dipchand,

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deceased, as a *defendant*. On this hypothesis there is no question of the death of a *plaintiff* in this case, and therefore the provisions of ss. 363, 364, 365, 366, and 367 have no application. Upon the same hypothesis, what has really occurred is that a sole "*defendant*" has died, and a dispute has arisen as to who is his legal representative for the purposes of the litigation. The *defendants*-appellants (who must be regarded as *plaintiffs*) state that the deceased respondent (who must be regarded as *defendant*) lived jointly with his father, Sita Ram, who is therefore, as a surviving member of a joint Hindu family, the legal representative of the deceased, and it is only him whom they wish to implead for the purposes of carrying on this appeal. On the other hand, the widow of the deceased, Musammat Khushalo, wishes to force herself into the litigation, in spite of the wishes of the appellants, on the contention that her husband was separate from his father, and that she is therefore his legal representative in preference to his father, Sita Ram.

To the former part of this state of things s. 368 of the Code (reading it as I do in the light of ss. 582 and 587 of the Code) is fully applicable. The effect of that section so interpreted is that upon the application of the appellant, the Court "*shall*" enter the name of **[254]** any person whom he desires to implead as legal representative of the deceased respondent. In this view the Court has no choice with reference to impleading Sita Ram, because the provisions of the statute are imperative. Then as to the latter part of the state of things already discribed by me, that is, the application of Musammat Khushalo, the provisions of the first part and the last paragraph of s. 582 (read with s. 587) are applicable, and, in my opinion, the claims of the widow to be impleaded in the action must be dealt with upon principles of s. 32 of the Code, so far as they are applicable to the array of the parties in appeals. The words of the last paragraph of s. 582 are very comprehensive and seem to be consistent with the principles upon which such matters are dealt with by Courts of appeal in England, for, if I remember rightly, there are cases to be found in the English reports where even third persons have been made parties to appeals where the sound discretion of the Court required such a course. The ruling of Lord Selborne, L. C. and Brett and Cotton, L, JJ., in *Markham* v. *Markham* (1) is an illustration of what I have just said; and although I am not prepared to say definitely one way or the other that our powers in such matters under our Code are as extensive as those of the Court of appeal in England under their rules of procedure, I think I may say that the principles upon which those Courts proceed furnish a good guide for our own procedure in cases of doubt.

Nor is the view which I have taken unsupported by the authority of the Indian case-law. In the case of *Athiappa* v. *Ayanna* (2) Sir Charles Turner, C. J., in delivering the judgment of the Court, and referring to the Bombay ruling in *Lakshmibai* v. *Balkrishna* (3) which, as I have already stated, was followed in *Bai Javer* v. *Hathi Singh Kesri Singh* (4) went on to say: "While we agree with the learned Judges of the High Court of Bombay that the Court must place on the record the person indicated as the representative of a deceased respondent, we are not prepared to say that in no case can the Court place on the record any other person as filling that character. The Court has the same power to make parties to an appeal as it has to make parties to suit; and were there apppears a substantial doubt whether the person indicated by an appellant

(1) L.R. 16 Ch. Div. 1. (2) 8 M. 300. (3) 4 B. 654. (4) 9 B. 56.

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is the [255] representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and a person other than the person indicated by the appellant lays claim to the representative character, and on good *prima facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced, we consider the Court ought to proceed under s. 32 to make him a party to the appeal."

This ruling was concurred in by Mr. Justice Mutusami Ayyar, and I am of opinion that it lays down a sound principle of law. There are, of course, some portions of s. 32 of the Code which may not be applicable to the procedure of the appellate Court, but so far as the matter now before us is concerned I think that that section is applicable. I have already said that the provisions of s. 367 of the Code are not applicable because the *defendants*-appellants are *alive*, and being dealt with as plaintiffs for the purpose of the array of parties, no dispute has arisen as to who is the proper legal representative. And what we have to consider is whether Musammat Khushalo has any such *prima facie* right as would entitled her to be made a party respondent to this appeal. Sita Ram, the father of the deceased Dipchand, respondent, as I have already said, must *necessarily* be impleaded, because he has been named by the appellants as the person against whom they wish to prosecute their appeal; and so far as Musammat Khushalo is concerned, I think that although her application to be made a party respondent to this appeal is opposed by the appellants, and may for aught we know be contested by Sita Ram also, we are not called upon to apply the procedure laid down in s. 367 of the Code of Civil Procedure, for the simple reason that the plaintiff-respondent (Dipchand) cannot, according to my view, be regarded as a *plaintiff* for purposes of the array of parties to this appeal. All that we have to consider is whether Musammat Khushalo has any such *prima face* case as would entitle her to be made a party respondent to this appeal under s. 32 read with ss. 582 and 587 of the Code of Civil Procedure. Even a Court of first instance is not required by our laws to decide any dispute as to the legal representation of a deceased *defendant*, and I fail to see why a Court of appeal should be called upon either to decide such a dispute as [256] to the legal representation of the deceased respondent and thus stay the decision of the appeal. In the present case, what I have gathered from the argument addressed to us at the Bar is that the contention as to the legal representation of the deceased Dipchand rests mainly upon the decision of the question whether he was a member of a joint Hindu family with his father, Sita Ram, or was separate from him. We know that such questions are as a rule very difficult to decide and rest upon very minute details of evidence upon the issue when raised. It is obvious that no adjudication on such an issue when it arises between two defendants (*i.e.*, two respondents) can bind them, and it seems to me that we shall only be delaying the disposal of this appeal if we apply s. 367 of the Code to this matter, and either decide the issue ourselves or stay the hearing of appeal until the issue has been determined in another suit.

I do not wish to go into the details of the juristic reasons why the rules of procedure, *ad litis ordinationem*, applicable to a dispute as to the legal representation of a *plaintiff* are not the same as those which relate to a dispute in connection with the legal representation of a deceased *defendant*. The reason why I do not go into those details is that I have already given my reasons for holding that a *plaintiff*-respondent, such as Dipchand in this case, must be treated as a defendant for the purpose of the array of

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the parties to an appeal such as this; and that whilst Sita Ram must necessarily be impleaded as respondent, the claims of Musammat Khushalo to be impleaded also as a respondent must be dealt with under s. 32 of the Code read with ss. 582 and 587.

This view explains why I have said that the ruling of the Bombay High Court in *Lakshimbai* v. *Balkrishna* (1) went too far in holding that no application could be made by a claimant to a deceased respondent to be impleaded in an appeal as a respondent. In my opinion the ruling of the Madras High Court in *Athiappa* v. *Ayanna* (2) solves the difficulty in this case. And adopting that ruling, I hold that Musammat Khushalo has in this case shown a sufficient case to entitle her to be made a respondent in this appeal without the condition precedent of any decision whether she or Sita Ram is the proper legal representative of the deceased Dipchand.

[257] Having said so much as to the views which I hold, I now proceed to state *seriatim* the specific answers to the five questions which, as I stated at the outset, arise in this case. My answer to the first question is that the order of the 17th July, 1886, whereby Musammat Khushalo was brought upon the record as the legal representative of the deceased plaintiff-respondent, Dipchand, can be rescinded by the Bench at this stage, that is, after having heard the defendants-appellants.

To the second question my answer is that, notwithstanding the objections of the defendants, Musammat Khushalo, as the childless widow of the deceased plaintiff-respondent, Dipchand, occupies a position which affords her a sufficient *prima facie* status to resist the appeal, and as such, to be impleaded as respondent under s. 32 of the Code of Civil Procedure read with ss. 582 and 587 of that Code.

To the third question my answer is that the defendants-appellants, being in the position of the plaintiffs for the purposes of the array of parties to their appeal, were bound by law to implead some one to represent the deceased plaintiff-respondent, Dipchand; that their omission to do so would subject them to the penalty of the abatement of their appeal under s. 368 read with ss. 582 and 587 of the Code of Civil Procedure; that this Court is therefore *bound*, by reason of the specific provisions of s. 568, to implead Sita Ram as a respondent to this appeal.

To the fourth question my answer is that under the circumstances of this case both Musammat Khushalo (who has already been brought upon record as a respondent) and Sita Ram should be made parties to this appeal by reason of s. 32 read with ss. 582 and 587 of the Code of Civil Procedure (Act XIV of 1882).

To the fifth question my answer is that there exists no authority in our Code of Civil Procedure either to require or permit the decision of disputes as to the legal representation of a deceased plaintiff-respondent (any more than the Code requires or permits adjudication upon such questions when they arise between two or more defendants in the Court of first instance); that, therefore, the question whether Musammat Khushalo or Sita Ram is the proper legal representative of the deceased plaintiff-respondent Dipchand [258] is a matter which we not only need not determine for the purposes of this appeal but is a matter which we cannot determine under the rules of procedure as a condition precedent to the further hearing of this appeal.

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(1) 4 B. 654. (2) 8 M. 300.

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I would therefore, without adjudicating upon the question whether Musammat Khushalo or Sita Ram is the proper legal representative of the deceased plaintiff-respondent, Dipchand, bring both upon the record as parties respondents to this appeal and would proceed to decide the appeal after having heard both of them.

As I understand the judgment of the majority of the Court, I take it to mean that it is not by reason of any provisions in the Code that we are required to hold an inquiry whether Sita Ram or Musammat Khushalo is the proper legal representative of the deceased plaintiff-respondent, Dipchand. I also take that judgment to mean that it is not upon the authority of any case-law existing in India or in England that such an enquiry is proposed to be held. I also understand that judgment to imply that even though a plaintiff-respondent may stand in the position of a defendant within the meaning of s. 582 of the Code, his death renders the question as to whether *A* or *B* is his legal representative a matter for adjudication by the Court as a condition precedent to the further progress of the appeal, and that such an adjudication can be made under an inherent power of the Court regulated by considerations of convenience and promotion of the ends of justice.

I regret that I cannot accept these views, for I cannot help holding that, even accepting the doctrine of inherent power in matters of procedure, the views adopted by the majority of the Court, far from resulting in convenience of procedure, will tend to prolong litigation and not necessarily obviate the inconveniences or difficulties anticipated from the view of the law which I have taken.

I am not aware of any rule of law which requires a Court in dealing with a case such as this to adjudicate upon the conflicting claims of two *defendants*, and if the deceased plaintiff-respondent in this case, Dipchand, is to be treated as a defendant within the meaning of s. 582 of the Code, I can find no authority either in that Code or in the case-law to necessitate an adjudication between the contending claims of two or more persons claiming to be the [259] legal representatives of the deceased. In such cases there may be not only two but many more persons, each claiming to be the proper legal representative of the deceased to the exclusion of the others, and if the law requires adjudication upon their respective rights as a condition precedent to the progress of the appeal, the effect would be to prolong litigation. And I may add that, even if such rights are adjudicated upon, it is far from certain that any such adjudications, when made by a Court of appeal in a case such as this, would be conclusively binding upon parties.

I need not, however, pursue this matter further, because although it may possibly be true that Sita Ram is in collusion with the present defendants-appellants (who have named him as the proper legal representative of Dipchand), yet it may also be true that he is the real representative and not Musammat Khushalo, and it may also be true that both of them are his legal representatives. It may also be possibly the fact that there is a third person or persons of whose existence we have not heard, and who, by reason of the existence of a will or otherwise, are the proper legal representatives, but whose existence has not been brought to our notice by any of the parties to this litigation.

In a state of things such as this, what is the duty of this Court? Is it its duty to go about searching for the real legal representatives of the deceased? And if it is not, it is clear that, whether we have Musammat Khushalo or Sita Ram as the proper legal representative of the deceased

Dipchand, our decree must necessarily be ineffective against those who are no party thereto, rendering further litigation necessary if the party or parties whom we hold to be the legal representatives of the deceased Dhipchand are not his proper legal representatives. It seems to me that the difficulties and inconveniences contemplated by the judgment of the majority of the Court are such as no system of procedure can avoid. Indeed, those difficulties and inconveniences increase, and have the effect of prolonging litigation, when attempts are made to adjudicate upon the rights of parites arrayed on the same side, whether in a Court of first instance or a Court of appeal.

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Opposed to the view of the law which I have taken, two judgments have been relied upon which I have not yet mentioned. **[260]** One is the case of *Narain Kuar* v. *Durjan Kuar* (1), which relates to the exercise of powers under s. 32 of the Code, and the other case is *Har Narain Singh* v. *Kharag Singh* (2). The former of these cases does not appear to me to clash with my views because there is no question of intervenors in this case; but the latter no doubt militates against the *ratio decidendi* which I have adopted in this case. With much that was laid down in that case I am respectfully unable to agree for the reasons which I have already fully stated.

There is only one more point to which I need refer, *viz.*, the difficulty contemplated as to costs if my views of the law were adopted. Under s. 223 of the Code of Civil Procedure read with ss 582 and 587 of that enactment this Court would have the power to make any order as to costs within its judicial discretion, just as a Court of first instance would have similar power. And this appeal, if Sita Ram has been improperly impleaded, or if Musammat Khushalo has wrongly forced herself upon the record as a party to the appeal, and the appeal prevails or fails, these would be considerations regulating the discretion of the Court regarding the order as to costs.

For these reasons, without adjudicating upon the contention of the appellants that Sita Ram is the proper legal representative of the deceased Dipchand, and without adjudicating upon any such claims as he may have to that capacity as against Musammat Khushalo or *vice versa*, I would place both upon the record as parties respondents to this appeal, and would proceed to hear the same and dispose of it.

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(1) 2 A. 738. (2) 9 A. 447.

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10 A. 260. (F.B.)= 8 A.W.N. (1888) 111.

10 A. 260 (F.B.)=8 A.W.N. (1888) 111.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

CHAJMAL DAS AND OTHERS (*Defendants*) *v.* JAGDAMBA PRASAD (*Plaintiff*).* [30th April, 1888.]

Civil Procedure Code, ss. 3,368,582—*Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 171B, 178—*Death of plaintiff-respondent—Application by defendants-appellants for substitution of legal representative.*

The judgment of the majority of the Full Bench in *Narain Das* v. *Lajjo Ram* (1) only decided that art. 171B, sch. ii, of the Limitation Act of 1877, did not apply [261] to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art. 178 applies to such applications.

So *held* by the full Bench, MAHMOOD, J., dissenting.

Held by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code, the word "defendant" in art. 171B, of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand* v. *Grish Chunder Taluqdar* (2) referred to.

[R.—11 A. 408=8 A.W.N. 111.]

THIS was a suit brought by one Jagdamba Prasad for possession of a share of alleged ancestral property which was sold in execution of simple money-decrees against the plaintiff's father, Narain Lal. The Court of first instance decreed the claim in full on the 31st March, 1884. On the 15th April, 1884, the defendants (purchasers under the decrees in execution of which the property in suit had been sold) appealed to the High Court from the Subordinate Judge's decree. On the 17th September, 1885, while the appeal was pending, the plaintiff-respondent died.

On the 20th March, 1888, an application was made on behalf of one Musammat Genda Kuar, mother of the deceased plaintiff-respondent, in the following terms:—

1. "That your petitioner's name be entered as the heiress and legal representative of her deceased son, Jagdamba Prasad, plaintiff in the original suit under the provisions of ss. 365 and 582 of the Civil Procedure Code (Act XIV of 1882).

2. "That as the appellants (defendants in the suit) have failed to bring the proper legal representative of the deceased respondent into Court within the time prescribed therefor by the Limitation Act, their appeal be ordered to abate under the last paragraph of s. 368 coupled with s. 582 of the Code."

The appeal came for hearing before Straight and Mahmood, JJ. It was ordered to be laid before the Full Bench for consideration of Musammat Genda Kuar's application.

The Hon. *T. Conlan*, Munshi *Hanuman Prasad*, and Lala *Juala Prasad*, for the appellants.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the respondent.

[262] EDGE, C. J.—In this case the plaintiff obtained a decree from the Court below. From that decree an appeal was filed in this Court on the

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* First Appeal No. 59 of 1884 from a decree of Maulvi Muhammad Basit Khan Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) 7 A. 693. (2) 11 C. 694.

15th April, 1884. The plaintiff-respondent died on the 17th September, 1885. No application has been made by or on behalf of the appellant to bring upon the record the representative of the deceased plaintiff-respondent, nor has any representative of the deceased plaintiff-respondent applied to be brought upon the record. The present application, which was preferred on the 20th March, 1888, is made on behalf of the mother of the deceased plaintiff-respondent. It is an application for an order of the Court decreeing that the appeal has abated. I consider that the judgment of the majority of the Full Bench in the case of *Narain Das* v. *Lajja Ram* (1), notwithstanding the head-note, simply decided that article 171 B of sch. ii of the Limitation Act of 1877 did not apply in that case. That case is on all fours with that now under consideration, so far as the question of limitation is concerned. The result of that decision, I think, must be that art. 178 of sch. ii of the Limitation Act must apply. As three years have not expired since the death of the plaintiff-respondent, and as I do not propose to re-consider the question decided in the case of *Narain Das* v. *Lajja Ram* (1), I think that the application is premature and, as such, must be rejected with costs.

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10 A. 260 (F B.)= 8 A.W.N. (1888) 111.

STRAIGHT, J.—I am of the same opinion. I was a party to the Full Bench ruling in this Court to which the learned Chief Justice has referred, Any one who will take the trouble to read what I said in that case will find that what I laid down there was that art. 171B of the Limitation Act did not apply to a case like this. I was of opinion, for reasons stated therein, that the word "respondent" had, whether from intention or mistake, been omitted from that article, and comparing it with the preceding article, I showed, in reference to s. 582, that it seemed rather as if it had been intentionally omitted. That view has been adopted by five Judges of the Calcutta Court, and the same view has been taken by the Madras Court. I add these remarks for the purpose of showing that when I used the expression at the end of my judgement in that case, "it therefore appears to me impossible to say that the appellant in the present case has failed to make the application within the period [263] prescribed therefore, because no period for making such an application is in fact prescribed at all," I was limiting my remarks to art. 171B, no other article having been suggested to me, and it not having occurred to my mind that art. 178 of the Limitation Act was applicable. I think that art. 178 is applicable, and that, therefore, where a respondent dies, the appellant has three years from the date of such death, that is to say, from the date "when the right to make the application" accrues to him, to come into Court and have the heirs of the deceased respondent brought on the record. I concur with the learned Chief Justice that this application is premature and that it should be rejected with costs.

BRODHURST, J.—I also concur with the learned Chief Justice.

TYRRELL, J.—I concur.

MAHMOOD, J.—The order which I have to make on this application must be the same as that made by the majority of the Court. But I am anxious to guard myself against being understood to hold that the provisions of s. 582 of the Code of Civil Procedure, read with s. 368 of that Code, would not render the word 'defendant' as used in art. 171 B, sch. ii, Limitation Act, applicable also to the case of the death of the plaintiff-respondent. I say this, of course, with due deference to the rulings to the contrary, which need, however. not be now cited. I dealt with most of those

(1) 7. A 693.

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cases in my dissentient judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (1). At page 700 of the report I expressed the exact reasons why by dint of the interpretation clause of the Civil Procedure Code, the word 'defendant' occurring in art. 171 B, sch. ii of the Limitation Act, must necessarily include a plaintiff-respondent. That was a view in full accord with what was said by Field and Beverley. JJ., in *Soshi Bhusan Chand* v. *Grish Chunder Taluqdar* (2). The ruling in this last case, however, though apparently not cited or considered, has been dissented from by a Bench of five Judges of the same Court: and all the other cases, bearing on this point were collected by me in delivering my judgment in the recent Full Bench case of *Muhammad Hoosein* v. *Khushalo* (3), in which the order of the Full Court was passed on [264] the 23rd January, 1888. To the remarks I have made in this last judgment I have nothing to add, though, being bound by the decision of the majority of the Court, I agree in the order which has been made.

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10 A. 264 (F.B.) = 8 A.W.N. (1888) 112.

FULL BENCH.

Before Sir John Edge., Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

DEBI DIN (*Plaintiff*) v. CHUNNA LAL (*Defendant*).*
[30th April, 1888.]

Civil Procedure Code, ss. 3, 368, 582—*Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 171 *B,* 178—*Death of defendant-respondent—Application by plaintiff-appellant have representative of deceased substituted as respondent.*

Held. by the Full Bench (MAHMOOD, J., dissenting) that art. 171 B of the second schedule of the Limitation Act does not apply to the death of a respondent whether plaintiff or defendant in the original suit; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent.

Narain Das v. *Lajja Ram* (1) and *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (4) referred to.

Baldeo v. *Bismillah Begam* (5); and *Rameshar Singh* v. *Bisheshar Singh* (6) overruled.

Held by MAHMOOD, J., *contra*, that the word "defendant" in art. 171 B includes a defendant-respondent, and, reading art. 171 B with clause 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code includes also a plaintiff-respondent, and that an application made by a plaintiff-appellant more than sixty days after the defendant respondent's death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement.

Soshi Bhusan Chand v. *Grish Chunder Taluqdar* (2) referred to.

[F.—29 M. 529 = 16 M.L.J. 475 = 1 M.L.T. 348.]

THIS was a suit for an account of the profits of certain zemindari property in which the plaintiff claimed a share, and for the recovery of such sum with interest as might be found due on the accounts being taken. The defendant, the uncle of the plaintiff, was the manager of the property.

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* First Appeal No. 153 of 1886 from a decree of Munshi Rae Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 14th June, 1886.

(1) 7 A 693. (2) 11 C. 694. (3) 10 A. 223. (4) 10 B. 663.
(5) 9 A. 118. (6) 7 A. 734.

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Cawnpore decreed the claim in respect of part of the property in suit. On the 13th August, 1886, the plaintiff appealed to the High Court from so much of the lower Court's decree as was adverse to him. On the 4th January, [265] 1888, pending the appeal, the defendant-respondent Jia Lal, died, and on the 19th March an application to the Court was made on behalf of the plaintiff-appellant to the effect that the names of the four sons of the deceased respondent might be entered on the record as respondents in his place. On the 27th March, 1888, pending the disposal of this application, another application was made on behalf of the abovementioned legal representatives to the effect that the application of the 19th of March, 1888, had not been presented within the period of limitation provided in art. 171 B of the second schedule of the Limitation Act, and prayed that the appeal should accordingly be declared to have abated.

On the 28th April, 1888, the case came for hearing before Edge, C.J., and Straight, J., who passed an order referring the applications of the 19th March and the 27th March, 1888, to the Full Bench for disposal together with the other cases raising similar questions of law.

The Hon. *T. Conlan*, Sheikh *Amiruddin*, and Lala *Lalta Prasad*, for the appellant.

Mr. *G. E. A. Ross* and Mr. *E. C. F. Greenway*, for the legal reapresentatives of the defendant-respondent.

The Hon. *T. Conlan* for the appellant.—The decision of the Full Bench in *Narain Das* v. *Lajja Ram* (1) applies to this case in principle. The judgment of Straight, J., in that case was concurred in by Oldfield and Brodhurst, JJ., and it shows that art. 171 B of the second schedule of the Limitation Act does not apply to the death of a respondent. The only article of the Limitation Act applicable to such a case is art. 178, and therefore the application of the 19th March was in time and that of the 27th March premature.

Mr. *G. E. A. Ross* for the legal representatives of the respondent.—In the case of *Baldeo* v. *Bismillah Begam* (2) Oldfield and Tyrrell, JJ., held that art. 171 B of the Limitation Act applies to applications to have the representative of a deceased defendant-respondent made a respondent. That case is exactly in point, and it shows that those learned Judges drew a distinction between the case of a defendant-respondent and that of a plaintiff-respondent dying, and considered that *Narain Das* v. *Lajja Ram* (1) did not [266] govern the former class of cases. The Legislature can never have meant that while an application under s. 365 of the Code for substitution of the legal representative of an appellant must be made within sixty days after the appellant's death, an application for substitution of a respondent might be made at any time within three years after the respondent's death.

[STRAIGHT, J.—The omission of the word "respondent" in art. 171 B was probably an oversight.]

The Hon. *T. Conlan* for the appellant in reply.

EDGE, C. J.—This is an application on behalf of the plaintiff appellant to bring upon the record the representative of the deceased defendant-respondent. The defendant-respondent died on the 4th January, 1888. This application was presented to the Court on the 19th March last. Mr. *Ross* also applied, on behalf of the legal representative of the deceased

(1) 7 A. 693.

(2) 9 A. 118.

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defendant-respondent, for an order directing that the appeal should abate. The question raised is whether art. 171 B of sch. ii of the Limitation Act applies to this case. It has been decided in the case of *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (1) that art. 171 B, sch. ii, of the Limitation Act does not apply to the case of a defendant-respondent. Having regard to the fact that by art. 171 the Legislature provided specifically for the cases of the death of an appellant or the death of a plaintiff, and there is no express reference in art. 171 B to the death of a respondent, I am of opinion that art. 171 B does not apply to the death of the respondent, whether that respondent was originally in the action plaintiff or defendant. I think the principle applicable to this case is the same principle which was the basis of my brother Straight's judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (2), with which, so far as the report enables us to see, at least two Judges of the Court concurred. This opinion of mine is in conflict with the judgment of Oldfield and Tyrrell, JJ., in *Baldeo* v. *Bismillah Begam* (3). It does not appear to me that Oldfield, J., who delivered judgment in that case, considered or discussed the bearing of the judgment of the majority of the Court in the Full Bench case of *Narain Das* v. *Lajja Ram* (2). Indeed my brother Tyrrell is now of opinion that that judgment was in opposition to the decision [267] of the majority in the Full Bench case. My opinion is also apparently at variance with the decision of Oldfield and Mahmood, JJ., in *Rameshar Singh* v. *Bisheshar Singh* (4). I think I am bound to follow the principle which is enunciated in the Full Bench case and with which principle I agree, as in my opinion art. 171B does not apply, and as there does not appear to be any other article than 178 applicable to the case, I am of opinion that the application of Mr. *Conlan* on behalf of the appellant must be allowed, and the application of Mr. *Ross* on behalf of the legal representatives of the deceased-respondent should be refused with costs.

Straight, J.—I am of the same opinion. The learned Chief Justice has correctly intepreted the principle upon which I based my decision in the Full Bench case of *Narain Das* v. *Lajja Ram* (2). To put it shortly, that principle is this, that the word "defendant" in the art. 171B does not include a "respondent," and that consequently the period of limitation provided in that article is not applicable to the failure on the part of the appellant to bring on the record the heir of a deceased "respondent." I am of opinion that the limitation applicable to cases of this kind is that which has been stated a Full Bench case of the Madras High Court (5), and has, as I understand it, been approved by the Calcutta High Court (6) has also, from that we see now, met with approval by the Bombay High Court (7), and has been adopted by us.

Brodhurst, J.—I also concur with the learned Chief Justice.

Tyrrell, J.—I concur in the order made.

Mahmood, J.—In delivering my judgment in *Chajmal Das* v. *Jagdamba Prasad* (8), in which I concurred in the conclusion at which the learned Chief Justice and my learned brethren arrived, I had no intention to concede any principle that the ruling in the case of *Narain Das* v. *Lajja Ram* (2) could be interpreted so as to render the rule that was there laid down applicable also to the cases in which a defendant who happened also to be a respondent died, because it is to be borne in mind that in

(1) 10 B. 663. (2) 7 A. 693. (3) 9 A. 118. (4) 7 A. 734.
(5) 9 M. 1. (6) 12 C. 520. (7) 10 B. 563. (8) 10 A. 260.

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that case the appellant was defendant in the original suit. In that Full Bench case the whole of my dissentient judgment of course proceeded upon repu-[268]diating any distinction between a plaintiff-respondent and defendant-respondent, because I held there, at page 700 of the report, that the effect of s. 582 was to demolish the distinction between the plaintiff and defendant for purposes of the array of parties in appeal. The effect of my view was that the defendant-appellant was a "*plaintiff*," as indeed a plaintiff-appellant also would have been a "*plaintiff*," so a defendant-respondent would have been a "defendant," as also a plaintiff-respondent would be a "defendant," for the purposes of art. 171 B of sch. ii of the the Limitation Act. That ruling, however, had to be considered by me in conjunction with Oldfield, J., in *Rameshr* v. *Bisheshar Singh* (1) where I endeavoured to show that the Full Bench ruling in *Narain Das* v. *Lajja Ram* (2) was distinguishable from cases in which a defendant respondent had died, and the plaintiff who was originally in the aggressive position in the first Court was also in that same position in the Court below. In that view Oldfield, J., concurred with me, though with hesitation. Exactly the same view was taken by Oldfield, J., with the concurrence of my brother Tyrrell, in *Baldeo* v. *Bismillah Begam* (3). I think these two cases are authorities for showing that a distinction does lie between the case of the death of a *plaintiff*-respondent and a *defendant* respondent.

There is indeed the case of *Balakrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (4), in which West, J., without having his attention drawn to this distinction, has applied a rule simliar to that of *Narain Das* v. *Lajja Ram* (2) to the case of the death of the *defendant*-respondent. But that judgment with all due respect for such an eminent Judge, does not seem to me to have dealt with the real difficulty in the case—*i.e.*, the effect of reading s. 3 of the Civil Procedure Code with art. 171-B of the Limitation Act. That enactment, as I said in the case of *Narain Das* v. *Lajja Ram* (2) and as was said by Field and Beverley JJ., in *Soshi Bhusan Chand* v. *Grish Chunder Taluqdar* (4) is to show that "*defendant*" as it occurs in art 171 B does include a respondent.

Whether it includes a plaintiff-respondent or not is a matter undoubtedly settled by the ruling in the case of *Narain Das* v. [269] *Lajja Ram* (2). The rulings of the Full Bench of Madras and other High Courts to which full reference has been made by me in *Muhammad Husain* v. *Khushalo* (5) which is also a Full Bench case, need not be referred to again. But why the word 'defendant' should be interpreted as excluding a defendant who is admittedly a defendant, but happens also to be a respondent, I confess with due deference that I fail to see. These words must be understood either with due regard to s. 582 or not. If so understood, then by s. 3 of the Civil Procedure Code the '*defendant*' in art. 171 B must be understood as defendant is understood in the Civil Procedure Code, and s. 582 is an essential part of that Code and defines a respondent. If the Civil Procedure Code lends us no help, then there is no rule of interpretation which would limit a term in itself general only to a defendant who does not happen to be a respondent.

In this view of course I am in a portion of my *ratio decidendi* departing from the judgment in *Narain Das* v. *Lajja Ram* (2). But it is in consequence of the opinion of the majority of the Judges that I cannot utilize

(1) 7 A. 734. (2) 7 A. 693. (3) 9 A. 118. (4) 11 C. 594. (5) 10 A. 223.

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the definition of '*defendant*' in s. 582 for interpreting art. 171 B of the Limitation Act.

I am of opinion that inasmuch as the Full Bench case of this Court in *Narain Das* v. *Lajja Ram* (1) does not settle the exact point now before me, the word 'defendant' read with clause 2 of s. 3 of the Civil Procedure Code in conjunction with s. 582 does include a defendant-respondent, and that a plaintiff-appellant not applying within the time provided by art. 171 B to bring upon the record the proper parties, is liable to the abatement of his appeal within the meaning of s. 368 of the Civil Procedure Code read with s. 582. I would therefore allow the application made by the heir of the deceased, and I would declare that this appeal should abate with costs.

As to the second application, *viz.*, that made by Mr. *Conlan*, it follows from what I have said that that application cannot be maintained, and those reasons are in principle the same as those stated by me in the case of *Narain Das* v. *Lajja Ram* (1) as also in my recent judgment in *Muhammad Hussain* v. *Khushalo* (2). It is an application which admittedly having been made after the lapse [270] of sixty days as provided by art. 171 B is an application which cannot be entertained, because we should then be placing upon the record of an appeal which has abated persons who are the heirs of deceased respondents. I would therefore reject that application (3).

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10 A 270 (F.B.) = 8 A.W.N. (1888) 114.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

RAM SARUP (*Defendant*) *v.* RAM SAHAI AND ANOTHER (*Plaintiffs*).*
[30th April, 1888.]

Act XV of 1877 (*Limitation Act*), *sch. ii., Nos.* 171 *B*, 178 –*Death of plaintiff-respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.*

Held, by the Full Bench that inasmuch as art. 178 and not art. 171 B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place.

THIS was a second appeal which came for hearing before Brodhurst and Mahmood, JJ., who on the 24th March, 1888, passed the folowing order :—

"In this case Mr. *Kashi Prasad*, on behalf of the appellant, states that one the of plaintiffs-respondents, Ram Sahasi, died more than sixty days ago, and that the other plaintiff-respondent, Sadho, is not to be found. Upon this state of things the learned pleader contends that his client, Ram Sarup, being defendant-appellant, was not bound to make

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* Second Appeal No. 2046 of 1886 from a decree of Rai Mata Din, Officiating Additional Subordinate Judge of Ghazipur, dated the 29th May, 1886, reversing a decree of Syed Zain-ul-abdin, Munsif of Korantadih, dated the 5th December, 1885.

(1) 7 A. 693. (2) 10 A 223. (3) See Act VII of 1888, s. 66 (4).

any application to implead any person as respondent to the suit as legal representative of the plaintiff-respondent, and that, there being neither any right to apply for such substitution of parties nor any period of limitation applicable thereto, the result would be that the suit will abate, and that the decree of the lower appellate Court should be reversed. The point so raised is very similar to that which has arisen in some other cases, such as *Chajmal Das* v. *Jagdamba Prasad* (1), which is to be considered, by the order of the learned Chief Justice, by a Bench of three Judges. We think that this case should also be disposed of [271] by the same Bench, and with this recommendation we direct it to be laid before the learned Chief Justice for orders."

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The case was ultimately referred to the Full Bench by an order dated the 28th April, 1888.

Munshi *Kashi Prasad* and Lala *Juala Prasad*, for the appellant.

A Pandit *Bishambhar Nath*, for the respondent.

JUDGMENTS,

EDGE, C. J.— In this case one of the two plaintiffs-respondent died pending the appeal. Three years have not expired since the day of his death. The defendant-appellant applies to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent. For the reason stated by the majority of this Court in *Muhammad Husain* v. *Khushalo* (2) I am of opinion that we should not accede to this request until we have the proper parties on the record. We have held that art. 178 and not art. 171 B applies to the case of a deceased respondent, be he plaintiff or defendant in the suit. In my opinion the motion should be refused.

STRAIGHT, J.—I am of opinion that the contention of Mr. *Kashi Prasad*, which has been referred to this Full Bench by the Divisional Bench for disposal, should be decided against him, and that he should not be allowed to proceed with the trial of this appeal, and to have it decreed as against the respondent who has died since the institution of the appeal until the period of limitation provided for in art. 178 of the Limitation Law has expired and the legal representatives or heirs of such deceased respondent have failed to make such application to be brought on the record. That contention of the learned Pleader for the appellant in the appeal must be taken to be disposed of, and the case will come on in due course.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I concur.

MAHMOOD, J.—Feeling myself bound by the opinion of the majority I must bow to the conclusion at which they have arrived. I concur in the order which they have made (3).

(1) 10 A 260, (2) 10 A. 223 (3) See Act VII of 1888, s. 66 (4).

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PRIVY COUNCIL.

PRESENT :

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces.*]

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[272] SARTAJ KUARI AND ANOTHER (*Defendants*) *v.* DEORAJ KUARI, MOTHER AND GUARDIAN OF LAL NARAINDAS BAHADUR PAL (*Plaintiff*).
[5th, 6th, 7th, 8th, December, 1887, and 21st January, 1888.]

Custom—Impartible estate—Right of possessor of impartible estate to alienate.

There is no such co-parcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of the estate, that it does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability dependent on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable.

[**F.**, 13 M. 197 (204) ; 20 M. 167 ; 22 M. 383 (**P.C.**) = 26 I.A. 83; **Appl.**, (1912), M.W.N. 790 (792-797) ; **Com.**, 27 M. 435 (460, 461) ; **Disc.**, 12 M.L.T. 245 (252) = 23 M. L.J. 79. **Disc. and Expl.** 18 M. 287 (292, 293); **R.**, 20 A. 537 ; 34 A. 79 (85) = 8 A.L J. 1251 = 12 Ind. Cas. 915 ; 29 B. 51 (58) = 6 Bom. L.R. 268 ; 22 C. 156 (163) ; 31 C. 111 (118) ; 38 C. 182 (186) = 15 C.W.N. 49 = 7 Ind. Cas. 806; **R.**, 16 M. 11 ; 17 M. 316 (341) ; 17 M. 362 (365) ; 18 M. 287 ; 21 M. 18 (25) ; 22 M. 110 (112) ; 22 M. 538 (549) ; 24 M. 147 (153) (**P.C.**) = 27 I.A. 151 = 10 M.L.J. 294 = 5 C.W.N. 74 = 2 Bom. L.R. 945 ; 27 M. 131 (142) (**P.C.**) = 6 Bom. L.R. 7 = 8 C. W.N. 186 ; 29 M. 453 = 16 M.L.J. 339 = 1 M.L.T. 272 ; 30 M. 255 (261) = 17 M. L.J. 367 = 2 M.L.T. 167 ; 9 A.L.J 40 = 13 Ind. Cas. 269 = 11 M.L.T. 71 = (1912) ; M.W.N. 16 ; 1 C.L.J. 557 (561. 562) ; 12 C.W.N. 966 (968) ; 13 C.W.N. 1013 (1021) = 6 M.L.T. 68 ; **R.**, 16 C.W.N. 783 (784) = 15 Ind. Cas. 657 (658); 17 C.W. N. 280 (287) = 17 C.L.J. 38 ; 22 M.L.J. 85 (92, 103) = 10 M.L.T. 463 = (1911), M. W.N. 539 ; 23 M.L.J. 658 (665) = 12 M.L.T. 57 = (1913), M.W N. 86 (88) ; 12M. L.T. 245 = 15 Ind. Cas. 412 (413) ; 13 Ind. Cas. 7 ; 18 P.R. 1908 = 156 P.L.R. 1908 = 19 P.W.R. 1908 (**F.B.**) ; **D.**, 31 C. 224 (226) ; 35 C. 823 (829, 835) = 8 C. L.J. 124 = 12 C.W.N. 958 ; 23 M.L.J. 79 (81).]

APPEAL from a decree (4th May, 1883) of the High Court affirming a decree (2nd October, 1880) of the Subordinate Judge of Gorakhpur.

The question was of the validity of a gift of seventeen villages in Gorakhpur, forming part of the hereditary and impartible raj estate in the possession of the Raja of Mahauli. It was in favour of a younger wife, and was disputed by the Raja' s eldest son, still a minor, represented by his mother and guardian.

The instrument which the son sought to have declared void was dated the 18th February, 1871.

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It recited that Raja Bhawani Ghulam Pal was the proprietor of a number of villages in the pargana of Mahauli, constituting [273] his raj estate, which had been settled with him for the revenue; and that he was, with regard to the nature of the raj and riasat, and also with regard to the custom and usage of the family and of the country, the sole permanent proprietor having full power to transfer the estate. The instrument then declared that the Raja thereby made a gift to his wife, Rani Sartaj Kuari, of the seventeen villages described therein, forming part of his "ilaka," and had put her into possession, she having full proprietary rights therein and being entitled to obtain *dakhil kharij*.

The plaintiff's ground of claim was that, by Hindu law and usage, the Raja had no power to alienate any part of the raj estate. The Raja denied this, alleging in his defence a right to make any transfer; adding that, in consequence of the separation of members of the family, and for other reasons, transfers of every description had been made of the raj estate from of old.

The judgment of the Court of first instance was against the validity of the alienation.

On appeal the High Court (Straight, J. and Tyrrell, J.) gave judgment as follows:

"The case is one of considearble moment, not only from the value of the property in suit, but the importance of the legal questions involved as to the precise character of the property of the raj and the power of the Raja in regard to it. Before addressing ourselves to the points raised for our determination, a few words may be conveniently devoted to recording the history of this Mahauli raj. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the province of Oudh, and Mahauli and Rasulpur, in the district of Basti, in these Provinces. It would appear that some 300 years ago two brothers, by name Alakdeo and Tilakdeo, Surajbansi Rajputs, hailing, so they alleged, from Kumaun, invaded the locality in which the property above mentioned is situate, and, killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years attached to the family. Originally the dwelling-house of [274] the Raja was in the village of Mahauli, but it was afterwards removed to Mahson, where it now is situated. The seventeen villages to which the deed of gift in favour of Rani Sartaj Kuari relats are nearly all situated in Mahson, and are estimated, in round figures, to be worth some five lakhs of rupees and form, so the plaintiff alleges, the most valuable part of the raj properties. The names of the several Rajas who have preceded the present incumbent in their order are, as far as we have been able to ascertain them;—(1) Dip, (2) Jaswant, (3) Kalandar, (4) Bakhtawar, (5) Sarfraz, (6) Shamshere, and (7) Mardan, father of the defendant Ghulam and grandfather of the plaintiff. Of the above, with the exception of Kalandar, who is said to have been selected in preference to his elder brother Zorawar, though the evidence as to this is of the vaguest and most unsatisfactory kind, succession to the *gaddi* has been ruled by primogeniture.

"We now revert to the contentions urged by the appellants' counsel in support of the appeal. Briefly they are—1st, that the plaintiff has no title to come into Court during his father's lifetime, for he is neither a co-proprietor nor a reversioner; 2nd, that if he has a right to institute a suit,

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it rests with him to establish the inalienability of the raj, and that under any circumstances the defendants have conclusively proved the competence of the Raja to make the gift impeached. The first question involves the consideration of many points of no slight difficulty and complexity, and their examination has been not a little perplexed by a perusal of the numerous authorities to which we were referred in the course of the arguments at the hearing of the appeal. Putting aside the suggestion of custom or usage made in the plaint, which we do not feel called upon to discuss, the position asserted by the plaintiff apparently resolves itself into this :—The estate now in possession of my father is ancestral; he and I are members of a joint Hindu family, ordinarily subject to the law of the Mitakshara. If I survive him, I must under that law succeed to the estate. Although it is admittedly impartible in the sense that I cannot demand partition thereof, or have joint enjoyment of the income derived therefrom, yet I have, so to speak, a limited proprietorship therein in the shape of rights to maintenance and succession by survivorship.' In other words, the plaintiff claims that except in so far as from the [275] nature of the estate they are in applicable, his case must be determined according to the principles of the Hindu law which govern families and their property. As a matter of first impression, it appears to us that this contention is based on grounds of justice and good sense, but it will be convenient at once to see how far authority supports it."

The judgment of the High Court then quoted passages from several judgments of the Judicial Committee, of which the effect is given by their Lordships in their judgment. They are therefore here omitted. The cases referred to by the Judges of the High Court were *Katama Natchiar* v. *The Raja of Sivagunga* (1); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (2); *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondora* (3); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4); *Periasami* v. *Periasami* (5); *Doorga Persad Singh* v. *Doorga Konwari* (6).

To the Judges of the High Court it seemed that the principles laid down by the Judicial Committee established that a raj, or impartible zemindari, might be a portion of a joint family estate; and that, in the absence of a custom to the contrary, succession to it would be regulated by the ordinary rules of Hindu law. And they added : "The conclusion to be deduced, as it appears to us, from the observations of their Lordships is that where there is no local or family custom overriding the general law, the succession to a raj or impartible zemindari, according to Hindu law, goes by primogeniture. There is one other decision of the Privy Council—*Doorga Pershad Singh* v. *Doorga Konwari* (6), in which the passage from the Shivagunga case is quoted with approval, and where the following material remarks to the question under our consideration occur:—"The impartibility of the property does not destroy its nature as joint family property or render it a separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate." In this connection we may also refer to the judgment reported in 13, [276] Moore's Indian Appeals, page 333, in the course of which it is observed :—" It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession

(1) 9 M.I.A. 543, at pp. 588, 592. (2) 12 M.I.A. 523. (3) 13 M.I.A. 333.
(4) 14 M.I.A. 570. (5) 5 I.A. 61. (6) 4 C. 201 = 5 I. A. 149.

to separate estate.'' So in *Periasami* v. *Periasami* (1), it is said :—"He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers; the latter taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

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"We have thought it right to quote at this length from these Privy Council rulings, because the counsel for the appellants greatly pressed upon us a case to be found at page 523 of the 12th Vol. of Moore's Indian Appeals, which is known as the Tipperah case, and particularly the following passage on page 540 :—Still, when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction also involving a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. With deference, we can only remark that we find ourselves wholly unable to reconcile this view of the matter with the opinions expressed in the other judgments of their Lordships from which we have quoted, and by which in every aspect of the question before us we prefer to be guided. An impartible raj or zamindari must, it seems to us, be one of two things—either a separate estate conferring independent and absolute proprietary powers and carrying its own special rules of succession, or a joint ancestral estate pertaining and belonging to a joint undivided family. Because it is impartible it is not necessarily separate, for its impartibility does not 'destroy its nature as joint family property,' nor does it make the succession follow the succession of separate estates.' If, then, it can be considered joint property, is it to be so merely in name? It must be conceded that the complete rights [277] of ordinary co-parcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in, or, perhaps, to use a more correct term, subordinate to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership. This is matter, however, more pertinent to the second question we shall presently have to consider. As to the first—namely, the competency of the plaintiff to maintain this suit—we think that, in the absence of any custom to the contrary, he and his father being Hindus and members of a joint Hindu family, and, as such, subject to the law of the Mitakshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property, in which he has an immediate present interest and a right of succession as eldest son. In this view of the matter the first contention urged for the appellant fails.

"In support of his second point—namely, that the onus was on the plaintiff to establish the inalienability of the raj—the counsel for the appellant referred us to *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (2). We have very carefully perused that ruling of their Lordships of the Privy Council, as also the judgment of the High Court of Calcutta, from whose decision the appeal was preferred, and it seems to us sufficient to say that the property to which the litigation related was situated in Lower

(1) 5 I.A. 61.

(2) 8 I. A. 248 = 8 C. 199.

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Bengal, where the parties would be subject to the Dayabhaga and not the Mitakshara. Under the general law, therefore, by which they were governed, the Raja had power to make alienations, and it was for those who denied his right to do so to establish a custom of inalienability that would override the general law. In the case before us, however, the Mitakshara is the law of the parties; and if we have correctly held that the Mahauli raj estate is joint family property, then, save for urgent or necessary expenses of the family, no one member, even though he stands in the position of father or manager, can alienate it or any part of it without the consent of all. Such at least is the view of the Hindu law that has been always recognised by this Court, in a long and, as far as we know, [278] unbroken series of decisions from which we should hesitate to depart. It cannot be pretended that an absolute gift of seventeen of the best and most valuable villages of the Raj to the junior wife is within the exception. On the contrary, to recognise such a power in a Hindu father would defeat the first principles of the Hindu law of inheritance and render the continuance of the joint family system impossible. We put it to the counsel for the appellant in the course of his argument, that if he carried it to its logical conclusion, a Raja might dissipate the whole of his ancestral estate, and of his own free will extinguish the raj; and he frankly admitted that he did not shrink from going that length. If for a moment we can entertain questions of policy, we doubt the expediency or propriety of allowing any such doctrine to go abroad. Looking at the matter in its practical aspect, and having regard to the origin and growth of these small powers or principalities, which are not without purpose or usefulness, we are not prepared to admit, at any rate so far as the law governing these Provinces is concernd, except where it is clearly overridden by well-recognised family custom, any such absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property. For to do so would involve the inconsistency that while the Raja, or incumbent for the time being, in no way controls the succession after him, he may nevertheless effectually deprive his successor of anything to succeed to. Until corrected by higher authority, we must hold that the law of the Mitakshara is applicable to the present case, and that the defendant Raja and the minor plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, the alienation impeached by this suit, not having been made for necessary purposes, is void and must be set aside.

"It only remains for us now to deal with the third contention put forward by the appellant's counsel, namely, that a custom has always existed in the Mahauli raj whereby the Raja for the time being can make alienations of the character challenged in this suit, and that this has been done over a long course of years. They contended that the custom has been well established by their evidence; that some of these witnesses are alienees in possession of parts of the estate conferred on them under the operation of this [279] custom by former Rajas; that no evidence was offered on the other side to contradict or qualify this testimony; and that it is not shown that objection was ever taken to any act of alienation previous to that which is the subject of this action."

In regard to the evidence relating to custom, the Judges said—

"We have to determine whether this evidence sufficiently shows (1) that previous Rajas had, by custom and usage, the absolute uncontrolled powers over the estate claimed by the defendants; (2) that they exercised such powers; (3) that they exercised them in the way and to

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the extent of the present alienation; and (4) that this custom is not only ancient and certain, but is also reasonable in itself as well as invariable and uncontradicted in its application:" and they concluded thus:—

"Having carefully considered this testimony, we cannot find that it establishes the fact, much less the custom, of any alienation so large in its scope, and so absolute in its character, as that made by the present Raja in favour, exclusively and for ever, of his younger Rani. We are told of settlements on cadets of the Rajah's house (*Babuai*): of pious and charitable gifts (*birt*, *shankalap*, and *muafi*), and of life allowances for maintenance or education of young Babus. We hear nothing of such an alienation as is challenged on behalf of the Raja apparent in this action, nor do we find anything to show assertion by any Raja, prior to the father of the plaintiff, of a right or title to permanently transfer the estate attaching to the raj. It remains to see how the documentary evidence helps the defendants' case. It is sufficient to say that it does not carry it a step beyond the point reached by the oral testimony. It indicates transfers by Rajas of certain bighas in mauzas by way of religious and charitable grants 'under the usual *birt* conditions and limitations;' transfers of waste lands to Ranis and others to bring into cultivation on a muafi tenure; and gifts of parts of mauzas or of an entire mauza to 'Babus' in virtue of their *Babuai* right. There are two cases only that wear an apparently different aspect. These are the alleged 'gifts' to the prostitute Musammat Roshan and to Rani Taliwand Kuari. The latter extended to three mauzas only, and the deed of gift has not [280] been produced. We have noticed above the circumstances which favour the theory that it was not an absolute and perpetual conveyance of this property to the Rani, the donee, but partook rather of the character of a life settlement on her and *Babuai* for the sons she had borne to the Raja donor; but even if it were, one such exceptional instance would be wholly inadequate to establish the custom prayed in aid by the defendants.

"As to the prostitute's gift that conveyed to her 'the muafi rights and interests' in one village only, mauza Koharwa, as her '*birt* property,' for which she paid malikana to the Raja, it is needless to point out that this differed *toto cœlo* from the assignment in perpetuity under the deed which is assailed in the present litigation. We are of opinion, for the foregoing reasons, that this appeal fails and should be dismissed with costs, and we order accordingly."

On this appeal,

Mr. R. V. *Doyne*, for the appellants, argued that the judgment of the High Court was erroneous, and that the gift made by the Raja was valid. The plaintiff could not allege that he had an estate in the nature of a share in joint family property, the raj estate being impartible, and the plaintiff being, at most, entitled to maintenance. Also, on the evidence, it was clear that so much of the estate had been alienated from time to time, without objection made by any son or other expectant heir, that the proof of the custom affirming the right to alienate outweighed that of a custom to the contrary. It should, therefore, have been held that the Raja had power to alienate, and was controlled in the exercise of such power by his son. No interest in impartible estate attached to a son at birth. That right in the case of impartible estate did not, whatever the son's rights were, commence at his birth, as in the case of ordinary estates under the Mitakshara, and there remained no reason for distinguishing such a case as the present from those already disposed of, by the Bengal High Court, in favour of the liberty of alienation. It had not been proved

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that custom prohibited such an alienation as had been made; on the contrary, the estate was shown to have been reduced in this way to less than it formerly was. Reference was made to *Raja* [281] *Ramnarain Singh* v. *Pertum Singh* (1), *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* (2), *Thakoor Kapilnath Sahai Deo* v. *The Government* (3), which cases, it was contended, were distinguishable from the present, as they related to ancestral estate not diminished by alienation. *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (4) *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondora* (5), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (6). There was no ground for applying the Mitakshara rule as to sons controlling their father's alienation to an impartible raj estate, large portions of which had been subjected to customary alienation.

Mr. *F. H. Jeune* and Mr. *Reginald C. Saunders*, for the respondent, argued, in support of the judgment of the High Court, that the Raja's alienation was invalid. The raj estate was by custom impartible and descended to the eldest son: but the custom prevailed only to this extent; and no right of alienation save to make such usual gifts as were made by way of *birt*, or for pious purposes, or other objects, such as maintenance of dependents or moderate grants incidental to the Raja's position, had been shown to exist by custom. The gifts in question did not answer that description. Although by custom the right of succession belonged only to one member of the family at a time, the other members might in their turn succeed, and were also entitled to be maintained out of the income of the estate. Thus there was a joint interest in the estate, although there was no right to demand a partition. The custom regulating the inheritance only to a certain extent, the law of the Mitakshara, as a necessary result, prevailed as to all other rights.

It was not contended that the raj estate was inalienable only because it was impartible, but it was argued that it was inalienable in the absence of any proved custom of alienation, the ancient Hindu raj not admitting, save in the above exceptional cases, and for reasons of necessity, such as the general law regarded, alienation of the family estate. Although it was impartible, it was not separate estate; and in a qualified, if not in the full, sense it was joint family estate. In place of the ordinary right of partition [282] there stood the special rule of inheritance, but beyond this customary rule, there was a community of interest derived from the general law; and the estate remained that of a joint family, in which each member, being entitled to interest from his birth, and to his turn of succession, had a joint interest. The question in this appeal, in effect, resolved itself into whether the burden of proving the custom, sufficiently to displace the Mitakshara law, had been discharged or not. They contended that to prove this custom of alienation was a burden cast upon those who supported it, and that it had not been discharged.

Reference was made to *Katama Nachiar* v. *The Raja of Shivaganga* (7), *Sri Raja Yenumula Gavuridevamma Garu* v. *Sri Raja Yenumula Ramandora Garu* (8), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (6), *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankandora* (5).

The cases from the Bengal Law Reports cited in the argument for the appellants were also referred to.

(1) 11 B.L.R. 397. (2) 9 B.L.R. 274. (3) 13 B.L.R. 445.
(4) 8 I.A. 248 = 8, C. 199. (5) 13 M.I.A. 333. (6) 12 M.I.A. 523.
(7) 9 M.I.A. at p. 588. (8) 6 M.H.C. 93.

Mr. *R. V. Doyne*, for the appellants, was not called upon to reply. 1888
Their Lordships' judgment was delivered by Sir R. Couch. JAN. 21.

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JUDGMENT.

SIR R. COUCH.—The question in this appeal is whether a gift of seventeen villages made by the appellant Raja Bhawani Ghulam Pal on the 18th February, 1887, to the appellant, Rani Sartaj Kuari, his younger wife, is valid. The suit was brought by the respondent, as mother and guardian of Lal Narindar Bahadur Pal, the minor son of Bhawani Gulam Pal, against the appellants. The plaint stated that the estate of Mahauli had been in the plaintiff's family for a very long time, and, according to the custom of the country and its neighbourhood and the provisions of Hindu law, the eldest son of the Raja succeeds to the estate; that since the establishment of the raj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognised usage, the successor of the Raja and occupant of the *gaddi* had had no other right under any circumstances except to enjoy [283] possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The plaint then stated the gift and prayed for a decree for establishment and declaration of the plaintiff's right by voidance of the deed of gift. The written statements of the defendants alleged that Bhawani Ghulam Pal was proprietor of the estate and authorized to make any transfer, and it would be proved on enquiry that, on account of the separation of the family and other reasons, transfers of every description had been made in the family from of old, without any objection or obstruction being offered.

The history of the family is given in the judgment of the High Court. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the Province of Oudh, and Mahauli and Rasalpur in the district of Basti, in the North-Western Provinces. It would appear that, some 300 years ago, two brothers, named Alakdeo and Tilakdeo, Surajbansi Rajputs, coming, as they alleged, from Kumaun, invaded the locality in which the property is situated, and killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years been attached to the family. It was admitted that the raj or estate was impartible ; that there was in the family the custom of primogeniture ; and that the family was governed by the law of the Mitakshara. The evidence as to the size of the estate originally was very vague, some witnesses saying it contained 600 or 700 villages and others 1,300. At the time of the gift in question it did not contain more than 100. The estate had been thus reduced by gifts by successive Rajas to younger members of the family, who were called Babus, for maintenance, and to Brahmins for religious or charitable purposes. The former classes of gifts were called "birt" and the latter "shankalp." The former were stated by the witnesses to have been of considerable extent, some being of 50 or more villages. It did not appear that a Raja had ever made an alienation by way of [284] sale of any part of the estate. The Subordinate Judge framed the following issue :—

"Is the defendant competent to execute the deed of gift during his lifetime in favour of his second wife according to the family custom and Hindu law? Is the deed of gift legal? Has the plaintiff no right, according

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to Hindu law, to get it cancelled? Is the plaintiff alone competent to sue in the presence of other rightful heirs, and is the plaintiff's claim legal or not?" The Subordinate Judge decided that the deed of gift was invalid and made a decree for the plaintiff. He appears to have held that, the estate being impartible, it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the defendant had failed to prove this.

The defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the plaintiff and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property in which he had an immediate present interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing these (the North-West) Provinces is concerned, except where it is clearly overridden by well-recognised family custom, an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the defendant Raja and the minor plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, and the law of the Mitakshara being applicable, the gift, not having been made for necessary purposes, was void and must be set aside. Accordingly the appeal was dismissed with costs.

A similar view of the law was taken by the High Court at Calcutta in *Raja Ramnarain Singh* v. *Pertum Singh* (1).

The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dayabhaga, the law in Bengal, is found in ch. 1, s. v. 27, where it is said that property in the paternal or ancestral estate is by birth, and the [285] father is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. In this case, if there were no family custom, the Rajah's power over the estate would be governed by this law, and the gift in question would be void. But, as was said by this Committee in the Tipperah case, 12 Moore. I. A, 542, "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." It is admitted that the raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty.

The Judges of the High Court have quoted in support of their view passages from several judgments of this committee. In all of them the question was as to the succession to the property on the death of the Raja or zemindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. The saying in the *Shivagunga* case (2) "the zamindari, though impartible, was part of the common family property," must be understood with reference to the question which was then before their Lordship. The question of the right of an eldest son or other son to control the father did not arise in that case. In *Doorga Prasad Singh* v. *Durga Kunwari* (3) it is evident from what is quoted by the High Court that this question was not considered. In *Periasami* v. *Periasami* (4)

(1) 11 B.L.R. 397. (2) 9 M.I.A. at p. 593. (3) 4 C. 201. (4) 5 I.A. 61.

the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shown by the previous sentence to be the younger brothers "taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir." In *Raja Yanumula Venkayamah* v. *Raja Yanumula Boochia Vankondora* (1), which was quoted in the argument for the respondent from a passage in the judgment at p. 339, where the estate is spoken [286] of as being part of the common family property, though impartible, the question in the suit being in regard to the succession, their Lordships at p. 340, after noticing evidence of the grants of portions of the estate, say: "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist.

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And in *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee* (2), the case of the zamindari of Hansapore in Behar, where the Mitakshara law prevails, an impartible raj, which by family usage and custom descended according to the rule of primogeniture, subject to the burthen of making Babuana allowances to the junior members of the family for maintenance, the question was whether the Raja had power to make a testamentary disposition of the raj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "*cessante ratione legis cessat et ipsa lex.*"

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common." (Mitakshara, ch. 1, s. 1., v. 30).

The argument in support of the view of the High Court appears to be that although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient [287] to enable them to prevent an alienation. The learned Judges of the High Court say: "it must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

In the case in the 11th Bengal L.R. 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405)

(1) 13 I.A. 333. (2) 12 M.I.A. 1.

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in the judgment: "It appears to me, then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family, and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or incumber the estate excepting upon a justification of a family necessity." Both Courts appear to have thought that, in order to prevent alienation by the father, there must be a co-ownership in the son or sons.

The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the Hansapur case there was a right to have Babuana allowances as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed. In [288] Bengal there is joint family property, but where property is held by the father as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition; Dayabhaga, ch. 1. In the case of the raj of Patcum in Chota Nagpore, which was admitted to be an impartible raj, and one in which the custom of primogeniture existed, it was held by the High Court at Calcutta (1) that it was necessary for the plaintiff to show that there was some custom which would prevent the operation of the general law empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed (2). In *Narain Khootia* v. *Lokenath Khootia* (3) it was held by the same High Court that the fact that the raj of Chota Nagpore is impartible does not prevent the Maharaja for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the law of the Mitakshara. It had been previously held by the same Court in a case in 13 Bengal L. R. 445, where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shown to be inalienable. Their Lordships think this is the correct view.

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in

(1) 5 C. 113. (2) 8 I.A. 248. (3) 7 C. 461.

some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the *onus* was upon the defendants (the appellants) to prove that by custom the estate was alienable, and they have found that the custom was [289] not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the plaintiff's favour; but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. For the foregoing reasons, their Lordships are of opinion that the plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The respondent will pay the costs of this appeal.

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Solicitors for the appellants: Messrs. *Ford, Ranken Ford*, and *Ford*.
Solicitors for the respondents: Messrs. *Bird* and *Moore*.

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10 A. 289.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

MUHAMMAD ALLAHDAD KHAN AND ANOTHER (*Plaintiffs*) v. MUHAMMAD ISMAIL KHAN AND OTHERS (*Defendants*).*
[7th April, 1888.]

Muhammadan Law—Inheritance—Legitimacy—Acknowledgment of sonship—Practice—Remand—Civil Procedure Code, ss. 562, 563, 564, 566.

Per EDGE, C J., and STRAIGHT, J.—The rules of the Muhammadan law relating to acknowledgment by a Muhammadan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him.

[290] *Per* MAHMOOD, J.—Although, according to the Muhammadan law, *ikrar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and others matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Muhammadan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by the Muhammadan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and

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* Appeal No. 1 of 1888 under s. 10 of the Letters Patent.

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there is nothing in the Muhammadan law similar to adoption as recognised by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty.

Ashruf-cod-Dowlah Amhed Hossein Khan v. *Hyder Hossein Khan* (1), *Mahammad Azmat Ali Khan* v. *Lall Begam* (2), and *Sadakat Hossein* v. *Mahomed Yusuf* (3) referred to.

In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiff's legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case, the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below.

Held by EDGE, C. J., and MAHMOOD, J., (STRAIGHT, J., dissenting) that s. 562 of the Civil Procedure Code applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence ; and that, as in the present case, evidence had been excluded in this broad sense, s. 562 (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues.

[291] *Held* by STRAIGHT, J., *contra*, that, with reference to ss. 562, 563 and 564, the case could not be remanded under s. 562 because it had not been disposed of upon a perliminary point so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under s. 566.

[F., 15 A. 396 (398) ; 23 C. 130 ; 27 C. 801; 5 C.L.J. 664 (667) ; 190 P.L.R. 1908 ; R., 9 C.W.N. 352 (362) ; 16 C.W.N. 231 (234) ; 16 M. 207 (210) ; D., 6 P.R. (1909).]

[See 8 A. 234, wherein this appeal has arisen.]

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Brodhurst, J., dated the 22nd March, 1886, dissenting from the judgment of Petheram, C. J., and affirming the decision of the Subordinate Judge of Meerut, who had dismissed the suit. The facts of the case are stated in the report of the case before the Division Bench (4) and in the judgment of Straight, J., now reported. For the purpose of making the arguments of counsel intelligible the following summary will be sufficient :—The parties were Sunni Muhammadans. The suit was brought by Muhammad Allahdad Khan and Musammat Hakim-un-nissa (to whom Muhammad Allahdad Khan had sold his rights and interests in a portion of the property in dispute) against Muhammad Ismail Khan and his three sisters, and three other persons, for a declaration of right to and possession of two shares in certain villages left by Ghulam Ghaus Khan, father of the first four defendants, upon the ground that the first-mentioned plaintiff was the eldest son of Ghulam Ghaus Khan and brother of the defendants, and was therefore entitled to the shares, under the Muhammadan law, by right of succession. The defence of the first four defendants was

(1) 11 M.I.A. 94. (2) 9 I.A. 8 = 8 C. 422. (3) 11 I.A. 31 = 10 C. 663. (4) 8 A. 234.

to the effect that Allahdad Khan was only the step-son of Ghulam Ghaus Khan, having been born prior to the marriage of his mother, Moti Begam, with Ghulam Ghaus Khan. The case of the plaintiffs was that even if they failed to prove that Allahdad Khan was the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had, on various occasions, acknowledged him to be his son and therefore, under the Muhammadan law, Allahdad Khan was entitled to inherit as the legitimate son of Ghulam Ghaus Khan. They filed certain letters and other documents in which the deceased expressly referred to Allahdad Khan as his son; and contended that these references amounted to acknowledgments of him as a son by the deceased, which, under the Muhammadan law, gave him the status of a legitimate son.

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[292] The defendants 5, 6, 7, held a lease of parts of the property in suit from the daughters of Ghulam Ghaus Khan. They filed a written statement of defence in the following terms:—

"That defendants have taken the lease of the villages from the actual owners, and they have reason to believe that the plaintiff is not the legitimate son of Ghulam Ghaus Khan. Defendants have, year after year, paid in good faith the lease-money to the daughters of Ghulam Ghaus Khan, the owners of the property, from whom defendants have taken the lease. Defendants have been unnecessarily joined as parties to the suit."

No issue was fixed by the Court of first instance with reference to this written statement. The issues which it framed were:—"1. Whether Allahdad Khan, plaintiff, is a son of Ghulam Ghaus Khan? 2. Whether this suit is vitiated by the defect of champerty and ought for that reason to fail? 3. What amount of stamp duty ought, according to law, to have been paid on the deed to Hakim-un-nissa, and is it receivable in evidence in this suit? 4. Had Allahdad Khan, plaintiff, knowledge of the proceedings in the former suits while they were pending, and is his not being a party to them a bar to this suit? 5. What amount of debts, if any, due by Ghulam Ghaus Khan has been paid by Ismail Khan? 6. What sort of decree, if any, is the plaintiff entitled to?"

The Court decided the first four of these issues only. After dealing at length with the first issue and deciding it against the plaintiffs, the Subordinate Judge observed that, in his view of the case, it was not necessary to determine the other issues.

The conclusions of the learned Judges of the Division Bench hearing the appeal are thus summarised in the head note of the report at I.L.R., 8 All. 235:—"*Held* by Petheram, C. J., that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son or intended to give him the status of legitimacy. *Held* by Brodhurst, J., that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy, and in the [293] sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the status of a son capable of inheriting."

The grounds on which the plaintiffs appealed from the judgment of Brodhurst, J., were as follows:—

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"1. Because the appellant is proved to be a legitimate son of Ghulam Ghaus Khan.

"2. Because under the Muhammadan law, the acknowledgments of Ghulam Ghaus Khan are sufficient to establish that the appellant is his legitimate son.

"3. Because the onus of proof was on the respondent, and he has failed to discharge that onus."

Mr. *G. E. A. Ross* and the Hon. Pandit *Ajudhia Nath*, for the appellants.

Mr. *G. T. Spankie*, the Hon. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondents.

The Hon. Pandit *Ajudhia Nath* for the appellants, referred to a passage in Syed Amir Ali's "Personal law of the Muhammadans" (at pp. 166, 167), to the effect that the Muhammadan law does not recognise adoption in the sense of the Roman and Hindu legal systems or "any mode of *filiation* where the parentage of the person adopted is *known* to belong to a person other than the adopting father; but only the form of filiation created by *ikrar* or "acknowledgment," which can be established by the father alone. The essential condition of this mode of filiation is that the person to be filiated must not be known to be the son of a person other than the acknowledger. The author goes on to say that such acknowledgment may be either express or implied, and may be inferred from treatment of the child. See also Elberling's Treatise on Inheritance, &c., pp. 43, 44. The rules of the Muhammadan law as to acknowledgment are not mere rules of evidence. If a Muhammadan acknowledges another to be his brother, that, according to the Muhammadan law, does not prove the relationship asserted, but makes the acknowledged the heir of the acknow-[294]ledger in the absence of other heirs. On the other hand, an acknowledgment of another as son is deemed to constitute the consanguinity. He also referred to Baillie's Digest of the Muhammadan Law, pp. 404, 405.

[EDGE, C. J.—The passage at p. 105 seems to show that the circumstances must amount to a reasonable presumption of actual paternity.]

My contention is that it is not a question of presumptive or other evidence: the acknowledgment has the force of an affiliation.

[STRAIGHT, J., referred to *Najmooddeen Ahmed* v. *Bebee Zuhoorun* (1), in which Macpherson, J., cited the passage from Baillie, pp. 404, 405, as establishing the proposition that the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father.]

The acknowledgment is binding not only on the acknowledger but on all the world. The acknowledged person succeeds his brothers as their heir. This suggests that the acknowledgment does not merely operate by way of estoppel or conclusive proof. It cannot be contradicted either by the acknowledger or by any of the other members of his family. If ever brought into question, the inquiry must be limited to ascertaining whether in fact, words or conduct amounting to an acknowledgment were ever uttered or took place. If this is proved, the affiliation follows as a necessary legal consequence and cannot be questioned.

[MAHMOOD, J.—Syed Amir Ali at p. 188 of his book points out that the adoption practised by the pre Islamic Arabs was abolished by reason

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(1) 10 W. R. 45.

of the teaching of the Prophet; and in the Koran there is a verse which says that no one can be the son of a man from whose loins he has not sprung. It appears to me that, under the Muhammadan law, affiliation independent of blood relationship does not exist.

The passage referred to merely condemns the kind of adoption formerly practised; it does not prohibit affiliation by acknowledgment. See also Grady's edition of the *Hedaya* (Hamilton's translation), 2nd ed., p. 439 ("acknowledgments of parentage with [295] respect to infants"). This shows that once an acknowledgment has been proved, nothing further is required to constitute parentage.

[STRAIGHT, J., referred to *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (1).]

In Macnaghten's Principles of Muhammadan law (chapter IV, on Parentage) it is laid down that "if a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established."

[EDGE, C. J.—Does not that mean that, under the circumstances stated, the actual parentage is to be deemed proved?]

No; the actual parentage is, *ex hypothesi*, unknown, and the acknowledgment operates as an affiliation. It resembles in some respects the Kritrima form of adoption in the Hindu law.

In the Sirajiyyah (Sir William Jones' translation, edited by Rumsey, p. 3), in enumerating the different classes of heirs, reference is made "to him who was acknowledged as a kinsman through another, so as not to prove his consanguinity." This explains the passage already quoted from Elberling (p. 44); and the distinction which it implies is that an acknowledgment of collateral relationship does not establish consanguinity but that an acknowledgment of paternity does so. See also Grady's edition of the *Hedaya*, p. 438 ("but it is annulled by a subsequent acknowledgment of the stranger being his son," &c.). The *Hedaya* draws no distinction between rules of substantive law and rules of evidence or procedure. It discusses in the same place acknowledgment or *ikrar* in all its aspects and in connection with all matters in which it may come in question. [He also referred to the *Durrul Mukhtar*.]

[MAHMOOD, J,—If it is not a question of evidence, but acknowledgment operates as a sort of adoption or affiliation, why should it be essential to the validity of an acknowledgment that the acknowledged person should not be known to be son of any one other than the acknowledger?]

That condition was imposed in order to prevent adoptions of the kind practised by the pre-Islamic Arabs (Sale's translation of the [296] Koran, chapter XXXIII). The judgment of the Privy Council in *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (1) is strongly in my favour. See in particular pp. 17, 18 and 19 of the report. The decision is an authority for the principle that an acknowledgment by a Muhammadan is not merely evidence. It is a question of fact in each case whether there has or has not been an acknowledgment. If this is proved, the legitimacy is established. The passages at pp. 18, 19 clearly show where the question of evidence ends and the question of substantive law begins. What can the following sentence mean, if not the proposition for which I contend?—"An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged he acquires the status of legitimacy" (p. 18).

(1) 9 I.A. 8=8 C. 422.

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[EDGE, C. J.—Suppose a case in which a woman is know no be married, but her husband has been absent from her for more than a year. Could her child be affiliated by any one other than her husband? Or suppose that the husband though absent, has had an opportunity of access to the wife.]

In the former case there could be such an affiliation but s. 112 of the Evidence Act would prevent it in the latter.

[MAHMOOD, J.—Do you contend that the offspring of admitted or proved adultery could be legitimated by acknowledgment?]

Yes. The question is treated as an open one in *Sadakat Hossein* v. *Mahomed Yusuf* (1). In that case it was held by the Privy Council that the marriage of the acknowledger with the mother of the acknowledged was not proved; and nevertheless the acknowledgment was held to confer the status of legitimacy. Even if the question is regarded as one of evidence, the principles of the Muhammadan law on the subject should be applied: *Khajah Hidayat Oolah* v. *Rai Jan Khanum* (2), *Ranee Khujooroon-nisa* v. *Musammat Roushun Jehan* (3).

[MAHMOOD, J.—The case reported in Moore was decided long before the Evidence Act came into force.

[297] STRAIGHT, J.—It appears to me to lay down only what is practically the rule of English law, that marriage may be inferred from prolonged co-habitation.]

Oomda Beebee v. *Syud Shah Jonah Ali* (4) and *in the matter of the petition of Musammat Bibi Najib-un-nissa* (5) are strong authorities in my favour.

[MAHMOOD, J.—The judgments in those cases were based on Baillie's Digest and Macnaghten's Principles, and the learned Judges evidently had no opportunity of consulting the original texts.]

STRAIGHT, J., referred to *Mahomed Bauker Hossein Khan* v. *Shurf-oon-nissa Begam* (6) and *Muhammad Ismail Khan v. Fidayat-un-nissa* (7).

[EDGE, C. J.—Can we as a matter of law determine whether Ghulam Ghaus Khan intended what is alleged to be an acknowledgment to have the effect of an affiliation?]

I contend that if, upon the face of it, it is an acknowledgment, the question of intention cannot be gone into.

[EDGE, C. J.—Then you say that if one man says to another " You are my son, " the words, *prima facie*, work an affiliation?]

Yes, assuming that the person acknowledged admits the affiliation and the three conditions stated at pp. 167, 168 of Mr. Amir Ali's "Personal Law of the Muhammadans " are fulfilled. I contend, moreover, that in this case there is practically unrebutted evidence which, together with the presumptions of marriage from continued co-habitation and of legitimacy, establish that the appellant is the legitimate son of Ghulam Ghaus Khan.

Mr. *G. T. Spankie* for the respondents.—Assuming the question to be one of substantive law, and not merely of evidence, still the " acknowledgment " of the Muhammadan law means an acknowledgment not merely of sonship, but of legitimate sonship. This is the real meaning of the judgments of the Privy Council which have been cited. As pointed out by

(1) 11 I.A. 31=10 C. 663. (2) 3 M.I.A. 295. (3) 3 I.A. 291.
(4) 5 W.R. 132. (5) 4 B.L.R. (A.C.), 55 (6) 8 M.I.A. 159.
(7) 3 A. 723, affirmed on appeal by the Privy Council, 8 A. 516.

Mr. Amir [298] Ali, an acknowledgment may be either express or implied. An implied acknowledgment is a continuous and consistent course of treatment of another as a legitimate son. An express acknowledgment must have the same meaning, the only difference being that it consists of words instead of acts. Otherwise the words "This boy is my son" would give the status of legitimacy in the face of twenty years' treatment as an illegitimate son, both before and after the words were uttered. Where there is an express acknowledgment, its meaning in the particular case must always be considered. The words "This is my son" either may or may not have the effect of a legitimation, according to circumstances. See *Ashruf-ood-dowlah* v. *Hyder Hossein Khan* (1) at pp. 103, 104 and 106 of the report. The case is no authority for the proposition that a mere acknowledgment of sonship amounts to an affiliation. In *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (2) the Privy Council did not content themselves with saying that the acknowledgment was proved, but they considered that there was strong evidence as to treatment.

[STRAIGHT, J.—The facts here are that, forty-five years ago, Moti Begam, the appellant's mother, was admittedly the wife of Ghulam Ghaus Khan, though the time of marriage is not shown. The appellant was brought up in the same house; he is written to and described by members of Ghulam Ghaus Khan's family as if he were Ghulam Ghaus Khan's legitimate son. Other children of Ghulam Ghaus Khan and Moti Begam are admittedly legitimate. Under these circumstances, why should we not presume that the appellant also is a legitimate son of the same father?

EDGE, C. J.—You will have to deal with the question whether in presuming legitimacy from cohabitation, it is or is not essential to show that the period of cohabitation covered a time when the person to whom the dispute relates could have been conceived.]

In *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (2) the decision really turned on the evidence of legitimacy, and it was nowhere suggested, from the Court of first instance to the Privy Council, that a bare acknowledgment of sonship would be sufficient. [299] Upon the hypothesis put forward on the other side, one letter containing a clear statement as to sonship would have been unanswerable; but the evidence of treatment was fully gone into. In the case reported in 11 Moore, at p. 104, acknowledgment in the sense of the Muhammadan law is described as "acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition not simply of sonship, but of legitimacy as a son." Again in *Sadakat Hossein* v. *Mahomed Yusuf* (3) their Lordships of the Privy Council accept the conclusion of the Courts below "that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from which an inference is fairly to be deduced that the father intended to recognize him and give him the status of a son capable of inheriting." Surely this implies that it is a question of evidence. All the authorities on the Muhammadan law treat it as such a question. The passage which has been cited from p. 439 of Grady's *Hedaya* must be read with the definition of *ikrar* at p. 427 as "the notification or avowal of the right of another upon oneself." Whether such an avowal is intended by a particular statement is a matter of evidence; and nothing short of such an avowal constitutes an "acknowledgment" as understood in the Muhammadan law.

(1) 11 M.I.A. 94. (2) 9 I.A. 8=8 C. 422. (3) 11 I.A. 36.

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Taking the legitimacy of the defendant Muhammad Ismail Khan and the marriage of his parents ten months prior to his birth as proved, nothing can be inferred as to cohabitation before that time. The facts do not warrant any presumption as to the cohabitation of Ghulam Ghaus Khan with Moti Begam three years or so previously, or as to the date of their marriage, or as to the appellant's legitimacy. If it were permissible to infer from the fact of Muhammad Ismail Khan's legitimacy that his parents were married three years prior to his birth, it would be equally permissible if the interval were twenty years or more; and this shows how unsafe such an inference would be.

[EDGE, C. J., referred to the *Berkely Peerage case* (1).]

A passage in Grady's *Hedaya*, at p. 439, showing that an acknowledgment made by a woman may be contradicted, confirms **[300]** the view that the question is always one of evidence. See also 9 I.A., p. 14, where an acknowledgment in a formal report to Government, which speaks of the acknowledged as the acknowledger's son, is described as "almost conclusive;" and there occurs this sentence:—" He not only calls him his son, but treats him as he treated Azmat, his undoubted legitimate son." If the acknowledgment had been considered as *ipso facto* establishing the legitimacy, it would have been inconsistent to proceed to examine the evidence on the point of legitimacy. The word *ikrar* means "admission," and admissions form a distinct part of the law of evidence. The Muhammadan law of evidence is excluded by s. 24 of the Bengal Civil Courts Act (VI of 1871). By s. 2 of the Evidence Act, all rules of evidence other than those contained in that Act or some other part of the statute law are expressly repealed. It is true that the case is one of succession, in which the Muhammadan law is saved by s. 24 of the Bengal Civil Courts Act; but it does not follow that the particular question under consideration should be treated as relating to succession: *Mazhar Ali* v. *Budh Singh* (2). All the old authorities as to acknowledgment imply the acknowledger's belief that the acknowledged is in fact his son; and affiliation is unknown in cases where the former has had no intercourse with the mother of the latter. This is implied by the three conditions which all writers on the Muhammadan law lay down as essential to the validity of acknowledgments. The use of acknowledgments is always to legitimatise children whose legitimacy is doubtful. The system originated in the practice of cohabitation with slave-girls, who had opportunities of promiscuous intercourse, and whose children, brought up in the master's house were often of uncertain parentage.

The Hon. Pandit *Ajudhia Nath*, for the appellants, in reply.

ORDER OF REMAND.

STRAIGHT, J.—This is an appeal, under s. 10 of the Letters Patent, from a judgment of my brother Brodhurst, dated the 22nd March, 1886, affirming, in difference with the opinion of Petheram, C. J , a decree of the Subordinate Judge of Meerut of the 3rd of March, 1885. The suit to which the appeal relates was instituted by the plaintiff-appellant before us on the 13th of May, **[301]** 1884, in the Court of the Subordinate Judge of Meerut, for a declaration of his right to and possession of his share of the property left by his deceased father, Ghulam Ghaus Khan, who died on the 6th of November, 1879. The defendants cited by him were, Muhammad Ismail Khan, son, and Musammats Fidayat-un-nissa

(1) 4 Camp. at p. 416, and 6 Ves. Jun., 251. (2) 7 A. 297.

Karamat-un-nissa, and Barkat-un-nissa, daughters of the said Ghulam Ghaus Khan, and four other persons, lessees or mortgagees in possession of portions of the property leased or mortgaged to them by the other defendants. The real contesting defendant was Muhammad Ismail Khan, and the single and substantial position taken up by him with which we are concerned is that the plaintiff was not a son of Ghulam Ghaus Khan, but that he was born of the body of one Musammat Moti Begam before her marriage with Ghulam Ghaus Khan. The Subordinate Judge found that "the weight of evidence on the record then proves that Allahadad is not really a son of Ghulam Ghaus Khan, and that he never really acknowledged him as such," and he accordingly dismissed the suit. The plaintiff then appealed to this Court, and the case came before a Division Bench consisting of Petheram, C. J., and Brodhurst, J. The former was of opinion that the evidence established that "Allahdad Khan was the illegitimate son of Ghulam Ghaus Khan; that he was born before the marriage of Ghulam Ghaus Khan and Moti Begam; that it is proved by evidence, the truth of which is beyond doubt, that upon several occasions in 1861 and 1862 Ghulam Ghaus Khan did at that time acknowledge the plaintiff, Allahdad Khan, to be his son in fact, and that the case resolves itself into a pure question of law, namely, what, according to the Muhammadan law, is the effect of an acknowledgment by a Muhammadan that a particular person born of the acknowledger's wife before marriage is his son? How does such an acknowledgment affect the status of the person in reference to whom it is made?" Petheram, C. J., then proceeded to discuss three rulings of their Lordships of the Privy Council reported in 11 Moore's Indian Appeals, p. 94, L. R. 9 I. A., p. 8, and L R. 11 I.A., page 31, which in the result he took to be auhorities for the proposition that "an acknowledgment of children by a Muhammadan *as his sons* gives them the status of legitimacy." Upon this view of the matter he would have reversed the decision of the Subordinate Judge and decreed [302] the plaintiff's claim. Brodhurst, J., found—"From the evidence and the whole circumstances of the case it is, I think, palpable that Allahdad was not the son of Ghulam Ghaus Khan; that he was not legitimated by Ghulam Ghaus, and that he well knew that he was at the highest nothing more than Ghulam Ghaus Khan's step-son, had never been called his son except by courtesy, and had no right to any share in his (Ghulam Ghaus's) property." He also referred to the case in L. R. 11 I. A., p. 31, and observed: "I see nothing to lead me to believe that Ghulam Ghaus ever regarded Allahdad in any other light than that of a step-son; and applying the principle contained in the above remarks of their Lordships of the Privy Council to the present case, I find that there is no sufficient evidence of the acknowledgment by Ghulam Ghaus Khan of Allahdad Khan as his son from which an inference is fairly to be deduced that Ghulam Ghaus ever intended to recognise him, and give him the status of a son capable of inheriting, and I would therefore dismiss the appeal with costs." It is from this judgment of Brodhurst, J., that the appeal now before us has been preferred. The case was very ably argued at the hearing on both sides, and the delay in pronouncing judgment has occurred owing to the necessity that arose for consulting the original texts of the Muhammadan law and considering them in conjunction with the several rulings of their Lordships of the Privy Council to which Petheram, C. J., referred. The contentions for the appellant were—1st, that the evidence established Allahdad Khan, the plaintiff, to be the legitimate son of Ghulam Ghaus Khan; 2nd, that the acknowledgments

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proved to have been made by Ghulam Ghaus Khan of Allahdad Khan as his son were sufficient to confer on Allahdad Khan the status of a legitimate son. Upon the first of these two matters it is to be observed that while Petheram, C. J., on the one hand, was of opinion that the facts showed the plaintiff to be the illegitimate son of Ghulam Ghaus Khan, Brodhurst, J., on the other, considered that all they proved was that he was " the son of Moti Begam by an unknown father." To clear the way to a consideration of the second ground put forward for the plaintiff, which, in my judgment, raises the real and only question to be determined, I may at once conveniently state that, in my opinion, the finding of Petheram, C. J., that the plaintiff has **[303]** proved himself to be the illegitimate son of Ghulam Ghaus Khan, cannot be sustained. For the purposes of this judgment it seems enough to say that the evidence does not establish to my satisfaction that he was born of the loins of Ghulam Ghaus Khan; that the facts go to show that Moti Begam was his mother, but that they do not suggest or prove any particular person to be his father. What the date of Moti Begam's admitted marriage with Ghulam Ghaus Khan is, it seems to me, unproved. The depositions of Muhammad Baz Khan and Sipahdar Khan, witnesses for the plaintiffs, the former of whom of his connection by marriage, are, to my mind, of such a character as to make it unsafe to rely upon them; while the same remark applies to the statements of Faizullah Khan, Ilahi Bakhsh Khan and Sirdar Khan called for the defendant, about whom the Subordinate Judge remarks. "Their demeanour produced in my mind the impression that they were strong partisans who were prepared to swear anything and everything that they found would be favourable to the case for the defence." The fact remains, and an important central fact it is, that at some time or another before the birth of the defendant Ismail Khan, Ghulam Ghaus Khan and Moti Begam had become man and wife; and this is common ground between the parties. Whether their marriage took place before or after the plaintiff's birth is, in my opinion, not established. The first contention for the plaintiff, therefore, must be decided adversely to him. Then arises the crucial and difficult point raised in the second contention on his behalf namely, that the acknowledgments proved to have been made by Ghulam Ghaus Khan of the plaintiff as his son are sufficient to confer on him the status of a legitimate son, with the legal consequence of a right to inherit. This point involves two questions—1st, what, in fact, were the acknowledgments? 2nd, what is the legal effect, under the Muhammadan law, of such acknowledgments?

With regard to the first of these two matters, it is satisfactory to feel that the materials for determining it are mainly to be found in the shape of documents which, if their authenticity be established, speak for themselves without fear of falsehood. I have said nothing as yet and shall have little to say about the evidence of the plaintiff and the defendant Ismail Khan, because it is obvious to my mind that both of them have made many statements that are **[304]** untrue—notably in the case of the plaintiff as to his ignorance of the litigation between Ismail Khan and his sisters and Musammat Nanhi and her children, upon which point the answers to interrogatories of Sheikh Wahid-ud-din, which, I believe, contradict him; and in the case of the defendant as to his denials of the several letters, undoubtedly written by him to the plaintiff, in which he addressed him as " brother " and spoke of Ghulam Ghaus Khan as " the father." Without particularising further it does not seem to me that any useful purpose would be served by my travelling in detail through the

evidence of either of these person, each of whom called the other as his witness. They are obviously bitterly hostile to one another, and it is clear that neither was over-scrupulous in what he swore to. So far as their testimony is concerned, I think that the one may be fairly set off against the other, as neither can be safely trusted. Before concluding my judgment, I shall later on have something to say with regard to the conduct of the plaintiff, upon which so much stress is laid by my brother Brodhurst and the Subordinate Judge, the materiality of which I need not discuss now.

I turn, then, to the documentary evidence for the plaintiff directly showing statements made by Ghulam Ghaus Khan that the plaintiff was his son and indicating treatment of him as such, which is as follows:— His Lordship proceeded to discuss the evidence in detail, and continued.

To sum up the matter briefly, therefore, the case for the plaintiff consists of the direct acknowledgments and treatment of him as a son by Ghulam Ghaus Khan, as shown by the documents Nos. 35-A, 36, 37,-38, 39 and 40; his reputation and recognition as a son of Ghulam Ghaus Khan, as disclosed by the documents Nos. 43,44,45 and 46, and the various letters written by the defendant to him upon which I have already commented. It seems to me, therefore, that the matter stands thus:— The plaintiff is admittedly the son of Moti Begam, whose marriage to, or carnal intercourse with, any other man than Ghulam Ghaus Khan, is not attempted to be proved, and who, at the time of her death in 1859, was admittedly the wife of Ghulam Ghaus Khan. How her connection with him originated, or what the date of her marriage to [305] him was, there is no satisfactory evidence to show; but that she lived in his house for a long period of time, co-habiting with him and bearing him several children whose legitimacy is not disputed, is beyond question. The defendant in effect asks us to draw a sharp dividing line between the date of the birth of the plaintiff and of his own, and to find as a fact that no marriage was subsisting when the plaintiff was born, but that it had taken place when he was born. My answer to this proposition must be and is, that there is no evidence upon which I can safely rely to justify me in coming to any such finding, and if the defendant had to maintain the converse position to that now asserted by him, he would be in similar straits as the plaintiff to prove a marriage between Ghulam Ghaus Khan and his mother. That there was no legal obstacle to a marriage must be conceded, and though its date remains unestablished, I need for the purposes of my judgment say no more than this, that it may as well have taken place before as after the birth of the plaintiff.

Such being the material facts as to acknowledgment and treatment of the plaintiff by Ghulam Ghaus Khan, the next point to be determined is, what is the legal effect of such acknowledgments and treatment according to the Muhammadan law? If the rules of that law deal with such matters as questions of evidence, *i.e.*, as mere adjective law, and simply lay down principles for guidance in forming presumption or drawing inferences, then they would not come within the term "Muhammadan law' as used in s. 24 of the Bengal Civil Courts Act, *i.e.*, the substantive Muhammadan law regarding succession, inheritance, &c, and I should have to deal with the case according to the rules of evidence contained in the Evidence Act. Petheram, C. J., in his judgment has treated the decisions of their Lordships of the Privy Council to which he refers as enunciating rules of substantive law "as laid down in the book," but he adds, "the law so laid down is not, in my opinion, in accordance with the

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custom of the people of this country." With the most profound respect for so eminent an authority, I think this remark is somewhat misleading and calculated to create doubts and impressions that a close scrutiny of the matter does not warrant. There are many apparent anomalies [306] in both the Hindu and Muhammadan law that strike the mind of an English lawyer with astonishment, if not dismay, as irreconcilable with the principles of the English statute and common law that he has been taught; and in India it is natural enough that among our High Court advocates and pleaders, who represent the progress of English thought and influence upon the more or less undigested mass of doctrines and principles to be found in the Mitakshara or the various sources whence the Muhammadan law is drawn, the discussion of questions such as we have here should be maintained on modern lines and according to what may fairly be called popular views. But so long as the rules of the Hindu and Muhammadan law stand with such expositions and rulings as have been made in regard to them by their Lordships of the Privy Council, so long are we, sitting as Judges in this country, constrained by statute to find out what those rules are, and when we have ascertained them with precision to give effect to them. I have done my best to ascertain whether the ruling of their Lordships are in any way at variance with the practices recognised by the Muhammadan community, and I cannot discover that any custom has grown up or exists which overrides or alters those principles of Muhammadan substantive law which I shall presently state in detail. Let us, however, first look to what their Lordships of the Privy Council have said in *Lalli Begam's* case (1) to which Petheram, C. J., among others refers: "Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of the Muhammadan law has not been disputed at the Bar, *viz.*, that the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Muhammadan law has not been questioned at the Bar." The original case from which the appeal was preferred is to be found reported in the *Punjab Record* for 1875, at page 21 of the Civil Rulings, and from this it appears that Mr. Boulnois, a Judge of the Chief Court, held in effect that "the acknowledgment of a son renders that person the legitimate son of the acknowledger under Muhammadan law, although the person acknowledged was born out of wedlock." This view may [307] possibly seem to be in accordance with the often quoted passage to be found in their Lordships' judgment in the case of *Ashruf-ood-Dowlah Ahmad Hossein Khan* v. *Hyder Hossein Khan* (2) commencing—"But the presumption of legitimacy from marriage follows the bed, &c." Nevertheless, with the greatest deference, it seems to me that Mr. Boulnois' proposition goes too far, and that it is not in harmony with the texts. I see nothing in their Lordships judgment in *Lalli Begam's* case (1) to lead me to conclude that they accepted the rule of Mudammdan law, in the terms stated by Mr. Boulnois; indeed, they themselves formulated it in the manner already recited by me. This case of *Lalli Begam* is instructive not only from what their Lordships said as to this rule of the Muhammadan law, but from its result in that, while the question as to whether Lalli Begam was married to the Nawab before the birth of the plaintiffs was left undetermined, it was nevertheless held that they had by acknowledgment and recognition by

(1) 9 I.A. 8.=8 C. 422. (2) 11 M.I.A. 94.

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him as his sons acquired the *status* of sons and title to inherit. Their Lordships remark: "However, there is really no dispute about the law, and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts." That principle was embodied in the second question stated by them as arising for decision, *viz.*, whether, no marriage between Lalli Begam and the Nawab being established, there is proof of an acknowledgment and recognition by the Nawab of the two plaintiffs as his sons which would give them the status of sons and a title to inherit.

Now I do not hesitate to say, having very carefully considered the language of their Lordships' judgment, that they unhesitatingly adopted the view that the rules of Muhammadan law relating to acknowledgment by a Muhammadan of another as his son or daughter, as the case may be, are rules of substantive law, and such acknowledgment, if there is no legal impediment to it, confers a status of legitimacy just as, by the analogy of the Roman law, manumission of a slave conferred on him the status of a free man. Without further preface I proceed to state what the more important authorities are, which, having given them my most careful [308] consideration, I take as establishing two propositions: 1st, that proved acknowledgments by a Muhammadan of another person as his son or daughter, if none of the conditions in bar subsist, which will presently appear, confer on such person the status of a legitimate child with its legal consequences; 2nd, that such an acknowledgment once made cannot be recalled either by the acknowledger himself or any one claiming under him. I may remark that the following quotations are, as the names of the authors will show, from the highest sources known to the Muhammadan law:—

BIRJANDI.

"(i) The book on acknowledgment has been placed next to that of evidence, because an acknowledgment is a kind of information and as such like evidence. The reason why these two subjects precede the subjects of claims (دعوی) is that the ascertainment of evidence and acknowledgment occur in most cases before the claim. As a matter of language the word *ikrar* (إقرار) is derived either from *karar* (قرار), which means rest and confirmation, as if the acknowledger establishes by his acknowledgment a right against himself, or the word is derived from *kurrat-ul-ain* (قرة العين), that is, comfort of the eyes, because the person in whose favour an acknowledgment is made receives thereby comfort to his eyes, and thus the acknowledger comforts the eyes of the person in whose favour the acknowledgment is made (1).

"An acknowledgment is giving information as to the right of a person enforcible against the acknowledger; that is, the person who gives such information. Some difficulty has arisen (in consequence of this definition) in the case of acknowledgment by an agent appointed to conduct litigation and also in the case of an executor, inasmuch as in these cases the acknowledgment of these persons amounts to giving information as to

(1) اورده مقارنا للشهادة لانه من انواع الاخبار مثلها و تقديمها على الدعوي لما ان تعيين الشاهد والاقرار يكونان قبل الدعوي غالبا و هو في اللغة ماخوذ اما من القرار بمعني السكون والثبات كانه يثبت بذلك حقه على نفسه او من القرة العين فان المقرله بذلك يقرعينه فكان المقر اقر عينه ٭

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the right of another [309] person against the principal in the one case and the ward in the other (1).

"The requirement of acknowledgment is that it should be indicative of that in respect of which the acknowledgment is made, not a mere allusion thereto. This means that it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment as if it already exists, and that by the acknowledgment the proof thereof is expressed. *It is not an effect of an acknowledgment that anything is for the first time founded or established*, and it is on this account that when the person in whose favour the ackowledgment is made comes to know that the acknowledger was false in his acknowledgment, the subject of the acknowledgment is not lawful to such a person (as a matter between him and his Creator, the Almighty), since he would in such a case be taking the subject of acknowledgment without the real willingness of the acknowledger. But if the acknowledger has delivered the subject of acknowledgment willingly, then it is lawful and becomes like an investiture of ownership by the acknowledger, and as such on the footing of a gift. This is so because ownership is established in favour of him for whom the acknowledgment is made, and this without any verification or acceptance on his part; but such ownership is nullified by his rejecting it, so that if he first verifies it and then rejects it, such rejection is not valid. So in the *Kafi* (2).

"(ii) If a person acknowledges the sonship of a boy whose descent is unknown, and he is such that one like him can be born of one [310] like the acknowledger, and the boy verifies the acknowledgment, his descent is established. This has accidentally been mentioned with reference to the sonship of a boy, because, even if the acknowledgment of a daughter-hood is made in respect of a woman, the same rule applies. But it is essential that such sonship (or daughter-hood) should be without an intermediary link: so much so that if an acknowledgment is made that the boy is the son's son of the acknowledger, the descent is not established, and this result is similar to that of acknowledging anothor to be a brother (1).

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(1) هو اخبار الحق لآخر عليه اى على المخبر و هذا يشكل باقرار الوكيل بالخصومة و الوصي فان اقرارهما اخبار الحق لآخر على الموكل او اليتيم •

(2) و حكمه ظهور المقر به لا انشاءه لى حكم الاقرار ان يظهر به المقر به كانه ثابتا و بالاقرار يظهر ثبوته و ليس حكمه ثبوته ابتداء و لهذا اذا علم المقر له ان المقر كاذب فى اقراره لا يحل المقر به في مابينه و بين ربه تعالى اذا اخذه عن كره منه فان سلمه بطيب نفسه يحل و يكون تمليكا مبتدا منه بمنزلة الهبة والملك يثبت للمقر له بلا تصديق و قبول و لكن يبطل برده فلو صدقه ثم رده لا يصح رده كذا في الكافي •

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(1) و لو اقر بابنوة غلام جهل نسبه و يولد مثله لمثله و صدقه الغلام يثبت نسبه التقييد ببنوة الغلام اتفاقي اذ لو اقر ببنتية المرأة كان الحكم كذلك ايضا و ينبغي ان تكون البنوة بلا واسطة حتى لو اقر بغلام انه ابن ابنه لا يثبت النسب و كان حكمه حكم ما اذا اقر باخ •

"It is a condition precedent (to the validity of acknowledgment of parentage) that the descent of the acknowledged be unknown, because, if his descent is known, his sonship other than his parent would be impossible. What is meant by a descent not being known is that it should be unknown in the town in which he resides, and this explanation is contained in the *Kifaya* that the trustworthy reference is to the place of birth. It is stated in the *Kenaya* that when a person regarding one whose descent is known says," "This is my son, and when I die all my estate is his," then according to some of the jurists the acknowledged will be entitled to one-third of the estate by way of legacy, whilst according to other jurists he would not be entitled even to one-third; and this last doctrine seems to be most consistent with right principles (2).

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"The limitation that the acknowledged might have been born of the acknowledger means that the age of the acknowledger should exceed the age of the acknowledged at least by twelve years, and this because it is the minimum period of puberty for a youth: [311] and this limitation is necessary, because, if the acknowledger had not attained puberty, the acknowledgment would be falsified obviously. It is also a condition that the acknowledged boy should verify the acknowledgment, because, if he does not verify, an impediment is created, and his descent is not established by the mere acknowledgment, but requires proof. This, however, applies only to cases in which the boy acknowledged is capable of expressing himself; when he is too young to express himself, verification by him is not a condition. It is stated in the chapter on the manumission of slaves in the *Fatawa Kazi Khan* that some jurists have held that sonship is not established unless it is verified by the person in whose favour it is made. But the correct doctrine is that such a condition is not essential as above stated, and this is in conformity with the doctrine of the *Hedaya* and many other books (1)."

AINI.

"In the case of a man in sickness acknowledging a youth of unknown parentage it is a condition that such a youth might have been

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(2) وقيد بقوله جهل نسبه لانه لو كان معروف النسب امتنع نبوته من غيره والمراد بجهالة النسب جهالة في البلدة التي هو فيها صرح بذلك في القنية و ذكر في الكفاية ان المعتبر مسقط راسه و مولده و في القنيه اذا قال لمعروف النسب هو ابني و اذا مت مجموع تركتي له فعند بعض المشايخ يستحق الثلث بطريق الوصية و عند بعضهم لا يستحق الثلث و هو اشبه بالصواب •

(1) وقيد بقوله يولد مثله لمثله اى يكون سنه ارقد من سن المقر له باثنتي عشرة سنة و هي ادنى مدة يحتلم فيها الغلام و ذلك لانه لو لم يكن كذلك كان مكذبا في الظاهر و شرط تصديق الغلام له اذا لو يصدقه الغلام حصل له معارض فلا يثبت النسب بمجرد الاقرار بل لابد من البينة و هذا اذا كان الغلام يعبر من نفسه اما اذا كان صغيرا لا يعبر عن نفسه فلا يشترط تصديقه — و في كتاب العتق من فتاوي قاضي خان قال بعض مشايخنا لا يثبت النبوة الا بتصديق المقر له و الصحيح انه لا يشترط تصديقه و ما ذكرنا اولا هو الموافق لما في الهدايه و كثير من الكتب •

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begotten by such an acknowledger, because, if the acknowledged is older in age, the obvious fact falsifies the acknowledgment. Indeed, *Malik* has gone the length of holding that even if notoriety contradicts the acknowledger, such as by indicating that he was an Indian whilst the acknowledged boy was a Persian, the latter's descent is not established. The restriction that the acknowledged youth should verify the acknowledger has been imposed because the rule as to a youth who can express himself is applicable owing [312] to his being in his own competency, whilst, on the contrary, an infant is in the power of another, and as such descends to the footing of animals, and no importance is attached to his verification. But according to the three Masters (*i.e.*, Imam Abu Hanifa, Imam Muhammad and Kazi Abu Yusuf) the descent is established without any such verification if the acknowledged be below the age of discretion. The descent is established because it is one of the necessities of nature, and there can be no objection thereto, even though the acknowledger be in sickness at the time of the acknowledgment. The acknowledged youth will participate with the heirs in the inheritance, because such is one of the consequences of the proof of descent. The acknowledgment by such in respect of a child or parents or wife or a manumitted slave will hold good, because, since it does not involve attribution of descent to any one else, the acknowledgment must be accepted (1)."

DURRUL MUKHTAR.

"(i) If a person makes an acknowledgment in favour of a stranger whose parentage is unknown and thereafter acknowledges him to be his son, and the latter verifies it whilst he is one of those who are fit to make such a verification, his descent is established with reference to the time of his being begotten (2).

[313] " (ii) If a person makes an acknowledgment in favour of a youth whose parentage is unknown either at his birth-place or in the town where he is, that the latter is his son, and the acknowledger and the acknowledged are such in age that the latter may be born of the former as a son, and

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(1) و إن اقر رجل بغلام مجهول النسب يولد مثله اى مثل هذا الغلام لمثله اى لمثل هذا. المريض قيد به لانه اذا كان اكبر منه سنا كذبه الظاهر حتى عند مالك لو كذبه العرف بان يكون هنديا والغلام فارسيا لا يثبت نسبه انه اى ان هذا الغلام ابنه فصدقه اى المقر الغلام قيد به لان المسئلة فى الغلام المعبر عن نفسه لانه حينئذ يكون في يد نفسه بخلاف الصغير لانه في يد غيره فنزل منزلة البهيمة فلم يعتبر تصديقه و عند الثلاثة يثبت نسبه بلا تصديقه ايضا لو غير مكلف ثبت نسبه لانه من الحوائج الاصلية و لا تهمة فيه و لو كان المقر في حال اقراره مريضا و شارك الغلام الورثة في الميراث لانه من ضرورات ثبوت النسب و صح اقراره اى اقرار الرجل بالولد والوالدين و الزوجة المولى لانه ليس فيه حمل النسب على غير فيقبل •

(عينى شرح كنز جلد ٢ صفحه ١٦٢)

(2) و ان اقر لاجنبي مجهول نسبه ثم اقر ببنوته و صدقه و هو من اهل التصديق ثبت نسبه مستند الوقت العلوق •

(الدر المختار باب اقرار المريض صفحه ٦٠٢ - ٦٠٣) •

the youth verifies it, he being capable of discretion (because otherwise his verification is not necessary as already stated), then his descent is established, though the acknowledger be in sickness; and when the descent is so established, the youth will participate with the other heirs (1)."

ASHBAH.

"When the person in whose favour an acknowledgment is made falsified the acknowledger the acknowledgment is nullified, except in the case of acknowledgment as to the freedom of slaves, as to the parentage, and as to the right arising out of manumission of slaves: so the rule had been laid down in the *Saran-ul-Majma* on the ground that such acknowledgments are not susceptible of annulment (2)."

ALAMGIRI, VOL. I.

"(i) When a man acknowledges a son expressly or impliedly, the negation thereof will not be valid thereafter whether such acknowledgment is made at the time of the birth or afterwards. Express acknowledgment is when a man says '*The child is mine*,' or says '*This is my child*;' and implied acknowledgment is that the man should remain silent when he is being congratulated upon [314] the birth of the child in which case he may be required to take an oath. So in the *Ghayat-ul-bayun* (1).

"(ii) If the husband is without penis and she is not aware of his condition and gives birth to a child and he claims him, then the Kazi is to hold his descent to be established; and if she thereafter comes to be aware of his condition and therefore claims separation, she is entitled to do so, because the child necessarily becomes his even without proof of sexual intercourses (2).

Page 27, Baillie. and Note.

(1) و ان اقر لغلام مجهول النسب في مولده او في بلد هو فيها و هما في السن بحيث يولد مثله لمثله انه ابنه و صدقه الغلام لو مميز او الا لم يحتج لتصديقه كما مر و حينئذ ثبت نسبه و لو المقر مريضا و اذا ثبت شارک الغلام الورثة •

(الدرالمختار صفحه ٦٠٣) •

(2) المقر له إذا كذب المقر بطل إقراره إلا في الاقرار بالحرية والنسب ولاء العتاقة كما في شرح المجمع معللا بانها لاتحتمل النقض •

(اشباه والنظائر كتاب الاقرار صفحه ٣٢٢)

(1) إذا اقر بالولد صريحاً او دلالة لايصح النفي بعد ذلک سواء كان بحضورة الولادة او بعدها والصريح ان يقول الولد مني او يقول هذا ولدي والدلالة ان يسكت اذا هنئ لكنه يلاعن كذا في غاية البيان •

(فتاوي عالمگيري جلد اول كتاب الطلاق باب اللعان صفحه ٧٠٣)

(2) إن كان الزوج مجبوبا و لم تعلم بحاله فجاءت بولد فادعاه و اثبت القاضي نسبه ثم علمت بحاله فطلبت الفرقة فلها ذلک لان الولد لزمه بغير جماع •

(فتاوي عالمگيري جلد اول باب ١٢ بحث المجبوب صفحه ٧١٠)

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"(iii) A man says in favour of a boy 'There is my son' and then he dies; thereafter the mother of the boy, she being a free woman, comes forth and says 'I am the wife of deceased.' Thereby she is the wife of the deceased, and both she and the boy inherit from him (3).

"(iv) If a man has illicit intercourse with a woman, who then becomes pregnant, and afterwards marries her and she then gives birth to a child, if such child is born after expiration of six months or more, his descent is established. But if she gives birth within less than six months his descent is not established, unless he claims him and does *not* say that the child is the result of illicit intercourse. But if he says that the child is born of me by illicit [315] intercourse, the descent is not established and he will not inherit from him. So in the *Yanasi* (1)."

FATWA KAZI KHAN.

"(i) A man has married a woman by a *defective* marriage and thereafter he retires with her, and thereafter she gives birth to a child after expiration of six months: his descent is established from him. There is difference of opinion as to the exact fixation of this time, because the question is whether these six months are to be calculated from the date of the marriage or from the time of retirement. Abu Hanifa and Abu Yusuf (on whom be peace!) regard this from date of the marriage; but Muhammad regards the six months from the time of retirement, and this is the accepted doctrine. In the case of a valid marriage all the three Masters are agreed that the period is to be regarded from the time of the marriage. Some of the jurists have said that in the case of the valid marriage retirement is not a condition precedent, but that there must be a state of things when they might have had intercourse (2).

"A man has had illicit intercourse with a woman and she is impregnated by him, and during her pregnancy he marries her and has not had

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(3) رجل قال لغلام هذا ابني ثم مات ثم جاءت ام الغلام و هي حرة و قالت انا امرأته فهي امرأته و يرثانه *

(فتاوي عالمگيري جلد اول باب ثبوت النسب صفحه ۷۲۶)

(1) و لو زنى بامرأة فحملت ثم تزوجها فولدت إن جاءت به لستة اشهر فصاعدا ثبت نسبه و إن جاءت لاقل من ستة اشهر لم يثبت نسبه إلا إن يدعيه و لم يقل إنه من الزنا اما إن قال إنه من الزنا لا يثبت نسبه ولا يرث منه كذا في الينابيع *

(فتاوي عالمگيري جلد اول باب ثبوت النسب صفحه ۷۲۷)

(2) رجل تزوج امرأة نكاحا فاسدا فدخل بها فجاءت بولد لستة اشهر ثبت النسب منه اختلفوا في اعتبار هذا الوقت انه يعتبر ستة اشهر من وقت النكاح او من وقت الدخول قال ابو حنيفة و ابو يوسف رح يعتبر من وقت النكاح و قال محمد رح يعتبر ستة اشهر من وقت الدخول و عليه الفتوى و في النكاح الصحيح اجمعوا على انه يعتبر المدة من وقت النكاح و قال بعضهم لا يشترط الدخول في النكاح الصحيح لكن لابد من خلوة *

sexual intercourse with her till she gives birth to a child; then they (*i.e.*, the three) have held that the marriage is valid, if she was not during her *iddat* in consequence of some one else and penitence is necessary for him; and the jurist Abulhai [316] holds that if she gives birth to the child after the expiration of six months are more from the time of the marriage, the marriage is lawful and the descent is established. But if she gives birth to the child in less than six months from the date of the marriage, the marriage is not established and the child will not inherit from him *unless* the man says 'This is a son from me' and does not say 'This is the offspring of illegitimate intercourse' (1).

"(ii) A man has married a woman and she gives birth to a child in less than six months. Muhammad maintains that the marriage is defective 'according to my views and those of Abu Yusuf' (2).

"A Majbub has married a woman who lived with him for a time and then gave birth to a child. Abu Yusuf in such a case holds that the son is his son and she is lawful to him. (3)

"(iii) A man has married a woman and had then divorced her at the time before intercourse, and she gives birth to a child at the end of six months from the time of the marriage. The child is his child, though Zufar holds a contrary view (4)."

[317] From these passages it appears to me that the proposition stated by their Lordships of the Privy Council in *Lalli Begam's* case, as not being questioned before them, but which has been questioned before us in this appeal, namely, that the acknowledgment of children by a Muhammadan as his sons gives them status of sons capable of inheriting as legitimate sons, unless certain conditions exist, is established to be a distinct and

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(1) رجل زنى بامرأة فحملت منه فلما استبان حملها تزوجها الزاني ولم يطأها حتى ولدت قالوا ان لم تكن في عدة الغير جاز النكاح وعليهما التوبة وقال الفقيه ابو الليث رح ان جاءت بولد ستة اشهر فصاعدا من وقت النكاح جاز النكاح ويثبت النسب وان جاءت بولد لاقل من ستة اشهر من وقت النكاح لا يثبت النسب ولا يرث منه الا ان يقول الرجل هذا الولد مني ولا يقول من الزنا ●

(فتاوي قاضي خان فصل في مسائل النسب صفحه ٣٢١ - ٣٢٢)

(2) رجل تزوج بامرأة فجاءت بولد لاقل من ستة اشهر قال محمد رح النكاح فاسد في قولي وقول ابي يوسف رح ●

(3) مجبوب تزوج امرأة فمكثت عنده زمانا ثم جاءت بولد قال ابو يوسف رح الولد ولده ويحلها ذلك الزوج كان قبله طلقها ثلاثا ●

(فتاوي قاضي خان صفحه ٣٢٣)

(4) رجل تزوج امرأة وطلقها من ساعة قبل الدخول فجاءت بولد لتمام ستة اشهر من وقت النكاح كان الولد ولده خلافا لزفر رح ●

(فتاوي قاضي خان صفحه ٣٢٣)

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specific rule of the substantive Muhammdan law relating to inheritance to which we are bound to give effect. Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock, subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category. In the present case we have the fact that Moti Begam, the undoubted mother of the plaintiff, admittedly at some time or other—when it was we have no reliable proof—became the wife of Ghulam Ghaus Khan, that the plaintiff was acknowledged as a son by Ghulam Ghaus Khan and treated by him as such, and the plaintiff accepted and described himself as holding that position. It seems to me, therefore, that the requirements of the rule of the Muhammadan law have been satisfied, and that the plaintiff has established his acknowledgment and recognition by Ghulam Ghaus Khan as a son which gave him the status of a son and a title to inherit. This being so, it remains to be seen whether such a status once conferred can be destroyed by any subsequent act of the acknowledger or those who claim through him. It is equally clear that it cannot, and in support of this view there are not only the authorities of the Muhammadan law which I have quoted, but a decision of their Lordships of the Privy Council reported in 11 Moore's Indian Appeals, p. 94, in which it was held "that the denial of a son after an established acknowledgment, though supported by a deed of repudiation and disclaimer by the father, is [318] untenable." As it seems to us that there were distinct acknowledgments by Ghulam Ghaus Khan of the plaintiff in 1861, it becomes immaterial to consider whether Ghulam Ghaus Khan did or did not personally cause, or bring about, the entry which was made in the *wajib-ul-arz* of September 12th, 1870, upon which so much stress was laid by the learned counsel for the defendant in the course of his argument: though, if it were necessary to do so, I should have said without hesitation that there is no evidence to show that it was the result of any act or declaration of his. From the same point of view it is unnecessary to discuss the conduct of the plaintiff in regard to the suit brought by the defendant in 1880 and his delay in coming into Court with his present claim. None of these matters could alter or destroy his status as a son if once conferred by acknowledgment, and it would serve no useful purpose, and only lead me into greater length in a judgment already sufficiently prolix were I to explain my views in detail with regard to them.

For the reasons I have given I have come to the conclusion that this appeal must be decreed and the status of the appellant as the legitimate son of Ghulam Ghaus Khan, with the consequent right of inheriting a share in the deceased father's estate, be declared.

Then arises the question as to the precise form our order should take, and I much regret that upon this point I am at difference with the learned Chief Justice and my brother Mahomed. I feel sure that I must be wrong in my own view, and I have endeavoured to convince myself that I am, but I am unable to do so.

In determining what our order should be, it is necessary to examine

the terms of ss. 562, 563 and 564 of the Civil Procedure Code; for if I understand the matter aright, those sections read together and in contrast to the provisions of ss. 565, 566, distinctly direct a Court of appeal not to remand a case, unless it has been determined and disposed of by the Court of first instance "upon a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essential for the determination of the rights of the parties, and the decision upon such preliminary points is reversed in appeal."

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[319] The question here, then, is whether the Sub-Judge can be said to have disposed of this suit upon a preliminary point, to the exclusion of evidence of fact. In determining that question it is important to see, apart from the mere question of the status of the plaintiff, which, with the rest of the Court, I am willing to treat as a preliminary point, and which the Sub-Judge has determined, what were the other issues raised? It will not be disputed that the first four issues settled by the Sub-Judge for trial, including that of status, have been disposed of by him. The fifth issue which he settled was this:—"What amount of debts, if any, due by Ghulam Ghaus Khan has been paid by Ismail Khan?" That issue was fixed in reference to the seventh paragraph of the written statement, in which Ismail Khan vaguely and without any particulars said:—"The plaintiff has in his petition of plaint referred to the balance of the mortgage money due by the ancestor, but he has not mentioned the large debt paid by the defendant: the latter, like the former, is also payable from the property."

Now no one would deny, having regard to the Full Bench ruling of this Court (1), and according to the principles of the Muhammadan law of inheritance, that so far as Ismail Khan was concerned, if he was in possession of the estate of Ghulam Ghaus Khan, and if he had paid the debts of Ghulam Ghaus Khan, he would be entitled to hold on to the possession of Allahdad Khan's share of that estate, so long as, and until, Allahdad Khan paid off his quota of the debts which Ismail Khan had paid; and this is not denied.

But in the plea taken by Ismail Khan which, I have said, is of the vaguest possible kind, no mention is made of any debts that were paid, and, for aught I know to the contrary, no such payments were ever made. An issue having been fixed by the Sub-Judge in reference to that question, there is not a pretence for suggesting, and Mr. *Conlan* frankly admits that upon the face of this record there is not a particle of proof to show that Ismail Khan ever paid a pice of the debts of the ancestors. Moreover, I have asked in vain to have pointed out to me any trace upon the record to indicate that at any stage of the trial in the first Court, [320] the Subordinate Judge, either by order or expression of opinion, actually excluded or led the defendant Ismail Khan or his pleaders to believe that he would exclude, or that it was unnecessary to produce evidence upon this point.

What, then, are the materials from which I am to infer that the Court below disposed of this case upon a preliminary point, so as to exclude any evidence of fact which was necessary for the determination of the rights of the parties? Neither Mr. *Conlan* nor any other person has satisfied me upon this point, and it appears to me that this being so, I am not justified, in reference to the language of ss. 562, 563 and 564 of the Code, and more especially to the prohibition contained in such

(1) *Jafir Begam* v. *Amir Muhammad-Khan*, 7 A. 822.

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lastmentioned section, to make the form of remand proposed by the rest of the Court.

It is clear, and in accordance with many expressions of opinion by their Lordships of the Privy Council, the effect of which is embodied in those sections, that a court of appeal should not send a case back to a Court of first instance in such a way as to open the door to one or both of the parties making a new case with fresh evidence—a most dangerous thing to do in this country. There is nothing whatever to show in the present instance that Ismail Khan was prevented from producing evidence or led to believe by the Court of first instance that the evidence upon the question of payment of debts was unnecessary because it was going to decide the case upon a preliminary point. I do not think that we are entitled, sitting here upon this point, and upon a mere speculation as to the possibility of Ismail Khan having had some claim to an equitable charge in respect of the debts of Ghulam Ghaus, paid by him, to remand the case back to the Court of first instance generally, so as to allow of a third person, who has acquired his interest *pendente lite* and after the appeal was filed here, to open up this part of the defence *de novo* and call witnesses and give other proof which Ismail Khan never attempted to produce.

There was undoubtedly, and the learned Chief Justice has put his finger upon that, a defence set up by the three persons, lessees of the villages from Ismail Khan, against whom the relief sought [321] is stated in the third paragraph of the plaint. It is true, no doubt, that if those lessees had proved the matter set out in their statement of defence, there might have been, *prima facie*, a good answer in point of law to the claim of the plaintiff. In respect of these defendants it may be said that no issue was specifically stated by the Sub-Judge in respect of their defence, and their answer to the plaintiff's claim, which would be direct notice to them to give their evidence in regard to it. That being so, I am disposed to assist them to this extent, that, as the Court of first instance failed to frame an issue with regard to these defendants, and as the determination of such an issue appears to me essential for the right decision of the case, I would remit an issue under s. 566 of the Code to the lower appellate Court for determination.

The matter therefore stands thus:—In my opinion, as regards Ismail Khan, we cannot remand the case under s. 562 of the Code, because it has not been disposed of upon a preliminary point so as to exclude evidence of fact, and we should therefore proceed to dispose of it upon the evidence upon the record, if there is any. It is said for the plaintiff and I see no reason to doubt it, that there is no evidence on the record of the payment of any debt of Ghulam Ghaus Khan by Ismail Khan, and therefore, in regard to that particular matter, we ought, in my opinion, to dispose of it at once, and, there being no evidence, to dispose of it adversely to Ismail Khan.

With regard to the second question, I would remand an issue to try the question as to whether the defendants, lessees, did pay to Ismail Khan the rent of such land under a *bona fide* belief that he was the true proprietor. The question of costs would have to be determined hereafter.

EDGE, C. J.—I have had an opportunity of reading and considering and in fact discussing with my brother Straight and my brother Mahmood my brother Straight's judgment, on the status of the plaintiff Allahdad Khan. With that judgment, so far as it deals with the status and rights of inheritance of Allahdad Khan, I concur for the reasons stated by my

brother Straight. But I do not agree with him as to the course we should take under the circumstances.

[322] First of all we must consider s. 562 of the Civil Procedure Code. It appears to me that s. 572 applies not only to a case in which the Judge of the Court of first instance has expressly excluded evidence, but that also it applies to a case in which the parties may have been or were by the act of the Judge misled as to the issues or the evidence necessary in the case. I think it would apply to a case in which it was apparent that a Judge intended only to consider one issue, such as the status of the plaintiff as an heir as in this case, or an issue of limtation; and where the parties owing to the view of the Judge on that point did not tender or bring forward their evidence. It appears to me here in this case that the main contention in the Court below, as in fact here in appeal, was as to the status of the plaintiff Allahdad Khan. In fact, during the whole of the argument of this case there was no word addressed to us by either side, so far as I remember, in regard to any of the issues, except as to the legitimacy to be inferred from the acknowledgment of Ghulam Ghaus Khan. I do believe that the probability is that in the Court below the same course was followed and that the attention of the Judge and the parties was almost exclusively directed to the exceedingly interesting point of law as to the effect of the acknowledgment made by Ghulam Ghaus Khan. It is quite true that we are told that in this case there is nothing on the record to show that any evidence was in fact excluded, not in the broad sense in which I use the word excluded, but in the contracted sense of exclusion by a rule or order of the Judge. That proposition put so broadly, I am bound to say I do not concur in. Because with regard to the issues raised by the defendants Nos. 5, 6, 7, the so-called lessees, I think it can hardly be said that their evidence was not excluded within any reading of s. 562, because the Judge for some reason omitted to frame any issue on their written statement. In their case they raised certain questions which would have to be tried. I do not express at present any view as to whether, if that written statement were proved, the allegations contained in it would amount to a defence in law, but it was the duty of the Court to inquire whether those allegations were true or not.

It is also true in this case that no affidavit is produced to show that the parties were misled, or that any evidence was excluded by [323] the order or direction of the Judge. But we have to remember this, that Ismail Khan, one of the defendants in the suit, was, we are informed practically a pauper and these issues, which may not have been tried, may have been very immaterial to him, I think that in this case, if we proceed to finally dispose it on the evidence on the record, it is possible that we may do very material injustice to the parties interested in this litigation. I think, unless we are satisfied that no injustice will be done by proceeding on the evidence on the record as it at present stands, we ought to satisfy our own minds by directing a remand under s. 562. The issues, except those numbered 1,2,3 and 4, framed by the Judge, have admittedly not been tried. There were other issues arising in the case which were not even framed by the Judge; and I do think in a complicated case of this kind it is better that we should extend the operation of s. 562 rather than limit the operation of that section. We have remanded cases under s. 562 where all the evidence was on the record, but where we came to the conclusion from the nature of the judgment that the Judge had misunderstood the case. If s. 562 be taken in its literal sense it is obvious to me that it was our duty in

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these cases to have tried the real issues raised by ourselves and not to have remanded them. I have never had any doubt that s. 562 would be applicable to a case in which the Judge has misunderstood the questions raised by the parties and has in consequence mistried the case. Such a trial could not be said to be a trial at all. I quite agree with what has fallen from my brother Straight that, in remanding cases under s. 562 we should take care that the parties should not have the opportunity of starting an absolutely new case; and I do not propose suggesting to the Judge to whom this case will go that he will give the parties an opportunity of starting a new case. The Judge must take the pleadings of the parties and their admissions and frame issues to dispose of all the material questions and proceed to try those issues on the merits.

For the reasons which I have given I am of opinion that this is a case to which s. 562 applies, and that we ought to remand it under that section. I have to make one observation with regard to s. 563. It appears to me to be a section which had been drafted upon an assumption that there was something in the previous section [324] to which it would apply and which gave authority to the Court to say what evidence should be taken on the remand under s. 562. We order the Court to try the case on its merits. Concurring with my brother Straight on the finding as to the status of the plaintiff, I am of opinion that this case should be remanded for the disposal of the rest of the issues under s. 562 of the Civil Procedure Code, and that the costs should abide the result.

MAHMOOD, J.—I concur in what has fallen from my brother Straight as to the facts of the case, and also as to the rules of law applicable to those facts. But because, in the course of the elaborate argument which was addressed to us at the Bar, many suggestions were made as to the exact scope of the rule of Muhammadan law relating to the acknowledgment of parentage, and much was argued as to such acknowledgment being a substitute for adoption as recognised in other systems, such as the Roman of the Hindu law, I am anxious to specify my own views.

First, then, as to the facts of the case, for the reasons so exhaustively stated by my brother Straight, I have no doubt that the following conclusions are justified by the evidence:—

(1) That Moti Begam did not stand in any such position of relationship with Ghulam Ghaus as would render her marriage with him unlawful;

(2) that she is not proved to have been even married to any person other than Ghulam Ghaus;

(3) that she was married to Ghulam Ghaus;

(4) that the exact date of her marriage with reference to the birth of the plaintiff Allahdad is *unascertainable* for want of trustworthy evidence;

(5) that she cohabited with Ghulam Ghaus for a considerable number of years and was treated by him as his lawful wife;

(6) that the plaintiff Allahdad was acknowledged and treated by Ghulam Ghaus as his son;

(7) that in such acknowledgment or treatment there was no express specification as to whether Allahdad was a step-son, a legitimate son, or an illegitimate son of Ghulam Ghaus;

[325] (8) that similar acknowledgment or treatment was accorded to him by the defendant Ismail and the other children of Ghulam Ghaus by Moti Begam, and indeed by the rest of the family.

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Such being the main conclusions as to the facts of the case, I am desirous of stating the propositions of the Muhammadan law applicable to these facts. My brother has so fully quoted the authorities of the Muhammadan law that I am relieved of the necessity of repeating them, and need only refer to them for formulating my propositions.

The first and perhaps the most important question in the case is whether the rule as to the acknowledgment of parentage is a rule of the Muhammadan substantive law of inheritance, or merely a rule of evidence. The question is important, because unless it is a "question regarding succession, inheritance, marriage or caste, or any religious usage or institution," within the meaning of s. 24 of the Bengal Civil Courts Act (VI of 1871) which governs this case, we are scarcely at liberty to apply the Muhammadan law in its integrity to this case, and the alternative would be almost unavoidable to apply to the question the rules of evidence, as to the admissions and presumption of legitimacy, contained in the Indian Evidence Act (I of 1872), by s. 2 of which enactment all other rules of evidence have been abolished.

Now, it cannot be denied that in all mediæval systems of jurisprudence much confusion exists between rules of substantive law and rules of adjective law, that is, between rules which affect the merits and go *ad litis decisionem* and rules which regulate the remedy and, as rules of procedure, only go *ad litis ordinationem*. The Muhammadan system of jurisprudence is no exception to the general rules, and I have before now felt considerable difficulty in distinguishing the rules of the substantive law of Muhammadan inheritance from the rules of evidence. I allude in particular to the case of *Mazhar Ali* v. *Budh Singh* (1), which related to the inheritance of a missing person, and in which, after much consideration, a Full Bench of this Court agreed in holding that the question there raised was a question of evidence and as such governed by ss. 107 and 108 of the Evidence Act.

[326] Is the question now before us one of a similar character? In order to decide this question I have been at some pains to consult the original authorities of the Muhammadan law which my brother has already quoted, and I am responsible for the English translation of the original Arabic of those texts. The first of them is a passage from *Birjandi* which describes the exact place which *ikrar* or acknowledgment in general occupies in Muhammadan jurisprudence, and the passage leaves no doubt that the Muhammadan jurisconsults themselves do not treat the subject of acknowledgments as forming part of the rules of evidence, though they recognise the fact that acknowledgments resemble admissions. To use the language of *Birjandi*," an acknowledgment is giving information as to the right of a person enforcible against the acknowledger, that is, the person who gives such information", and "it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment *as if it already exists* and that by the acknowledgment the proof thereof is expressed." The author then goes on to explain that "it is not an effect of an acknowledgment that anything is for the first time founded or established."

So far, it would seem at first sight that an *ikrar* or acknowledgment stands in the Muhammadan law much on the same footing as an ordinary admission as defined in s. 17 of the Evidence Act; and if the matter rested here, I confess I should have been inclined to regard the question as one

(1) 7 A. 297.

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appertaining to the province of the law of evidence. But acknowledgments of parentage under the Muhammadan law rest upon a footing higher than that of ordinary admissions as pure matters of evidence. The rules of the Muhammadan law applicable to such acknowledgments and the conditions under which such acknowledgments can be validly made are stated in the authoritative texts which my brother Straight has already quoted, and to those texts I wish to add a passage from the *Hedaya* which sums up the law upon the subject:—

"If a person acknowledge the parentage of a child who is able to give an account of himself saying 'This is my son,' and the ages of the parties be such as to admit of the one being the child of the other, and the parentage of the child be not well known to [327] any person, and the child himself verify the acknowledgment, his parentage is established in the acknowledger, although he (the acknowledger) be sick; because the parentage in question is one of those things which affect the acknowledger himself only and no other person. It is made a condition, in this case, that the ages of the parties be such as to admit of the relation of parentage; for if it were otherwise, it is evident that the acknowledger has spoken falsely. It is also made a condition that the parentage of the boy be unknown; for if he be known to be the issue of some other than the acknowledger, it necessarily follows that the acknowledgment is null. It is also made a condition that the boy verify the acknowledgment; because he is considered as his own master, as he is supposed able to give an account of himself. It were otherwise if the boy could not explain his condition; for then the acknowledgment would have operated without his verification. It is to be observed that the acknowledgment, in this instance, is not rendered null by sickness, because parentage is an original and not a supervenient want. By the establishment of the parentage, therefore, the boy becomes one of the acknowledger's heirs in the same manner as any of his other heirs" (Hamilton's *Hedaya* by Grady, p. 439).

In commenting upon this passage of the *Hedaya*, the author of the *Kifaya* points out that the rule as to acknowledgment of parentage is based upon the words of the Koran, "*call them after their fathers*;" and the author explains that such acknowledgment is sufficient, "because the burden of the obligation in respect of the child rests especially on the father, and the latter's acknowledgment affects himself personally and is thus accepted without any verification by the mother" (1). Another celebrated commentary on the *Hedaya*, the *Fathul Qadir*, in explaining the rule contained in the above passage as to the condition that the acknowledged child should be of unknown parentage, goes on to say that the condition has been imposed, because otherwise the [328] descent of the acknowledged child could not be established from the acknowledger since "*descent after it is established is not susceptible of the annulment*" (1).

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(1) لان النسب مما يلزمه خاصة قال الله تعالى ادعوهم لآبائهم و على المولود له رزقهن و لان مؤنة الولد على الاب خاصة فيكون إقراره به على نفسه فيقبل من غير تصديق الام (هدايه مع شرح الكفايه - جلد ۳ كتاب الاقرار صفحه ۵۸۱)

(1) و شرط ان لا يكون له نسب معروف لانه اى لان كون نسبه معروفا يمنع ثبوته من غيره لان النسب لا يقبل الفسخ بعد ثبوته - (فتح القدير على الهدايه - كتاب الاقرار باب إقرار المريض - فصل صفحه ۶۱۱)

The last point is important, and is to the same effect as the text from the *Ashbah* and the first text from Vol. I of the *Fatawa-i-Alamgiri*, both of which are quoted in my brother Straight's judgments. The same rule is stated in another portion of the *Fatawa-i-Alamgiri*; and to use the words of Mr. Baillie's translation, "descent, when once established, cannot be dissolved or cancelled, neither can it be transferred from one person to another" (Baillie's Dig., p, 408).

The passage from the *Ashbah*, however, throws the greatest light upon the nature of such acknowledgments and their effect under the Muhammadan law. That passage shows that whilst ordinary acknowledgments stand upon one footing an exception is made in favour of such acknowledgments as relate to matters of *personal status*, and that in such cases the law does not allow cancellation or annulment of the acknowledgment. This peculiarity of such acknowledgments, that is, the permanency of their effect when duly made, upon the *personal status* of the persons in respect of whom such acknowledgments are made, is in itself sufficient to justify the conclusion that the acknowledgment of parentage, though it has reference to evidential presumptions and other considerations, is in effect a rule of *personal status* in the eye of Muhammadan law; and I am fortified in this conclusion by the uniform practice of the Courts in India and of the Privy Council in dealing with such questions as falling within the province of the Muhammadan law of inheritance and marriage.

The various propositions of the Muhmmadan law as they apply to the fact of this case and the steps of legal reasoning upon which those propositions proceed may now be stated.

The right of inheritance under the Muhammadan law is based upon three grounds described by Mr. Baillie to be, "*nusub*, which [329] is *kurabat* or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all, and *wula*, which is of two kinds, *wula* of emancipation and *wula* of *Moowalat*, or mutual friendship." In this case we are concerned only with *nusub*, that is, relationship by consanguinity of descent, which in Muhammadan law means legitimate descent only, so far as inheritance from or through males is concerned, and marriage between the parents of the inheritor is a condition precedent to his legitimacy. "The intercourse of a man with a woman who is neither his wife nor his slave is unlawful and prohibited absolutely. When there is neither the validity nor the semblance of either of these relations between the parties, their intercourse is termed *zina* and subjects them both to *huad* or specific punishment, for vindicating the rights of Almighty God" (Baillie's Dig., p. 1). "The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *wulud-ooz-zina*, or child of *zina*, and is necessarily illegitimate," (26, p. 3). The *Durrul Mukhtar* states the acknowledged general rule that "an illegitimate child as well as a child of curse or imprecation inherits only from the relations on the mother's side by reason of its being no residuary and having no father." (Tagore Law Lectures, 1873, p. 123). The same is the effect of the rule as stated in Rumsey's Chart of Muhammadan Inheritance (p. 342, 3rd ed.); and it is more fully expressed in *Aini*, where it is laid down that "illegitimate children and children of curse do not inherit, except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers, but as their parentage on the mother's side is established, they, on account of such

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parentage, inherit only from their mothers and half brothers by the mother's side the legal shares and no more." (Tagore Law Lectures, 1873, p. 123). "When a man has committed *zina* with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established, but it is established from the woman by the birth." (Baillie's Dig., p. 411).

From these passages two points are perfectly clear, *viz.*, *first*, that, so far as inheritance from males or through males is concerned, the existence of legitimacy of descent or consanguinity is a condition [330] precedent to the right of inheritance; and *secondly*, that such legitimacy depends upon a valid marriage or connection between the parents of the inheritor. Now, the Muhammadan jurists themselves in dealing with the question of parentage, *nusub*, or relationship by consanguinity, recognise a distinction between cases in which inheritance is claimed from or through the father and inheritance claimed from or through the mother. "Maternity admits of positive proof, because the separation of a child from its mother can be seen. Paternity does not admit of positive proof, because the connection of a child with its father is secret; but it may be established by the word of the father himself or by a subsisting *firash* (bed), that is, a legally constituted relation between him and the mother of the child" (Baillie's Dig., p. 389). And it may be taken as an undoubted proposition of the Muhammadan law of inheritance that in no case can an illegitimate child, that is, the offspring of *zina* or illicit intercourse, be entitled to inheritance from his father or through him, because he is regarded as *nullius filius*, that is a person whose *nusub* or descent from the father is wanting.

I have already said that in the case of establishing descent from a mother and claiming inheritance from her, legitimacy is not a condition precedent to such right of inheritance; but in the case of inheritance from the father legitimacy is absolutely necessary before any such right can be claimed. The question then is, whether in cases like the present, where the paternity of a child, that is, his legitimate descent from his father, cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognises any other method whereby such marriage and legitimate descent can be presumed, inferred, or held to be established as a matter of substantive law for purposes of inheritance.

In dealing with this part of the case much help is rendered by the case-law upon the subject. In *Khajah Hidayat Oolah* v. *Rai Jan Khanum* (1) the principle was laid down by the Lords of the Privy Council "that, under the Muhammadan law, where a child has been born to a father of a mother where there has been [331] not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan law, the presumption is in favour of such marriage having taken place;" and their Lordships go on to add, "that in considering this question of Muhammadan law we must, at least to a certain extent, be governed by the same principles of evidence which the Musalman lawyers themselves would apply to the consideration of such a question" (p. 318). The general effect of the ruling in that case is that continual cohabitation of the parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. Their Lordships had to deal with a similar question in *Mahomed Bauker Hoossain*

(1) 3 M.I.A. 295.

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Khan v. *Shurf-oon-nissa Begam* (1) in which their Lordships held, that although by the Muhammadan law the legitimacy of a child of Muhammadan parents may be presumed or inferred from circumstances, without any direct proof either of a marriage between the parents or of any formal act of legitimation, in the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party as a legitimate son to share in an intestate's estate should be dismissed. But whilst laying down this rule their Lordships went on to say :—

"But in arriving at this conclusion, they wish to be distinctly understood as not denying of questioning the position that, according to the Muhammadan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation" (p. 159).

The exact effect of these rulings was again considered by their Lordships in the important case of *Ashruf-ood-Dowlah Ahmad Hossein Khan* v. *Hyder Hossein Khan* (2), where their Lordships observed :—

"The presumption of legitimacy from marriage follows the bed and whilst the marriage lasts, the child of the woman is taken to be the husband's child ; but this presumption follows the bed, and [332] is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate ; if acknowledged, he acquires the *status* of legitimacy. When therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of facts. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumption of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to over-ride, over-balancing proofs, whether direct or presumptive" (pp. 113-14.)

This passage, if taken as an abstract enunciation of the law, might lend colour to the contention that even a child whose *illegitimacy is proved* may be legitimated by an acknowledgment, and indeed it was upon this interpretation of that passage that a considerable portion of the argument on behalf of the plaintiffs appellants proceeded. But the Lords of the Privy Council themselves in *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (3) took occasion to explain the exact effect of that passage and went on to say :—

These observations must be taken with a reference to the facts of that case, and in that case it appeared that there was a *Mottah* marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as son and at others not ; and indeed by a deed executed by the father for that purpose he was distinctly repudiated by him as his son. In that case it was decided that in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in

(1) 8 M.I.A. 136. (2) 11 M.I.A. 94. (3) 9 I.A. 8=8 C. 422.

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point of time would cover the birth of the child or of an acknowledgment. The facts and [333] questions in that case were very complicated, and some of the passages in the judgment referred to by the Judge below can only be understood by referring to the question to which they were addressed" (p. 19).

These observations are, in my opinion, an important limitation upon the interpretation of the passage on which so much reliance was placed at the bar in the argument for the appellants. The general effect of the ruling in the case last cited is that according to Muhammadan law, the acknowledgment and recognition of children by a father as his sons gives them the status of sons capable of inheriting as ligitimate sons, and this rule was affirmed again by the Privy Council in *Sadakat Hossein* v. *Syed Mahomed Yusuf* (1), where their Lordships expressly refrained " from offering any opinion upon the very important question of law" whether " the offspring of an adulterous intercourse could be legitimated by any acknowledgment" (p. 36).

This last reservation is to my mind a most significant one, as showing that the passage which I have quoted from their Lordships' judgment in *Ashruf-ood-Dowlah, Ahmed Hossein Khan* v. *Hyder Hossein Khan* (2) must not be understood loosely in the sense of being an abstract enunciation of the law applicable to all cases ; for I cannot help feeling that if that passage were to be interpreted loosely and regardless of the facts of the case in which those observations were made, there would have been no necessity for reservation of opinion by their Lordships in the case of the acknowledgment of an offspring of an adulterous or even of an incestuous intercourse. Illegitimacy under the Muhammadan law, as indeed under other systems, arises from the absence of a lawful matrimonial relation between the parents of the child ; and if illegitimacy which is *proved and placed beyond doubt* were no impediment to an acknowledgment, there would no be logical reason why the offspring of an adulterous or incestuous intercourse should not acquire the status of legitimate children when acknowledged by the father.

After having carefully considered the various rulings of the Lords of the Privy Council in the case to which I have referred, I am of opinion that their Lordships never intended to go the [334] length of laying down the rule that a child who is *proved* to be illegitimate, either in consequence of marriage between his parents being *disproved*, or being unlawful, could be legitimated by an acknowledgment. All the cases which their Lordships had before them were cases in which the question of marriage itself was a matter in dispute and involved in obscurity with reference to the legitimacy of the child. In other words, those cases were such as left either the fact or the exact time of the alleged marriage a matter or uncertainty, that is, neither *proved* nor *disproved* ; and their Lordships in dealing with those cases applied the principles of Muhammadan law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance. Any other view of those cases would involve the proposition that their Lordships intended to go far beyond the authority of the Muhammadan law itself as to acknowledgments of parentage and legitimacy for purposes of inheritance.

Yet such was the effect of the argument addressed to us in support of the appeal, and indeed that argument went the length of contending that the Muhammadan law as to acknowledgment of parentage was nothing

(1) 11 I.A. 31=10 C. 663.

(2) 11 M.I.A. at page 113.

more or less than a substitute for affiliation by adoption as recognised by the Roman or the Hindu law, that is, an affiliation which has no reference either to the consanguinity of descent of the acknowledged child from the acknowledger or to the legitimacy of such descent. I have already said that this contention is not warranted by any of the rulings of the Lords of the Privy Council, and I now proceed to show that it is positively opposed to the rules of the Muhammadan law itself.

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Not a single authority of that law has been quoted, and I am not aware of any, which would justify the conclusion that legitimacy of descent from a father is not an absolutely indispensible condition precedent to the very existence of the right of inheritance from the father, and I have already shown that children born of *zina* (which means fornication, adultery, or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a *proved and established* fact. The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to **[335]** cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child. This is abundantly clear from the authorities from which my brother Straight has already quoted. Among those authorities the passages from the first volume of the *Fatawa Alamgiri* may at first sight contradict the view to which have I given expression, and I am therefore anxious to explain that those passages have no such effect. The first of those texts only shows that an acknowledgment of parentage when duly made cannot be negatived. The second text, which relates to the case of a *majbub* (مجبوب) (1) acknowledging a child and such acknowledgment taking effect, notwithstanding the acknowledger's mutilated condition, proceeds upon the general principle of Muhammadan law against bastradizing children, and the words "*the child necessarily becomes his even without proof of sexual intercourse*" which occur in the text must not be understood to mean any thing beyond the rule that even in such a case acknowledgment of parentage obviates the necessity of ascertaining either the time or the extent of the mutilation of the acknowledger's person. The text assumes the existence of a valid marriage and the possibility of the acknowledged child's legitimate descent from the acknowledger , and I have no doubt that it would be misunderstanding the text if it were held to mean that even where there is a physical impossibility of the child's descent from the acknowledger, the child becomes of one who could not be his father. The reason of the rule relates not to any theory of adoption, but to the theory that an **[336]** acknowledgment of parenatge obviates any investigation as to the phycial condition of the acknowledger's potency or impotency or for procreating the

(1) From *jubb* (جب) which means the removal of the penis only. (*Dur*-ul-*Makhtar* p. 267). See footnote at p. 27, Baillie's Dig.

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offspring of a valid marriage. The same is the explanation of the latter part of the second text which my brother Straight has quoted from the *Fatawa Kazi Khan*.

The third text from the *Fatawa Alamgiri* requires no explanation, but the fourth text does require reference to show that it does not contradict the view which I have taken as to the assumption of legitimacy being a condition precedent to the validity of an acknowledgment of parentage. Now that text begins by assuming that the offspring was the result of an illicit intercourse, but the birth of the child took place during lawful wedlock, and it was acknowledged by the father. Now, so far as my view that the assumption of a legitimate descent is a condition precedent to the validity of the acknowledgment of parentage is concerned, it is enough to point out that in the text itself the condition is imposed that the birth of the child should take place after the expiration of six months (the shortest period of gestation under the Muhammadan law) from the date of the marriage—a condition which proceeds upon the theory of the possibility of a legitimate birth. The same is the theory upon which the latter part of the text proceeds, although it relates to birth within six months of the marriage, because the implication there is that the acknowledgment of the father must be taken to involve the possibility of a legitimate intercourse between the parents of the acknowledged child at the time of his being begotten. The text would be misunderstood if not considered in the light of the circumstance that divorce under the Muhammadan law rests entirely with the husband, that it may under certain limitations be retracted by him, and that there may be a remarriage between the parties. It is no doubt in view of this circumstance that the Muhammadan jurists have placed acknowledgment of the parentage of a child by a man upon an exceptionally strong footing, as obviating the necessity of an investigation into facts which would otherwise be necessary to establish the legitimacy of the child, with reference to the marriage of his parents, the period of his conception, and the date of his birth. The principle of the Muhammadan law on this head is much the same [337] as that adopted by the Courts of justice in England, where the rule is represented by the maxim *semper praesumitur pro legitimatione puerorum*, or by a cognate rule *semger praesumitur pro matrimonio*, the authority of which was recognised in *Piers* v. *Piers* (1). And it is important to observe that in the very text with which I am now dealing it is expressly indicated that an acknowledgment of parentage is ineffective if accompanied by an intimation that the acknowledged offspring was the result of an illicit intercourse. The words of the text are:—"*if he says that the child is born of me by illicit intercourse, the descent is not established and he will not inherit from him*," and they leave no doubt in my mind that it is only by misapprehension of the principles of Muhammadan law that it can be held that a person *proved* to be a *walad-ooz-zina*, that is, the offspring of a fornication, adultery, or incest, can ever be legitimated by any kind of acknowledgment by the father. It is upon the same principles that the first and third texts from the *Fatawa Kazi Khan* quoted by my brother Straight must be explained, and the latter part of the first text, as also the third text, show that the matter as to the effect of acknowledgment of parentage, though a rule of substantive law, proceeds entirely upon an assumption of the possibility of legitimate descent of an acknowledged child from the acknowledger, and that the rule as to the effect of such acknowledgment does not extend to cases where

(1) 2 H.L. Cas. 331.

such legitimate descent was impossible owing either to the impossibility of a valid marriage between the parents of the child, or owing to the existence of such a marriage being disproved by trustworthy evidence. And I have no doubt that I am representing the views of the Muhammadan jurists rightly when I say that there is no warrant in the principles of the Muhammadan law to justify the view that a child proved to be the offspring of fornication, adultery, or incest could be made legitimate by any act of acknowledgment by the father. I repeat that the rule is limited to cases of *uncertainty* of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment.

[338] I have dwelt upon this point at such length because the judgment of Petheram, C. J., now under appeal begins by saying :—

"The evidence in this case proves, in my opinion, that the plaintiff-appellant Allahdad was the illegitimate son of Ghulm Ghaus Khan. I also think upon the evidence that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was, in the inception at all events, an illegitimate son of his father."

Similarly, my brother Brodhurst, in summing up the effect of the evidence in this case, went even further than Petheram, C. J., in saying :—

"The following appears to be the established fact :—that Allahdad was not born in wedlock ; that he was the son of Moti by an unknown father ; that his mother was at the time of his birth and up to the time that she married Ghulam Ghaus a prostitute."

If I had taken the same view of the evidence as Petheram, C. J., or my brother Brodhurst, as to the parentage or birth of Allahdad, I should have found it impossible to have favoured his claim ; but according to the view of the facts which my brother Straight has taken, and in which I concur, the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad is wholly uncertain owing to want of trustworthy evidence, and, indeed, it is not even established that he was the natural son of Ghulam Ghaus. But direct evidence of paternity is not to be expected in such a case any more than in a case where the question of alleged illegitimacy does not complicate the facts. Indeed, in the Muhammadan law, as in other systems of jurisprudence, direct proof of paternity is not required, and rules of presumption more or less stringent are adopted by various systems as furnishing the place of absolute proof of paternity which, *ex necessitate rei*, cannot be proved by positive and direct evidence, because, as the *Fatawa Alamgiri* puts it, "the connection of a child with his father is secret," as distinguished from "maternity, which admits of positive proof, because the separation of a child from its mother can be seen." To sum up the matter, I agree in the views of my brother Straight in holding that the entire question of the descent, birth, and legitimacy of Allahdad is involved in obscurity owing [339] to the exact date of his mother's marriage with Ghulam Ghaus being unascertainable, and that, therefore, this case presents all those conditions to which the Muhammadan law as to the acknowledgment of parentage is most appropriately applicable ; and further, as my learned brother has shown here, the requisite acknowledgment in words and by treatment was made by Ghulam Ghaus without any such intimation of Allahdad being the offspring of illicit intercourse as would vitiate the effect of the acknowledgment according to the texts which my learned brother has quoted.

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Such being my view of the facts of the case, it is not necessary to enter into any elaborate discussion as to how far the provisions of s. 112 of the Indian Evidence Act (I of 1872), as to birth during wedlock being conclusive proof of legitimacy, would affect a case such as this. That section of course proceeds upon adopting the period of birth, as distinguished from conception, as the turning point of legitimacy. It is a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate who is born of parents married before the time of his birth, though they were unmarried when he was begotten" (Lord Mackenzie's Roman law, p. 133, 4th ed.)

That peculiarity of the English law has no doubt been imported into India by s. 112 of the Indian Evidence Act, and it may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon Muhammadan law of marriage, parentage, legitimacy, and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India. Fortunately the difficulty does not arise in this case owing to the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad being uncertain, and I need not therefore refer to the difficulty any further than by saying that there is enough authority in the text of the Muhammadan law to show that, under that system of jurisprudence, questions of legitimacy are referred to the date of the conception of the child and not to the period of his birth.

Nor need I dwell much upon that part of the argument of the learned Pandit for the appellant which aimed at showing that the [340] Muhammadan rule as to the acknowledgment of parentage is only a substitute for adoption as understood in the Hindu and the Roman system of jurisprudence, or that the rule of the Muhammadan law is the same as the Roman or the Scotch rule relating to the legitimation of children *per subsequens matrimonium*, that is, legitimation of ante-nuptial children whose illegitimacy is proved and admitted by subsequent marriage between the parents. So far as the argument refers to the Hindu law of adoption, I need only say, with reference to the numerous authorities which were considered by me in *Ganga Sahai* v. *Lekhraj Singh* (1), that adoption under that system has no reference to the natural descent of the adopted child from the adoptive father; that adoption at least in its principal form, is established by a gift from the parents of the child to the adoptive parents; that the power of adoption itself is based upon religious considerations relating to the spiritual welfare of the adoptive father in the life to come after death; that the effect of such adoption, takes away the adopted child from the family of his natural parents and affiliates him to the family of the adoptive father. Further under that law only male children can be adopted for religious reasons, although no doubt secular considerations, such as the continuity of a family and devolution of inheritance, may form motives of adoption. None of these main elements of the theories upon which the Hindu law of adoption proceeds is common to the Muhammadan law, for there, as I have shown, acknowledgment of parentage proceeds upon the theory of actual descent of the acknowledged child (whether male or female) from the father who acknowledges it, and such descent being the result of a legitimate intercourse between the parents, and when either of these two essentials is disproved, the one by proving that the acknowledged child is

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(1) 9 A. 253

the offspring of another man, the other by proving either that marriage between the acknowledger and the mother of the child was impossible or did not exist at the time which would make the child legitimate, the acknowledgment itself would be ineffective.

For similar reasons there is absolutely no analogy between the Roman law of adoption and the Muhammadan law of the acknowledgment of parentage. Under the Roman system adoption, [341] whether in the form of *arrogatio* or in the latter form of *adoptio* proper, was simply one of the methods of acquiring *patria potestas*, that is, the rights of control enjoyed by the head of a Roman family over his children, and it went through various stages of modification both as to the method by which it was acquired and as to its conditions and effects upon the adopted children. The history of the law and its rules have been well summarized by Mr. Hunter in his work on Roman Law (pp. 58-66), and by Colquhoun in his work on Roman Civil Law (Vol. I, ss. 683-705, pp. 545-558). It is not necessary to enter into any detail of the reasons and rules which distinguish the Roman adoption from the Muhammadan law as to the acknowledgment of parentage, and it is enough to say that before the age of Islam adoption by a feigned parturition was common and well recognised among the ancient Arabs, that the cognate as well as the agnate rights were attributed to children so adopted, and that such adoption and its legal effects were abrogated by the express words of the Koran and have never since found a place in Muhammadan jurisprudence in connection with marriage, inheritance, or for any other legal purpose (see Colquhoun's Roman Civil Law, s. 707, Vol. I, p. 559).

Then, so far as legitimation is concerned as a rule of the Roman Law and of the Scotch Law, I need only refer again to Colquhoun's Roman Civil Law (ss. 660, 666, 667 and 683) and to Lord Mackenzie's Roman Law (pp. 130-34), which describe the rules, conditions, and effect of legitimation under both those systems, and it only requires a comparison between those rules and the rules of the Muhammadan law as to acknowledgment of parentage to show that no analogy exists between the principles upon which those rules proceed and those upon which the Muhammadan rule of the acknowledgment of parentage is founded. Putting the matter shortly, the former two systems proceed upon the principle of legitimating children whose illegitimacy is proved and admitted, whilst the Muhammadan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child. To illustrate this distinction I may refer to the rule adopted [342] in Scotland and I may also say in France (Lord Meckenzie's Roman Law, pp. 132-33), as to the legitimation of ante-nuptial children by reason of subsequent marriage between their parents—*per subsequens matrimonium*. In both those countries the marriage itself, subject to certain restrictions, has the legitimating effect. No such rule is known to the Muhammadan law and we should really be introducing doctrines foreign to that system if, influenced by the analogies furnished by the Roman, the French, or the Scotch law of legitimation, we were to place acknowledgment of parentage under the Muhammadan law on the same footing as the rule of legitimation *per subsequens matrimonium* rests on in the foreign systems of law to which I have referred.

It is apparent from what I have said that I fully concur with my brother Straight as to the weight of evidence and the facts of this case, and that I have as a matter of law arrived at the same conclusion as he

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has arrived at with reference to the status of the plaintiff Allahdad to be that of a legitimate child of Ghulam Ghaus, and as such entitled to inherit from the latter and entitled to maintain the suit. But then comes a question upon which, unfortunately, I am unable to agree with my learned brother, namely, the question as to what order we should pass upon this appeal. The facts of the case and the pleadings of the parties show that this is one of those cases which fall within the purview of the Full Bench ruling of this Court in *Jafri Begam* v. *Amir Muhammad Khan* (1) and of a Division Bench ruling in *Mahammad Awais* v. *Har Sahai* (2). These rulings show that no absolute and unconditional decree should be passed for possession in favour of the plaintiff, if it is true that during his remaining out of possession debts due by the deceased Ghulam Ghaus Khan were lawfully paid, by the heirs in possession. If such payment of debts be proved, the effect would be that the payment of a proportionate share of such debts would be a condition to which the decree in favour of the plaintiffs would be rendered subject with reference to the various equities that may arise in the case.

Have we, then, upon the record any material for framing such a decree? The learned counsel for the parties are agreed that there is no sufficient material upon the record to enable us to frame such [343] a decree. All that is contended by the learned Pandit for the appellants is that, in the absence of such materials, it is the duty of this Court as the Court of appeal to decree the suit absolutely without any further remand for a proper trial of the points upon which the equities aforesaid would proceed. It is important to observe that not only the heirs of the deceased Ghulam Ghaus Khan but also three lessees, were parties defendants to the suit, and it is clear that in a suit of this character, if the Court below had framed adequate issues arising out of the proceedings of the parties and after taking evidence thereon had adjudicated upon those issues, we should have been bound by s. 564 of the Code of Civil Procedure to go ourselves into the merits of the evidence and to refrain from a remand such as s. 562 of the Code contemplates. But for the reasons stated by the learned Chief Justice such is not the case here; and agreeing with him in the interpretation of the law upon the subject of remand for new trials under s. 562 of the Code of Civil Procedure. I hold that all that the learned Judge of the lower Court tried and decided in this case was the preliminary question of the plaintiff Allahdad's status to sue as the heir of the deceased Ghulam Ghaus and that, by reason of the view taken by that Judge upon this point of status the rest of the case was not tried upon the merits, and that, therefore, the case is a fit one for remand under s. 562 of the Code of Civil Procedure.

I agree with the learned Chief Justice in the order which he has made.

Cause remanded.

(1) 7 A. 822. (2) 7 A. 719.

10 A. 343 = 8 A.W.N. (1888) 38.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HASHMAT BEGAM AND ANOTHER (*Plaintiffs*) *v.* MAZHAR HUSAIN AND OTHERS (*Defendants*).* [11th January, 1888.]

Limitation—Suit by Muhammadans for possession of immoveable property by right of inheritance to mother—Act XV of 1877 (Limitation Act), sch. ii, Art. 141.

Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step-mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation inasmuch, as their mother died on the 22nd January, 1873, and the suit was not instituted till the 29th of January, 1885. The Court below finding that the mother died on the 22nd January, [344] 1873, held that art. 141, sch. ii, Limitation Act, barred the claim and dismissed the suit.

Held that art. 141 of the Limitation Act does not apply to a suit by an heir-at-law for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainder-man or reversioner or a devisee, and on the death of the female sues on the basis of that character.

[R., A.W.N. (1908) 256 = 5 A.L.J. 715.]

THE facts of this case are stated in the judgment of Straight, J.

Hon'ble *T. Conlan* and Mr. *Amir-ud-din*, for the appellants.

Mr. *C. H. Hill* and Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

STRAIGHT, J.—In the suit to which this appeal relates there were two plaintiffs, the appellants before us, Musammat Hashmat Begam and Musammat Ishrat Begam. The defendants to that suit, who are respondents before us, were Mazhar Husain, the brother of the plaintiffs, Husaini Begam, wife of Mazhar Husain, Musammat Khudayat-ul-Kubra, the sister of the plaintiffs' and Musammat Wajid-un-nissa, the second wife of Kamar-ud-din, the deceased father of the plaintiffs and defendants (1) and (3). It may be convenient also to state here that Kamar-ud-din, the father of the plaintiffs and defendants (1) and (3) and the husband of defendant No. (4), had a brother of the name of Zain-ul-Abid ; and that his first wife was one Musammat Sakina Bibi, who predeceased him. The property, which is the subject of the present suit is of two kinds : first, the interest which the plaintiffs claim as the daughters of Musammat Sakina Bibi in their deceased mother's estate ; and secondly, their shares in the estate left by their deceased father, Kamar-ud-din, who died upon the 25th May 1874. The case for the plaintiffs in regard to these two properties was that as to each of them they were severally entitled to six sihams; that their sister defendant Khudayat-ul-Kubra, was also entitled to six sihams ; and that the principal defendant, Mazhar Husain, their brother, was entitled to the residue of 12 sihams out of the 30 sihams into which the properties were divisible. Such were the claims in respect of which the plaintiffs brought their present suit, and the grounds upon which they based their cause of action for coming into Court was, that by reason of certain alienations of the property of their deceased father and mother made by their brother

* First Appeal No. 124 of 1886 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 29th March, 1886.

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Mazhar Husain in favour of his wife, the second defendant and daughter [345] of their father's brother, Jamal-ud-din, they had been prejudiced in their rights by inheritance. In regard to that portion of the property which belonged to the estate of their mother Sakina Bibi, they no doubt said in their plaint, as part of their statement of the facts, that her death took place upon the 2nd February, 1873. The nature of their claim being that which I have indicated, it was met by a long statement of defence filed by the defendant Mazhar Husain, the real answering defendant, which, when we come to analyze it, sets up three main contentions:—First, that Musammat Sakina Bibi did not die on the 2nd February, 1873, but on the 22nd January, 1873, and, therefore, that the suit, *quoad* that portion of the property claimed is, as to both the plaintiffs, barred by limitation; secondly, that if it is not barred, then that, *quoad* the claims of the plaintiffs to the property both of Musammat Sakina Bibi and of Kamar-ud-din, there has been upon their parts a relinquishment of their rights of inheritance; and, lastly, it is urged that, even assuming the rights of the plaintiffs have not been relinquished, they are bound to repay to the defendant, before they can succeed in this suit, their shares of certain debts of their deceased father Kamar-ud-din, which have been satisfied by the defendant.

As to the first of these matters, an issue was framed and tried by the learned Judge below, namely, whether Musammat Sakina Bibi died upon the 2nd February, 1873, as alleged by the plaintiffs, or on the 22nd January, 1873, as alleged by the defendant. Upon this point the Subordinate Judge found against the plaintiffs and in favour of the defendant, and his finding was that the death of Musammat Sakina Bibi took place upon the 22nd January, 1873. The learned Subordinate Judge acting upon that finding has, so I understand him, held that art. 141 of the Limitation Law is applicable to the suit, and that it, having been instituted upon the 29th day of January, 1885, is beyond time, such date being more than twelve years from the date of the death of Musammat Sakina.

As to the first point impeaching this finding of fact, I listened to Mr. *Conlan's* argument with very great attention, and gave full weight to his criticisms of the witnesses for the defendants, and of the views expressed by the Subordinate Judge as to the value to be attached to the testimony on the one side and the other. Having fully considered all that evidence [346] as it bears upon this point, I think it enough to say, without travelling through it in detail, that I am of opinion the Subordinate Judge was right in coming to the conclusion he did, and that the weight of evidence does appear to me to be in favour of the allegations made on the part of the defendants, that the 22nd January, 1873 was the date of the decease of Sakina Bibi.

Then arises the question whether art. 141 of the Limitation Act is applicable. Upon consideration, I am inclined to think that it is not. I have come to the conclusion, though not without doubt, that the suit therein provided for is one by a Hindu or Muhammadan who, prior to the date of the death of the female, occupied the position of a remainder-man, or reversioner, or of a devisee, by devise, after the death of the female, instituting a suit on the basis of such title as remainder-man, reversioner, or devisee, and that it does not apply to the case of an heir-at-law suing for the possession of immoveable property in that character. I say I have come to his conclusion not without doubt; but it seems to me that when there is doubt upon a question of limitation, and another article can be

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found which reasonably applies to the suit, it is right to adopt it. From the assertion of the defendant himself in the 9th paragraph of his statement of defence, and from the circumstances disclosed, I think that the property left by Sakina Bibi and Kamar-ud-din may be regarded as joint family property of the kind mentioned in art. 127 of the Limitation Act. If this be so, then it is clear that knowledge of their exclusion from their shares therein was not acquired by the plaintiffs till a date which would bring the suit well within the period provided by that article. But if this article be not applicable, the plaintiffs can fall back upon the limitation of art. 144, and as no adverse possession has been pleaded or shown—indeed, the inference from the relation between them and the defendant rather pointing to a contrary inference...the suit under that article would also be within time. In this view the matter stands thus, that the plaintiffs are persons who, as the daughters of Sakina Bibi and Kamar-ud-din, are entitled to a share in the inheritance of the estates left by those two persons, and it rests with the defendant Mazhar Husain to show either that, by relinquishment formally made and clearly and satisfactorily established, they have abandoned their interests in both properties, [347] or that by his adverse possession for a period of more than twelve years prior to the date of suit, he has obtained a proprietary title to their shares.

* [As to this latter point I have looked very carefully through the statement of defence, and I find no paragraph therein which I can construe as setting up a plea of adverse possession. Mr. *Ross* has said that, because the plaint was framed in a particular way, and suggested the date of the death of Sakina Bibi as the time when their cause of action arose in respect of her estate, the defendant was misled thereby, and did not raise the plea of adverse possession, I do not think that we ought at this stage of litigation to listen to such a contention. Taking the statement contained in the plaint as a whole, if the defendant Mazhar Husain had a defence upon the ground of adverse possession, he ought, in my opinion, to have raised it. But he did not, had not having done so, I do not think that we should entertain that question now or afford him further opportunity for producing evidence in regard to it. Then comes the point of whether the defendant has shown that the plaintiffs relinquished their rights of inheritance in the estate of their father and mother in favour of the defendant (or any other person). I do not propose upon the present occasion to repeat the remarks that I have in cases of this description frequently had to make before with regard to the obligation that rests upon our Courts of scrutinizing these matters, in which *pardahnashin* ladies are involved, with an extremely careful and jealous eye. Here I may remark that the learned Sub-Judge seems to have been a good deal influenced in dealing with the present case by certain circumstances present to his mind with regard to the character and conduct of Riazuddin, the husband of the plaintiff Hashmat Begam, and he seems to have lost sight of the fact that her rights in the property of her deceased father and mother were wholly independent of, and apart from, her husband; and that she was entitled to entirely independent control of that property according to Muhammadan Law. Therefore, whatever his misconduct or however fraudulent or dishonest her husband was, he could in no way prejudice or damage her interest or right, or by any act of his, preclude her from obtaining a determination of the question whether

* Here commences the latter portions of the judgment, not set out in 10 All. 343.

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she is not entitled to the rights which she claims. Mr. *Ross* has admitted, with the candour which always marks his conduct of his cases, that with regard to the plaintiff Ishrat Begam there is no evidence from which it would be proper to infer that she has relinquished her share, so that as regards her it must be taken as conceded, and I think rightly, that the defendant's plea upon that score entirely failed. Generally, as regards her case and that of her sister Hashmat Begam, the other plaintiff, I can only repeat what I have so often remarked before, that, considering the peculiar conditions of the lives of these *pardah* ladies, and remembering that in 999 cases out of 1,000 their business matters and interests connected with their own property are left in the hands of, and managed by, their male relatives, too much importance is not to be attached to their silence about or failure to assert their legal rights. Indeed, ordinarily speaking, I doubt if any adverse inference should be drawn from that circumstance. It is unfortunate that we have not before us the evidence of either of the plaintiffs, as, for some reason unknown to us, no commission was issued to take their deposition. But applying the common knowledge open to us of the position which the females in Muhammadan families occupy in regard to the male members, we are disposed to accept the explanation offered us for the plaintiffs, that while they were willing for a time at any rate to allow their brother, the defendant Mazhar Husain, to remain in possession of their interest, he having to wind up the father's affairs and pay any debts that he had owing out of the profits generally derivable from the joint property, they never contemplated nor intended to surrender or abandon their rights in the corpus of the estates left by their father and mother. With regard to the plaintiff Hashmat Begam, I have only a word or two to say about the evidence of relinquishment set up by the defendants to defeat her. This rests upon that extraordinary transaction, for I can call it no other, which is alleged by the defendant to have taken place on the 17th March, 1874. First of all it is to be observed with regard to it that the mortgage, which is said to be evidence that she relinquished her inheritance in the estate of her father, was executed before her father's death, a portion of the consideration money being in fact found by the father himself. Further, upon looking into the document and the evidence with regard to it, it is difficult to understand why the plaintiff Hashmat Begam should accept the position of a mortgagee of her father-in-law for Rs. 7,000 as an equivalent for the interest she had already acquired in her mother's estate, and was in future to acquire in her father's estate. It looks very much as if the real state of things was that Kamaruddin, who then was a Munsiff within the jurisdiction of this Court, was in conjunction with his son lending Rs. 7,000 to his brother Zain-ul-abdin, and for the purpose of avoiding the appearance of his name in the transaction as mortgagee, he simply used the name of his daughter, a course of proceeding by no means uncommon in this country. As I said, Kamaruddin did not die until the 23rd May, 1874, and, so far as I can ascertain, it was not until this suit was instituted that it was ever suggested that this extraordinary mortgage transaction represented the consideration for the relinquishment by the plaintiff Hashmat Begam of her interests in the several estates of her father and mother. But, as I have before observed, we must not lose sight of the fact that this is a case in which we are dealing with a *pardah-nashin* lady, and it behoves us not to hold her bound by any transaction, unless we are clearly satisfied that she was, with the knowledge of its

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nature, a conscious and consenting party thereto. Now it is clear, upon the face of the mortgage itself, that it was not executed by the lady, her name nowhere appears upon it, and even the name of her husband, who is said to have been mixed up in the transaction, is not subscribed by himself but by Zain-ul-abdin, his father-in-law, as his attorney. As far as the document itself is concerned, I find nothing to bind the plaintiff, Hashmat Begam, and for that purpose it seems to me to be practically worthless. In this connection, I need only refer to, without speaking at length, what I have more than once laid down from this Bench as to the objection that rests upon a party to a suit seeking to bind a *pardahnashin* lady to give clear and satisfactory proof that she had opportunities of obtaining independent advice before entering into the transaction with which she is sought to be fixed, and that she did enter into it with full knowledge of its nature and legal effect. I think also that, as regards Hashmat Begam, the evidence of any relinquishment of her rights by her entirely fails. Then the single question remains, has the defendant under the eighteenth plea, which was raised in his statement of defence, established anything on the nature of an equitable set-off that would entitle him to require the plaintiffs to repay to him any sums of money paid by him in respect of the debts of the father or mother? He has, in my opinion, proved no such case. Even if he has paid any debts, which as far as I can see were by no means considerable, he has now been in possession and enjoyment of the profits derivable, in respect of the rights of the two plaintiffs, since 1873 and 1874. No claim is made by them for profits received by him antecedent to the date of the institution of this suit and therefore I think we may well say here that we are not called upon to hold that he is entitled to receive anything from the plaintiffs before they can receive their shares. I am of opinion that this appeal succeeds, that the Subordinate Judge was wrong in the view he took, and, reversing his decree, the claim of the plaintiffs will stand decreed with costs in both Courts.] *

Tyrrell, J.—I entirely concur.

Appeal decreed.

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10 A. 347 = 5 A.W.N. (1888) 62.

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[347] *Before Mr. Justice Straight.*

GANGA PRASAD AND ANOTHER (*Defendants*) v. BALDEO RAM AND OTHERS (*Plaintiffs*).† [23rd January, 1888.]

Act XII of 1881 (N.W.P. Rent Act). ss. 84, 148—Suit to contest demand of distrainer—Intervenor—Decree of Rent Court in such suit not conclusive in civil suit for declaration of right to and possession of land—Limitation for such suit.

Decree of a Rent Court passed upon enquiries made under ss. 84 and 148 of the Rent Act (XII of 1881) is not conclusive as between the parties to the enquiry, upon the question of title, in a suit instituted in a Civil Court for declaration of right to, and possession of, the land in respect of, which the Rent Court decree was passed.

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* Here ends the portion of the judgment not set out in 10 A. 343.

† Second Appeal No. 1918 of 1886 from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 9th July, 1886, reversing a decree of Maulvi Muhammad Aziz Rahman, Munsiff of Bansgaon, dated the 16th April, 1886.

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The period of limitation, for instituting a suit in the Civil Court as prescribed in these sections, applies only to suits brought by plaintiff, or unsuccessful intervenor to have it declared that plaintiff had a title to receive the particular rent claimed, and which the Rent Court has refused to give him; and not to suits for declaration of title to, and possession of, the land in respect of which the rent accrued due.

In the year 1881, plaintiffs had, under the provision of the Rent Act (XII of 1881), made a distraint for rent alleging to be due by one of their tenants. The tenant contested the legality of the distraint by a proceeding in the Rent Court, and the defendant intervened on the ground that he had been actually and in good faith in receipt and enjoyment of the rent of the land occupied by the tenant. On the 28th of June, 1881, Rent Court decided against the defendant; but owing to some irregularity the distraint was withdrawn. Plaintiffs subsequently instituted a suit in the Rent Court against the tenant for recovery of arrears of rent and the defendant again intervened, and upon enquiry under s. 148 of the Rent Act (XII of 1881), plaintiffs' suit for arrears of rent was dismissed. Plaintiffs then instituted this suit in the Civil Court for declaration of their right to, and possession of, the land in respect of which distraint proceedings had been taken and suit for recovery of arrears of rent instituted. The Court of first instance dismissed the suit on the merits. The plaintiffs appealed and urged, *inter alia*, that the defendant was estopped by the decision of the 28th June, 1881, from contesting plaintiffs' title.

Held that the decision of the 28th June, 1881, in the enquiry held under s. 84 of the Rent Act (XII of 1881) was not conclusive between the parties in a subsequent [348] suit between them to determine their title to the land in respect of which the distraint proceedings had been taken.

[N.F. & D,—23 A. 434 (436) = A.W.N. (1901), 123; F., 25 A. 83 (86) = A.W.N. (1902), 204.]

THE facts of this case are stated in the judgment.

Munshi *Juala Prasad*, for the appellants.

Mr. *Simeon*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This is a suit for declaration of title to and possession of 1 bigha 12 pie *kham* land numbered 98 in the revenue registers. It will be seen that there are two defendants to the suit, one Ganga Prasad and the other Mital Kahar, and their position in regard to the litigation will be explained by a statement of the following facts, which the learned pleaders for the parties at the hearing informed me were the facts out of which the suit has arisen. It appears that some time before 1881, the plaintiffs had under the provisions of the Rent Act made a distraint for rent which they alleged to be owing from the defendant Mital Kahar. Mital contested the legality of that distraint by a proceeding in the Revenue Court, and under section 84 of the Rent Act the defendant Ganga Prasad intervened, and the question therefore came up for determination as to whether before and up to the time of the commencement of that suit in the Revenue Court the defendant Ganga Prasad had been in actual receipt and enjoyment of the rent of the land occupied by the defendant Mital. The Revenue Court decided against the claim of Ganga Prasad, but it was held that there had been irregularity in the plaintiff's distraint, and it was accordingly directed to be withdrawn.

Subsequently a second suit was brought in the Revenue Court by the plaintiffs to recover certain arrears of rent from Mital, and again Ganga Prasad intervened, this time under section 148 of the Rent Act, the question thus raised for determination again being, who had in good faith received and enjoyed the rent of the land before and up to the time when the right to sue claimed by the plaintiffs had accrued. On this occasion the Revenue Court took a different view and held that Ganga Prasad had

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established that he was the person who had had the receipt and enjoyment of the rent. Thereupon the present suit was instituted by the plaintiffs for, as I have already said, a declaration of their right to, and possession of, the land numbered [349] (98). The first Court dismissed their claim upon the merits, and they then appealed to the lower appellate Court. Among their pleas there was one to the effect that the defendant Ganga Prasad was incompetent to set up any defence to the present suit by reason of the first decision of the Revenue Court upon his intervention in the distraint suit under section 84, Rent Act. This plea has been accepted by the Subordinate Judge, and he has in effect found that the decision of the 28th June 1881, of which I have spoken, precluded the defendant from raising his present defence.

It is argued before me that this is an erroneous ruling in law and that, whether the decision of the 28th June, 1881, could have made the question subsequently raised in the Revenue Court in the rent suit *res judicata* for the purposes of that tribunal, it can in no sense stand in the way of the defendant asserting his proprietary title to the land, in a suit in the Civil Court, brought against him and the occupier of the land, for a declaration of the plaintiff's proprietary title to the land. Three rulings of this Court were referred to by the appellant's pleader in the course of his argument, which are *Gopal* v. *Uchabal* (1), *Chotu* v. *Jitan* (2), *Muhammad Salim* v. *Abdul Rahim* (3).

To the first two of those rulings I was a party, and in one of them I pointed out what appeared to me to be the scope of inquiry by a Revenue Court, as sanctioned by the provisions of section 148 of the Rent Act. Those remarks apply by analogy to section 84, and I need only briefly repeat them by saying that in either case, it appears to me that the sole question upon which, as a question of fact, the Revenue Court has the power to determine, is as to whether the plaintiff in the suit or the intervenor has received the rent of the land before and up to the date when the plaintiff alleged that his right to sue accrued to him.

Then comes the point as to whether the last paragraphs of sections 34 and 148 of the Rent Act deprive the plaintiffs, who have been worsted in such a suit, when they came into the Civil Court for a declaration of their proprietary title to, and possession of, such land, of the ordinary limitation period that under the law regulating such matters would ordinarily apply to a suit of such a [350] description, by reducing the twelve years' term to a term of one year. It has been ruled by my brothers Brodhurst and Tyrrell in effect that it does not, and I believe this to be a sound view.

All I understand those last paragraphs of section 84 and 148 to say is, that when an intervenor has succeeded in a revenue suit in convincing a Revenue Court that he has been in receipt and enjoyment of certain rent distrained for or claimed, or *vice versa*, that the plaintiff or the unsuccessful intervenor may go to the Civil Court with a a suit to have it declared that he had a title to receive that particular rent, which the Revenue Court refused to give him, and that if he does institute such a suit, he must do so within one year from the date of the Revenue Court's decision. I cannot hold that by the terms of either of those paragraphs, the period of limitation provided for a suit for a declaration of title to and possession of immoveable property, in the limitation law, is thus summarily abridged.

(1) 3 A. 51. (2) 3. A. 63. (3) A.W.N. (1885) 261.

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Such being the view I take, it follows that this appeal should succeed, and that the question of the proprietary title to the land should be determined upon the merits by the lower Court. I accordingly decree the appeal, and reversing the decision of the Subordinate Judge, direct him to restore the appeal to his file of pending appeals and to dispose of it according to law. Costs hitherto incurred will be costs in the cause.

Cause remanded.

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10 A. 350 = 8 A.W.N. (1888) 92 = 13 Ind. Jur. 36.

REVISIONAL CRIMINAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* AJUDHIA SINGH AND OTHERS. [25th January, 1888.]

Limitation—Sanction to prosecution—Application for such sanction—Criminal Procedure Code, s. 195—*Act XV of* 1877 (*Limitation Act*), *sch. ii, art.* 178.

Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases.

Article 178, sch. ii, Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*.

A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in Court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where, on the 24th June, 1886, the Munsif's decree was affirmed. Defendants then [351] applied to the Munsif for sanction to prosecute the plaintiffs for the offence of using a forged document knowing the same to be forged. Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge such sanction was granted. On application to revise the Sessions Judge's order granting sanction, it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted.

Held, that there is no fixed period of limitation for making applications for sanction under section 195 of the Criminal Procedure Code.

[Appl.—20 B. 543 (547); R.—11 C.P.L.R. 141 (142); U.B.R. (1902) 2nd. Qr. Cr. Pro. p. 3; 13 Cr. L.J. 209 (212) = 14 Ind. Cas. 305 = 11 M.L.T. 367 = (1912) M.W.N. 499 = 22 M.L.J. 419.]

THIS was an application under section 489 of the Criminal Procedure Code to revise the order of the Officiating Sessisons Judge of Gorakhpur, granting sanction to prosecute the petitioners for an offence punishable under section 471 of the Indian Penal Code. The facts under which the application was made are stated in the judgment of the Court.

Mr. *Niblett*, for the petitioners.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

MAHMOOD, J.—This is an application which invokes the interference of the Court, in the exercise of its revisional jurisdiction, on behalf of the petitioners, in respect of whom permission was given by the learned Sessions Judge to the opposite party for prosecuting the petitioners under section 471 of the Indian Penal Code. The petitioners produced in a former litigation a document which has been held by both the lower Courts to be a forgery, and that litigation came to an end on the 24th June, 1886, by a decision of this Court which was adverse to the interests

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of the present petitioners. Then, on the 6th November, 1886, the present application was made for a sanction to prosecute, such as is contemplated by section 195 of the Criminal Procedure Code, but the Munsif declined to give permission. The learned Sessions Judge, in the exercise of the powers of a Court of appeal, has, however, granted the sanction prayed for, and, in disputing the propriety of this order, Mr. *Niblett* has relied mainly upon two points. In the first place, the learned pleader contends that there was such unreasonable delay as to bar the application, and, in the next place, he argues that under section 195 of the Criminal Procedure Code it was important for the Court granting sanction to obey strictly the provisions as to the specification of the circumstances as to the place where and the time when the offence was committed.

[352] As to the first of these points, I am not aware of any rule of law which subjects such applications to any period of limitation. Mr. *Niblett* relies on the general provisions of art. 178 of the second schedule of the Limitation Act (XV of 1877) and contends that the clause gives indications of a period of three years within which such application should be made. I cannot accept this contention, because rules of limitation are foreign to the administration of criminal justice, and it is only by specific legislation that periods of limitation can be rendered applicable to criminal proceedings.

For instance, in the second division of schedule II of the Limitation Act specific provision as to the period of limitation is made in respect of criminal appeals, and, it is no doubt, by reason of those express provisions that limitation is applicable to such appeals. But supposing no such provisions existed, I should probably have been inclined to hold that even in the case of appeals arising out of criminal proceedings, no period of limitation was applicable on general principles of the law ; and the result of such a view would, no doubt be, to render it possible for a person convicted of a criminal offence to appeal at any time, at least during the continuance of the sentence passed upon him.

The present, however, is not a case of appeal, but only one of an application to obtain sanction for prosecution under section 195 of the Code of Criminal Procedure, and I have to consider whether article 178, schedule II, of the Limitation Act is applicable to the case. For the purposes of deciding this question, I need not determine " when the right to apply accrued " within the meaning of the third column of that article. The substantive portion of the article in describing the class of cases to which it is applicable runs as follows :—

" Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230. "

In order to interpret this clause, it is important to realize that the preamble of the Act itself, whilst making provision as to limitation governing "*suits*" and "*appeal,*" expressly limits the scope of the enactment to "*certain applications.* " In other words, the Act does not profess to provide for all kinds of applications what-**[353]** soever. This being so, it is important to notice that throughout the third division of schedule II of the Act no reference is made to any application arising out of proceedings under the Code of Criminal Procedure, and this circumstance taken with the language employed in the preamble of the statute, and also with the words of article 178 itself, leads me to the conclusion, that, that article is not applicable to applications under section 195 of the Code of Criminal Procedure. This view proceeds upon the same principle as the ruling of Westropp, C.J., in

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Bai Manakbai v. *Manakji Kavasji* (1), and of Wilson, J., in *Govind Chunder Goswami* v. *Rungunmoney* (2). The effect of those rulings is, that the general words of article 178 must not be read irrespective of the latter part of the article, which refers to the Code of Civil Procedure, and that the applications contemplated by the article must be taken to mean applications under that Code. Similar is the principle of the ruling of the Madras High Court in *Kylasa Gaundan* v. *Ramasami Ayyar* (3), and of the Bombay High Court in *Vithal Janardan* v. *Vithojirav Putlajirav* (4), and the Calcutta High Court in the case of *Ishan Chunder Roy* (5), where Tottenham, J., laid down the general rule that article 178 must be construed with reference to the wording of the other articles and can relate only to applications *ejusden generis*.

As to the next part of Mr. *Niblett's* argument, I have to consider the effect of the following paragraph of section 195 of the Code of Criminal Procedure :—

"The sanction referred in this section may be expressed in general terms, and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed."

It seems to me that the terms in which the learned Judge gave sanction in this case complied sufficiently with the provisions of this clause, because it specifies the Court and the occasion on which the offence is alleged to have been committed. Mr. *Niblett's* argument seems to proceed upon the contention, that the learned Judge in giving sanction, should have specified the place and occasion on which the alleged forgery was committed. But this contention is [354] clearly unsound, because the offence charged is that described in section 471 of the Indian Penal Code, which refers to the *use* of a forged document, and such an offence in a case like the present would take place in the Court where the document is used and not at the place where it has been forged.

For the purposes of this case, I am not required to enter into the merits of the case as to how far the prosecution, if instituted, is likely to succeed, and it is enough to say that Mr. *Niblett's* argument on the points of law raised by him having failed, I see no reason to interfere with the order of the learned Judge, in exercising the revisional jurisdiction of this Court.

The application is, therefore, rejected.

Application rejected.

(1) 7 B. 213. (2) 6 C. 60 (3) 4 M. 172. (4) 6 B. 586. (5) 6 C. 707.

10 A. 354=8 A.W.N. (1888) 57=13 Ind. Jur. 34.

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10 A. 354= 8 A.W.N. (1888) 57. 13 Ind. Jur. 34.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ISHUR DAS AND ANOTHER (*Defendants*) v. KOJI RAM (*Plaintiff*).*
[27th January, 1888.]

Question for Court executing decree—Money paid into Court by pre-emptor under Civil ProcedureCode, s. 214—Suit for pre-emption dismissed on appeal—Suit for refund of money paid into Court—Civil Procedure Code, s. 244.

A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595, which the Court determined was the amount of the sale-consideration. He paid the amount to the vendees and the payment was certified under s. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale-consideration to Rs. 1,995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the appellate Court and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who after unsuccessful application made to the Court of first instance, under s. 244 of the Civil Procedure Code, to recover the amount, instituted this suit.

Held, that the assignee was a representative of the plaintiff in the pre-emption suit, within the meaning of s. 244 of the Civil Procedure Code, and the suit was therefore barred under the provisions of that section.

ONE Balwant sold his right in Mauza Sakri to Kewal Ram and Ishur Das. Ram Lal brought a suit for pre-emption. On the [355] 11th of February, 1880, he obtained a decree conditionally on the payment within thirty days of the sum of Rs. 1,595, the amount of the purchase-money as determined by the Court. The vendees appealed to the Judge urging that the purchase-money was Rs. 1,994-4-0. On the 22nd of April, 1880, their appeal was dismissed. Ram Lal paid Rs. 1,595 to the vendees, and a receipt was filed in Court on 16th August, 1880. The vendees, however, appealed to the High Court urging that Rs. 1,994-4-0 and not R. 1,595 was the true amount of purchase-money, and on the 13th April, 1881, their appeal was allowed and Ram Lal was declared entitled to possession on payment of Rs. 1,994-4-0, within a month of the date of the receipt by the District Court of the decree of the High Court. Ram Lal did not pay the difference between the amount he paid, namely, Rs. 1,595 and the amount determined by the High Court as the true price, Rs. 1,994-4-0.

On the 15th of February, 1882, Ram Lal assigned to the plaintiff in this suit his right to get back the sum of Rs. 1,595, for the consideration of Rs. 1,500, and on the 21st March, 1882, plaintiff made an application to the Court of first instance to get back the amount Ram Lal had paid to the vendees. The application was contested by the vendees on the ground that plaintiff was not a representative of Ram Lal within the meaning of s. 244 of the Civil Procedure Code and it was refused. Plaintiff then instituted the present suit for recovery of the amount so paid by him as aforesaid, and the Subordinate Judge overruling all the objections of the defendants (vendees) decreed the claim. On appeal by the defendants the Judge holding that art. 62, sch. ii, of the Limitation Act (XV of 1887), applied to the suit, dismissed it. Plaintiff then appealed

* Second Appeal No. 1765 of 1886 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 13th July 1886, modifying a decree of Babu Abinash Chundra Banerji, Subordinate Judge of Aligarh, dated the 22nd May 1884.

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to the High Court, urging that art. 67 of the Limitation Act was not applicable to his case. His appeal was allowed and the case remanded to the District Judge for trial on the merits. The District Judge, after remand, confirmed the decrees of the Subordinate Judge. The defendants (vendees) then brought this appeal to the High Court, urging that plaintiff being the assignee and therefore the representative of Ram Lal was precluded by the provision of s. 244 of the Civil Procedure Code from bringing a suit for the recovery of the amount.

[356] Hon'ble Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for, the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

BRODHURST AND TYRRELL, JJ.—The plaintiff in this action is the purchaser of an auctionable claim held by one Ram Lal under the following circumstances. Ram Lal brought a pre-emption suit against the appellants here and obtained a decree from the first Court, conditionally on his payment to the appellants of Rs. 1,565, the price of the property that he was interested in. He procured the payment to the appellants of this money by a third person, and in concert with the appellants, he certified this payment to the Court in the sense of sections 257 and 258, Civil Procedure Code. But in the meantime, and prior to such payment, the appellants had appealed against the decree, fixing the price of the property which they had purchased at Rs. 1,595, and they obtained from the appellate Court a decree, raising that price and declaring Rs. 1,994·4 to be the true price payable by Ram Lal to the appellants for the estate. Ram Lal never paid the difference between his deposit, Rs. 1,595, and the sum fixed as the true price by the appellate Court. He also did not take possession of the property, which he had sought to pre-empt. He made no application under section 244 of the Code for the recovery of his money paid to the appellants, under the mistaken belief on his part, that this price would not be altered by the Court in appeal. He assigned his rights to the recovery of his money from the appellants, to Koji Ram, the plaintiff in this suit and the respondent here, who brought the present action and has got a decree for part of his claim from the Court below.

The defendants have brought this second appeal and contend that the plaintiff has purchased an actionable claim from Ram Lal, which Ram Lal could not have sustained himself, and that, therefore, the plaintiff's suit was unmaintainable. It cannot be questioned for a moment that the plaintiff is in all respects in the shoes of his assignor Ram Lal, and that he cannot maintain any action of the kind which has been brought here which his assignor Ram Lal could not have sustained. We have only then to consider whether the present action would have been barred, [357] if Ram Lal had brought it, by the rule of section 244 of the Civil Procedure Code. It seems to us, that the claim of Ram Lal against the appellant, for the refund of the price of the property which he did not choose to take possession of, in consequence of the alteration of the price fixed for the same by the appellate Court, is a question arising between Ram Lal plaintiff in that former suit, and the present appellants-defendants in that suit, in which the per-emptive decree was passed, in obedience to which Ram Lal deposited Rs. 1,595, and that this question related to the execution, discharge, or satisfaction of the decree. It is obvious that when the money was paid, the payment related to the execution, discharge, or satisfaction of the decree. But it is argued

that when the time fixed by the appellate Court, for the payment of the increased price had expired, there was no decree in existence, and that, therefore, no question of section 244 can arise.

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This is not a sound contention, for by the provisions of section 214, it is enacted, that when in a pre-emption suit "the Court finds for the plaintiff, if the amount of the purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plantiff shall obtain possession of the property; but that if such money and costs are not so paid, the suit shall stand dismissed with costs." Accordingly, when at the expiry of the time fixed by the decree of the Court, the additional sum required to make up the full price, was not paid by Ram Lal, there stood and still stands the decree in the suit, dismissing Ram Lal's claim, and under that decree Ram Lal could have come under section 244, cl. (*c*), and could have raised the question whether Rs. 1,595, which he had paid in execution of the decree *nisi*, so to speak, was not repayable to him by the defendants, who had received it, when the decree assumed another aspect. It was argued by Mr. *Jogindro Nath*, on behalf of the respondent, that this question could not be called a question relating to the execution of the decree, inasmuch as the execution of the decree was out of question at the time that Ram Lal could have applied for the restoration of the money; and secondly, because the payment [358] having been made out of Court. that payment was not such as to raise a question relating to the execution of the decree.

As for the first argument, there was and is a decree in the case to which the question of the refund of Rs. 1,595 wrongly drawn by the defendant appertains. As to the other point, it is sufficient to say that the payment was made in full conformity with the provisions of section 258 of the Code and was a payment into Court. In this view of the matter, it seems to us that the action brought by Koji Ram, the representative and assignee of Ram Lal, is an action that was not sustainable under section 244 of the Code, and that the suit must be dismissed with costs; the result of which is that this appeal prevails with costs.

Appeal allowed.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GOKAL PRASAD (*Plaintiff*) *v.* RADHO (*Defendant*).* [1st June, 1888.]

Easement—Privacy, right of—Custom.

A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utero tuout alienum non lædas* and *aedificare in tuo proprio solo non licet quod alteri noccat*.

A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action.

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* Second Appeal No. 1682 of 1886 from a decree of E. Elliot, Esq., District Judge of Allahabad, dated the 18th August, 1886, reversing a decree of Babu Madhub Chunder Banerji, Munsiff of Allahabad, dated the 9th July, 1886.

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Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being, whether, the privacy in fact, and substantially exists, and has been and in fact enjoyed. If this is answered in the negative, no further question arises. If in the affirmative, the next question is, whether, the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts.

In the case of a building for *parda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *pardanashin* woman, a custom preventing him from interfering with the privacy of such new building would not, in India, be unreasonable. The Indian case-law relating to the right of privacy reviewed.

[R—8 A.W.N. 270; 16 A. 69 (71,72); 29 A. 64 (65) = 3 A.L.J. 670 = A.W.N. (1906) 283; 29 A. 582 (584) = A.W.N. (1907) 183 = 4 A.L J. 445; 5 C.W.N. 147 (148), 7 O.C. 126 (128); D—18 M. 163 (164) = 5 M.L.J. 26.]

[359] THE facts of this case are fully stated in the judgment of Edge, C.J.

Mr. *G. T. Spankie* and Munshi *Ram Prasad*, for the appellant.
Pandit *Moti Lal Nehru*, for the respondent.

JUDGMENT.

EDGE, C.J.—In this case the plaintiff brought his action alleging that the defendant had wrongfully built a new house in such a way that certain eaves of that new house projected over the plaintiff's land, and that a verandah and certain doors of that house interfered with the privacy of those portions of the plaintiff's house and premises which were occupied and used by the females of the plaintiff's family, and claimed to have the eaves in question, and the verandah removed, and the doors which were complained of closed. The females of the plaintiff's family are *parda nashin* women. The plaintiff's house was admittedly an old one. The eaves of the defendant's new house do in fact project over the plaintiff's land. The doors in question open on to and afford access to the verandah. The doors, as admitted by the defendant in her deposition, interfere with the privacy of the plaintiff's female apartments. The Officiating Munsif of Allahabad, having considered some of the authorities bearing on the case, decreed the plaintiff's claim, as above stated, with costs. The District Judge of Allahabad, on appeal, reversed the decree of the Officiating Munsiff. As to the claim for the removal of the eaves, the District Judge acted on a petition which was filed by the defendant in his Court. The petition was to the effect, that in case the plaintiff should hereafter desire to raise his wall, she, the defendant, would not object to the removal of the eaves complained of. It is obvious that instead of that petition affording a reason for the dismissing of that part of the plaintiff's suit which related to the removal of the eaves, it was practically an admission by the defendant that the plaintiff was entitled to have those eaves removed. As to that portion of the suit which related to the interference with the privacy of the plaintiff's premises, the District Judge, overlooking the admission of the defendant in his evidence and being influenced by a personal inspection, came to the conclusion that the "doors could scarcely be said to inconvenience the plaintiff at all." The District [360] Judge appears to have confined his attention in the inspection, to the effect of the doors in question on the

privacy of the courtyard of the plaintiff, and to the position of that courtyard with regard to other houses in the neighbourhood. The District Judge in reversing the decree of the Officiating Munsif, dismissed the plaintiff's suit. From that decree of the District Judge this appeal has been brought.

As to the eaves, it is clear that the Munsif's decree was right and must be restored. As to the plaintiff's claim in respect of the interference with the privacy of his premises, we heard the arguments of the vakils on each side and took time to consider our judgment, not because my brother Mahmood or I had any doubts as to how we should decide, but because, owing to the conflicting authorities which were cited and to the importance in these Provinces of the question before us, we thought it advisable to consider those authorities at some length and to see if the records in this Court threw any additional light upon the subject.

The Indian Easements Act (V of 1882) has not been applied to these Provinces. This compels us to ascertain whether a right or easement of privacy is a right or easement which can be recognised by, what I may call, the common or customary law of India or of these Provinces, and further, whether such a right or easement does exist in these Provinces. With these objects in view, I have, so far as I am aware, considered all the reported decisions of the Courts in India to which I have access, and also the records of the unreported decisions of this Court which appeared to bear upon these questions. I shall now attempt to show, as shortly as I can, what have been the decisions in the cases which I have been able to examine. I shall, in the first place, go through the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of the High Court; then I shall take such of the reported decisions of the High Courts at Calcutta, Madras, and Bombay, respectively, and of the Chief Court of the Punjab, as I have been able to find in the library of this Court.

The earliest reported case, decided by the Sadr Diwani Adalat of the North-Western Provinces in which the question of a right **[361]** of privacy arose, is that of *Nuth Mull* v. *Zuka-oollah Beg* (1), in which Begbie, Smith and Jackson, JJ., held in 1855, on appeal from the decree of the Principal Sadr Amin of Delhi, that the erecting by the defendant of a new house, so that the plaintiff's premises were overlooked from the roof of the new house and their privacy thereby interfered with, gave the plaintiff a cause of action against the defendants. The Judges in that case differed only as to the nature of the relief to be granted.

In *Gunga Pershad* v. *Salik Pershad* (2) the plaintiff sued to close a window newly opened by the defendant, on the ground that it was an innovation which interfered with his privacy. The Munsif who tried the suit found that the window did not interfere with the privacy of the plaintiff as alleged, but held that the existence of the window was not to be made a plea by the defendant for hindering the plaintiff from, at any time, building a wall on his own land, which would have the effect of shutting up the defendant's window. The plaintiff did not appeal. The defendant appealed against so much of the decree as gave the plaintiff a right at any time to build a wall to shut up his window. Consequently the finding of the Munsif, that the defendant's window did not interfere with the plaintiff's privacy, stood. The Principal Sadr Amin of Allahabad on appeal reversed that portion of the Munsif's decree, the subject of the appeal. On special appeal to the Sadr Diwani Adalat of the North-Western Provinces, Ross

(1) S.D.A.N. W.P.R. 1855, p. 92. (2) S.D.A. N.W.P. 1862, Vol, ii. p. 217.

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and Roberts, JJ., in 1862, affirmed the decree of the Principal Sadr Amin, on the grounds that the relief decreed by the Munsif had not been sought by the plaintiff, and that the granting of that relief might interfere with the defendant's acquiring by prescription the right to enjoy the air and light afforded by the window which he had made. In that case it was not suggested by the Munsif, the Principal Sadr Amin, or the Judges of the Sadr Diwani Adalat that a right of a privacy could not be acquired, the wrongful interference with which would give a cause of action.

In *Goor Dass* v. *Manohur Dass* (1), which was a special appeal to this Court from the decree of the Civil Judge of Benares reversing [362] a decree of the Principal Sadr Amin of Benares, Morgan, C. J., and Spankie, J., in 1867, clearly recognised the right of privacy as a right existing in these Provinces. The whole of this judgment is instructive. It is as follows:—

" The Judge holds that the plaintiff cannot obtain the relief asked for, that is, the closing of the windows. His observation that the defendant has no objection to the plaintiff's putting up an ornamental screen, opposite to and within a few feet of the windows, leads to the conclusion that the defendant's right had been established, and that it was by concession on his part that this degree of obstruction by the plaintiff would be permitted. But the question of right has not been duly considered by the Judge. If the windows are not new, or are mere substitutions for former openings which had long existed, the defendants may have a right to the access of light and air by their means. The Judge has not found whether the apertures are old or new. If they have been recently made, we think that it follows almost necessarily that they are injurious to the plaintiff. The plaintiff's right (supposing the house to be one used by him and his family as an occasional place of residence, and the place adjacent to the windows to be a place where the female members of the family pass to and fro) must to some extent be affected. It may be that the injury and inconvenience is slight. On the other hand, any infringement of privacy of the description may affect very seriously the comfort and value of a place of residence. Unless the defendant can establish some right from long usage to the apertures, we think that he cannot, merely because the comfort and ventilation of his own building is increased, claim to have them open, and that the burden of erecting a screen to secure the privacy, to which he is already entitled, cannot be imposed on the plaintiff. It is suggested that from the defendant's building, as well as from other points, a view is commanded of the place in question. But even if this be true, the immediate opening, close adjacent to the road, may be a serious injury. Whatever may be the extent of the injury, if the plaintiff has a right to be exempted from this invasion of his pivacy, and if the Court is satisfied that privacy is invaded, the plaintiff is entitled to the relief claimed, namely, the closing of the windows. The case is remanded to the Judge for a new trial."

[363] in *Ram Baksh* v. *Ram Sookh* (2), which was an appeal to this Court from the decree of the Principal Sadr Amin of Moradabad, amending the decree of the City Munsif of Morababad, the grounds of appeal to which reference is made in the judgment were as follows:—

"1. That the said decision is contrary to the principles of jurisprudence, in that, the plaintiffs has no right to put restrictions to defendant's

(1) N. W. P. H. C. R. 1867, p. 269. (2) N. W.P.H.C. 1868, p. 253.

enjoyment of his proprietary rights, to suit the imaginary convenience of the former. 1888 JUNE. 1.

"2. That the said decision is contrary to law, in that, the defendant has a prescriptive right to use the three windows which are in existence for the last 20 years in the same manner as he hitherto did. APPELLATE CIVIL.

"3. That the said decision is contrary to law, in that, the lower appellate Court, having found that the *parada* system does not prevail among the caste to which the parties to the suit belong, should not have ordered any restrictions as to the use of the windows by the defendant." 10 A. 358 = 8 A.W.N. (1888) 135.

The judgment of Roberts and Pearson, JJ., delivered in 1868, was as follows :—

"It is contended that the injury alleged to have been caused to the plaintiff by the invasion of his privacy, is a sentimental grievance, rather than a substantial injury, for which relief can be claimed at law. Such a contention may be countenanced by English law ; but the doctrine contended for is scarcely in accordance with the feelings or suited to the habits of the natives of this country, and is not shown to have received judicial sanction from the Indian tribunals. On the contrary, we find that the first Bench of this Court on the 17th June last, in a case No. 742 of 1867, *Gur Dass* v. *Monohar Dass* (1), maintained the opposite view. We are not therefore prepared to allow the first plea in appeal. The second plea in our judgments fails, inasmuch as the lower Courts have not directed the three windows referred to, which have been used by the defendant for more than 20 years, to be entirely closed, but have merely provided that they shall not be used differently [364] from heretofore, in such a manner as to be prejudicial to the plaintiff's privacy.

"As to the third plea, the remark that the parties to the suit or the members of the caste to which they belong do not observe a strict *parada* is sufficient to deprive the plaintiff of the right to object to an innovation by which his comfort and that of his family is affected."

I infer from that judgment that the law in England as to easements had been discussed in the course of the arguments. I am unable to ascertain whether or not the Madras case of *Kamathi* v. *Gurunada Pillai* (2) had been referred to. As I read that judgment, Roberts and Pearson, JJ., had not at the time when it was delivered any doubt of the existence of a right of privacy in this part of India, or that for a substantial interference with such a right, an action could be maintained.

The next case in this Court, so far as I can ascertain, in which the question of a right of privacy arose was *Khuderun Lal* v. *Jaggannath Prasad* (3). That was a suit brought in the Court of the Munsif of the city of Jaunpur for permission or a declaration of a right to build in muhalla Mucharhatta in Jaunpur a two storied house, notwithstanding a Magistrate's order which apparently had prohibited the building of the house. I infer from the judgment of the Munsif that the defence was that on the site in question a one-storied house originally stood, but by an alleged usage the plaintiff was not entitled to erect on the site a two-storied house, that the plaintiff was prohibited by an order of a Magistrate from building a two-storied house on the site, and that the two-storied house, if erected, would invade the privacy of the defendant's house. On the question of privacy the Munsif found that "no inconveniance will be caused to the defendant, nor will the female apartments be exposed or

(1) N.W.P.H.C. 1867, p. 269. (2) 3 M.H.C.R. 141.
(3) Unreported. S.A. No. 545 of 1869.

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the ventilation of his house stopped by the plaintiff's construction of the second story of his house, for it appears from the statement of the plaintiff's witnesses, from the tenor of that of the defendant's witnesses, and also from a local inspection made by myself, that the existing windows of the defendant's house are at a distance from the road [365] and fields and from the roofs of the one-storied house of the defendant, and also from the other roof of the plaintiff's house and of that of the other persons living in that quarter: so that if the females of the defendant's house will themselves come at the windows, they will of course be seen by all and their privacy destroyed, but if they do not, they will not be seen and their privacy will be preserved."

The Munsif decreed the plaintiff's claim. The District Judge of Jaunpur, on appeal, reversed the decree of the Munsif. The plaintiffs appealed to this Court from the decree of the District Judge. The judgment of the District Judge is not with the record, and I am unable to ascertain what were his reasons for dismissing the suit.

In delivering judgment in the plaintiff's special appeal to this Court, Pearson and Turner, JJ., said:—"We are of opinion that the claim of the defendant is unreasonable. By the raising of the plaintiff's roof as proposed the defendant will not be deprived of light and air. His only complaint is that the plaintiff will be thereby enabled to look through a window, which window lights the women's apartments. But against this the defendant can easily protect himself by a screen or curtain, or if he holds that protection insufficient, it seems not impossible to procure light and air by the opening of a window on either side of the house, which would not be accessible from the plaintiff's roof;" and they decreed the appeal. The judgment of Pearson and Turner, JJ., was delivered on the 19th of July, 1869. I infer from that judgment either that those learned Judges adopted the Munsif's findings of fact, or considered that the erection by the plaintiff of a second story would not cause any material or appreciable interference with the privacy of the female apartments of the defendant. That case does not throw much light on the question. It has not been reported.

In the case of *Joogul Lal* v. *Musammat Jasodā Beebee* (1), in which the plaintiff sought to close a door recently opened by the defendant, the judgment of Morgan, C. J., and Spankie, J., [366] delivered in 1871, on appeal from the decree of the District Judge of Allahabad, so far as it is material, was as follows:—

"We think that in no view of the law can the plaintiff be held to be entitled to the relief sought for. Her house is one of several houses ranged (it would seem from the terms of the Munsif's judgment and from the pleader's statement here) on either side of a narrow road or lane. Already it, in the portion of it with which we are concerned, is within range of view from the opposite (that is, the defendant's) side of the way; for one at least of the adjacent houses commands it from the roof. It is said that the defendant has not only so altered or constructed and added to the upper part of his house as to command a view of the plaintiff's apartments, but that he has also made provision in the place newly constructed for persons to sit. No improper obstruction of light or air is stated to be occasioned. The case is really one in which a house-owner in a street, having changed the arrangement, or construction of the upper part of his house in a manner otherwise consistent with his joint rights of enjoyment,

(1) H.C.R.N.W.P. 1871, p. 311.

is sought to be restrained, not by the holder of an adjacent house, but by a neighbour living on the other side of the road, who can allege against the defendant no more substantial cause of suit than this, that the newly-constructed place admits of persons who may temporarily occupy it seeing portions of the interior of the plaintiff's house through his windows. Even if this is so, it is no more than others may admittedly do. There can be no question in such case of loss of privacy. And the mere fact that the alteration gives to the defendant a wider range of vision than before can constitute no legal right of suit in the plaintiff."

That judgment has been cited as an authority for the contention that no right of privacy, for the interference with which a suit could be maintained, exists or can in law exist in this part of India. As I read the judgment, the learned Judges did not in it inferentially or otherwise lay down any such proposition. They were dealing with the facts of the case before them, and if any inference is to be drawn from what they said as to what might be the rights and liabilities of parties under other circumstances, I think it is that where a house does enjoy substantial and real privacy, [367] a substantial interference with that privacy might afford the owner a good cause of action. In the case before them, these learned Judges apparently found, that there was, owing to the position of the house and the way in which it was overlooked, no privacy to be maintained, and consequently no privacy to be interfered with. If those learned Judges held in 1871 a view of the law different to that which they had expressed in 1867 in their judgment in *Goor Dass* v. *Manohar Dass* (1), I would have expected that they would have referred to their judgment in that case and explained why they no longer considered that case as an authority, and in what respect and for what reasons they considered that the view of the law which they then held was erroneous.

Another unreported case decided by Pearson and Turner, JJ., in 1874 is that of *Musammat Kohla* v. *Purbhoo Dial* (2). In that case the plaintiff sued the defendant for an injunction to compel her to close certain newly-opened windows in her house which interfered with the privacy of the female apartments of the plaintiff's house. As I gather from the judgment in first appeal of the District Judge of Cawnpore, the Munsif of Cawnpore, who tried the suit, following the rulings of the High Court at Calcutta in *Mahomed Abdur Rahim and others* v. *Briju Sahu* (3); *Ramlal* v. *Mahes Baboo* (4); *Sheik Golam Ali* v. *Kazee Muhammat Zahur Alum* (5), and of this High Court in *Ram Buksh* v. *Ram Sookh* (6); *Kasim Ali Khan* v. *Brij Kishore* (7), and *Joogul Lal* v. *Musammat Jasoda Bebee* (8), dismissed the suit. From that decree the plaintiff appealed to the District Judge of Cawnpore. In the judgment which the District Judge delivered he said:—"One of the pleas adverts to the custom of the country and its particular observance in the town of Cawnpore, where the parties dwell, that no one is allowed to open out doors in newly-erected buildings which will expose the privacy of their neighbours. There is nothing on record to show that the custom prevails in Cawnpore more than any other place in India. The custom is undoubtedly respected and observed throughout this country and indeed among all oriental races, and if it were left to the Court to enforce a custom founded on long [368] social usage, there would be no difficulty in doing so; but the introduction of principles of English

(1) H.C.R.N.W.P. 1867, p. 269.
(2) Unreported S.A. No. 1090 of 1873.
(3) 5 B. L. R. 676.
(4) 5 B. L. R. 677 note.
(5) 6 B. L. R. App. 76.
(6) N.W.P.H.C.R. 1868, p. 253.
(7) N. W. P. H. C. 1870, 182.
(8) H.C.R., N. W. P. 1871, p. 311.

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law, and the decisions of superior tribunals founded thereon, made it necessary to abide by the directions laid down therein for guidance. Had the suit been an ordinary one to have the newly-opened windows closed because of the want of privacy caused thereby, there would be no other course than to treat it as a sentimental grievance for which no relief could be granted, the right of privacy having been adjudged to be not of the nature of a legal right."

I infer from the judgment of the District Judge and the judgment of this Court on appeal here that the plaintiff's windows had been then recently opened and his verandah recently constructed. The District Judge of Cawnpore, however, allowed the appeal and decreed the plaintiff's claim on the ground that, as the defendant carried on the business of a prostitute in her house, the opening of the windows in question, would under the circumstance cause a nuisance to the plaintiff. From that decree the defendant brought a special appeal to this Court. On that appeal the judgment of Pearson and Turner, JJ., was as follows:—

"We cannot recognise the ground on which the Judge has considered that, in this case, he is at liberty to depart from what is now the established law, with regard to the opening of windows. The circumstance that the owner of the house opposite to that of the respondent is a courtezan does not deprive her of the ordinary rights of a proprietor. If persons who frequent her house conduct themselves in such a manner as to occasion a public nuisance, proceedings can be taken to put a stop to their misconduct; but so long as they merely look out of the windows of the house, using the windows as any other persons might use them, they cannot be interfered with, although the result may be that they disturb the respondent's privacy. He has, however, his remedy; he may, as has been suggested, block up the windows which he has himself recently opened"; and they allowed the appeal and dismissed the suit.

Those learned Judges cited no authority for the opinion which they expressed as to "what is now the established law with regard to the opening of windows." Pearson, J., had been one of the Judges [369] who had delivered judgment in *Ram Buksh v. Ram Sookh* (1), in which it was held that an invasion of privacy by the opening of windows was a substantial injury for which relief could be claimed at law; in which case also the decision of Morgan, C.J., and Spankie, J., in *Goor Dass v. Manohur Dass* (2), was followed apparently with approval. Pearson, J., did not refer to either of those authorities, nor, indeed, to any other authority. It is not apparent from this judgment, whether they considered that such a custom or usage, as the District Judge of Cawnpore stated to exist in Cawnpore, must be bad in law, or that no right of privacy could be acquired, or, if such a right could be acquired, that it had not been acquired under the circumstances of the case, or whether they treated the decree of the District Judge as being solely based on the possibility of those who might use the defendant's house causing a nuisance to the plaintiff.

Another unreported decision of this Court, to which we have been referred is that in *Saiyid Amjad Ali* v. *Reyat Husain* (3). In that case, so far as the present question is concerned, all that Stuart, C. J., and Oldfield, J., in 1877, decided was that the plaintiff was not entitled to an injunction compelling the defendant to close certain windows, which had

(1) H. C. R. N. W. P., 1868, p. 253. (2) H. C. R. N. W. P. 1867 p. 269.
(3) Unreported S. A. No. 576 of 1877.

been recently opened by him and which looked into a private lane of the plaintiff's, but did not disturb the privacy of the plaintiff's family within his house. The lane there in question was apparently used merely as a lane or passage.

Another unreported case which has been cited, decided in this Court in 1878, is that of *Lachmi Shankar* v. *Chet Ram* (1). In that case the Munsif of Moradabad had found that the doors and windows, which the plaintiff sought to have closed up, were old doors and windows, and that the plaintiff had not objected at the time when they were opened or until a dispute had arisen between the plaintiff and the defendant concerning a stair. The Munsif dismissed the suit so far as it related to the closing of the doors and windows. The Subordinate Judge on appeal found that the windows had been recently opened and decreed the claim of the plaintiff to have them closed. On appeal to this Court, the vakil of the plaintiff must, for some reason which is not stated, have admitted [370] that the portion of the Subordinate Judge's decree which ordered the doors and windows to be closed could not be supported. The judgment of this Court on the question as to the closing of the doors and windows does not assist me on the question under consideration. That portion of the judgment is as follows ;—" The decree of the lower appellate Court so far as it orders the closing of the doors and windows, it is admitted, cannot be sustained, and in this respect the decree of the lower appellate Court must be reversed and that of the Munsif restored with costs."

Another unreported case decided in this Court in 1882 is that of *Musammat Begam-ul-nissa* v. *Mahant Hardeo Das* (2). The judgment of Straight and Brodhurst, JJ., so far as it is material to this point, is :—"There is nothing in the judgments of the lower Courts to justify them in interfering with the legal rights of the defendants to open a door in their own wall. This they were fully entitled to do, and the plaintiffs had no cause of action against them." The Munsif of Muttra had found that the door in question was a new one, and that " the house of the defendants is so large that there is no necessity of this new door for the admission of air or light, but it encroaches upon the privacy of the plaintiff's house, and certainly it is a source of inconvenience to him." The Subordinate Judge of Agra, on appeal, adopted so much of the Munsif's judgment as found that the door had been recently opened and was an inconvenience to the plaintiff. He did not find whether or not the opening of the door had interfered with the privacy of the female portion of the plaintiff's house, and on this point the finding of the Munsif was of the vaguest description. Neither the Munsif nor the Subordinate Judge found in what way the opening of the door would cause inconvenience to the plaintiff or to what extent such inconvenience would be caused.

I think the judgments of Straight and Mahmood, JJ., when they made the order of remand in *Mata Prasad* v. *Behari Lal* (3), show that they considered, that in these Provinces at least, a material interference by the opening of windows with the privacy of the premises occupied by the females of a neighbour, might afford that neighbour, a good cause of action. In that [371] case, my learned brothers, considering that the District Judge had not on the appeal to him really tried the case, remanded the case under section 562 of the Code of Civil Procedure for a trial on the merits. My brother Straight in delivering his judgment said :—"Upon the statements of the plaintiff and upon the answers made by the defendants, the substantial

(1) Unreported S. A. No. 60 of 1878. (2) Unreported S. A. No. 1476 of 1881.
(3) Unreported S. A. No. 8 of 1886.

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issue to be tried between the parties was, whether there had been by the act of which the plaintiff complained on the parts of the defendants an interference with the privacy of the plaintiff: and in order to arrive at a conclusion upon that point, it was essential for the Courts below very specifically to find in what way and in respect of what right of privacy the defendants had interfered with the plaintiff's right. Upon a clear and distinct finding in respect of that point, then, the question of law would properly have arisen and could have been properly argued, namely, whether, looking to the findings of fact, such a right subsisted in the plaintiff at the time the wrongful act was alleged to have been done, that the plaintiff had a right to maintain the suit and had a cause of action to maintain the same." In that case I infer from the judgment of the Munsif of Allahabad that the plaintiff alleged in his plaint that the defendants, with the object of depriving the plaintiff of the privacy of his house situate in muhalla Pan Dariba in the city of Allahabad, had recently, and contrary to the old custom and usage prevailing in parts inhabited by respectable persons, opened these doors from a room in his house on to a terrace.

In the case of *Lachman Prasad* v. *Jamna Prasad* (1) the plaintiffs, according to the judgment of the Munsif of Cawnpore, who tried the suit in the first instance, alleged that the defendant in rebuilding his house had opened a door in the western wall of his house in the second story, by reason of which there had been an invasion of the privacy of the plaintiffs, and claimed to have the door closed. The Munsif in his judgment said:—"It has been repeatedly held by the Honourable High Courts that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house on the ground that they overlooked the *zenana* of the plaintiff —*vide Mahomed Abdur Rahim* v. *Briju Sahu* (2), *Sheikh* [372] *Golam Ali* v. *Kazi Mahomed Zahur Alum* (3), *Jogul Lal* v. *Musammat Jasoda Bebee* (4). The issue is accordingly decided against the plaintiffs."

The Subordinate Judge of Cawnpore on appeal said:—"I hold that although the door affects the privacy of the plaintiff's house, yet as the defendant has set it up in his own wall, the plaintiffs have no right to have it closed. The remedy is in the hands of the plaintiffs. They can raise their wall so high that the door may not affect their privacy." The case came up on appeal to this Court. There were cross objections. On the 25th May, 1886, Oldfield and Mahmood, JJ., remitted an issue to the Subordinate Judge for a finding, as to how and to what extent, the door affected the privacy of the plaintiffs. The Subordinate Judge on the remand found that the window in dispute overlooked the whole of the plaintiffs' house, and in particular those portions which were reserved for females. Upon the return of this finding the defendant filed objections under section 567 of the Code of Civil Procedure, to the effect that the plaintiffs were not entitled to restrain him from opening and using his window on the ground of interference with their privacy in the absence of proof of twenty years' uninterrupted user. The case came on to be heard, on the return to the order of the remand, before Oldfield and Brodhurst, JJ., and they ordered a further remand, saying, "We think it desirable that an issue be tried whether by local custom, there is any right of easement, by which the plaintiffs have a right to have the privacy of their apartments maintained by the removal of the door and window." The Subordinate Judge on that further remand found that the existence in the mohalla where the

(1) A.W.N. (1887) 295 = 10 A. 162.
(2) 5 B.L.R. 676.
(3) 6 B.L.R. App. 76.
(4) N.W.P.H.C.R., 1871, p. 311.

parties lived of a customary easement of privacy was proved. On the return to that last remand, as Oldfield, J., had retired from the Bench, the case came before my brother Brodhurst and myself to be disposed of. In my judgment I said that "the findings on remand show that the plaintiff is entitled to have his right of privacy observed and to have a mandatory order to compel the appellant to permanently close the door or window complained of;" and my brother Brodhurst agreeing with my view of the law, we decreed accordingly.

[373] I now come to the cases relating to rights of privacy, decided by the High Court at Calcutta. In *Sreenath Dutt* v. *Nand Krishore Bose* (1) on appeal from the decree of the Judge of Hoogly, Bayley and Shumbhunath, JJ., in 1866, in their judgment say:—We further notice that the plaintiff is said to have built an upper story to his house, overlooking the inner apartments of the defendant. Defendant on this built the wall which it is said has deprived the plaintiff of light and air. Even if it were shown that the light and air had long been enjoyed by the plaintiff and have now been cut off by the defendant's wall, still, as plaintiff had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer."

Those learned Judges could at that time have had no doubt that a right of privacy existed.

The next reported case in which the question as to a right of privacy arose which came before the High Court at Calcutta, so far as I have been able to ascertain, was that of *Mahomed Abdur Rahim* v. *Birju Sahu* (2). In the arguments and in the judgment in that case, amongst others, some unreported cases decided at Calcutta are referred to. In that case the Subordinate Judge on appeal had held that, according to the usage of this country, if the privacy of any house occupied by *parda-nashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury, and passed a decree ordering the windows complained of to be closed, and the defendant's verandah to be so screened as to prevent an exposure of the female apartments, and that in default thereof the verandah should be demolished. Judgment was delivered by Markby, J., Bayley, J., concurring.

The most important point which struck me on reading that judgment is that those learned Judges in deciding the appeal, which was a second appeal, either overlooked or ignored the finding of the Subordinate Judge as to the usage of the country, and decided the appeal as if no such usage or custom of privacy had been found. They considered that a right of privacy could [374] not be an inherent right of property in this country, and they allowed the defendant's appeal and dismissed the suit. I cannot ascertain from the judgment whether or not those learned Judges considered that there could be no valid custom of privacy in this country. They pass by the two Bombay cases, *Manishankar Hargovan* v. *Trikam Narsi* (3) and *Kuvarji Premchand* v. *Bai Javer* (4), with the observation that in those cases the right of privacy had been maintained on the express ground of a local usage in Guzerat. They also said: "It is remarkable that in the cases in which the right is upheld nothing is said of gaining by prescription a right to prevent your neighbour from building his house

(1) 5 W. R. 208.
(2) 5 B. L. R. 676 = 14 W. R. 103.
(3) 5 B. H. C. R. 42.
(4) 6 B. H.C. R. 143.

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so as to overlook your premises, but the right of privacy is spoken of as if it was an inherent right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case the Subordinate Judge considers that intrusion on the privacy of the female apartments is an injury which the law will prevent." They apparently overlooked the fact that in an unreported case decided by Kemp and Seton-Karr, JJ., two Judges of the High Court at Calcutta, to which they in this judgment refer, Kemp and Seton-Karr, JJ., had said: "Both the Judges of the lower Courts have visited the spot and have satisfied themselves that the opening of the windows complained of is a violation of the privacy to which the plaintiff has a right. There is nothing contrary to the law in this finding, *and it is certainly in conformity to the usage of the country.*" I do not know whether or not that judicial statement of Kemp and Seton-Karr, JJ., was founded on the findings of fact or the admission of the parties in the case before them, or upon a well-recognised custom of which they took judicial notice. Markby and Bayley, JJ., expressly did not dissent from the decision of Bayley and Shumbhunath, JJ., in *Srinath Dutt* v. *Nand Kishore Bose* (1). In fact, in reference to that case Markby, J., said: "I think that the opening of new windows affecting a neighbour's privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that a person who has opened these new windows cannot complain that [375] such erection interferes with his light and air." The proposition of law from which Markby and Bayley, JJ., were not prepared to dissent was this:—"The defendant, on this, built the wall which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by the defendant's wall, still, as plaintiff had no right to build an upper story with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, *as he was the first and greater wrong-doer.*" The plaintiff in that case could not have been treated as a wrong-doer, if the defendant had no right the violation of which constituted a wrong. It is not easy to understand how Bayley, Shumbhunath, and Markby, JJ., could have thought that the commisson of a wrong by the plaintiff in that case excused the commission of another and a distinct and different wrong by the defendant, unless those learned Judges were of opinion that the principle of the plea of *son assault demesne* to an action of assault applied to the case before them. Markby and Bayley, JJ., in the case the decision in which I am now considering, appear to have thought that there can be no inherent right of property the interference with which would be an actionable wrong, unless such interference were a trespass. They apparently overlooked the existence of inherent rights of property known, at least, to the law of England, as for instance the right of lateral support for adjoining land.

The judgment delivered by Markby, J., and concurred in by Bayley, J., to which I am referring at present, and the judgments in some other cases, apparently suggested a distinction between the legal effect of a general custom and that of a purely local custom. As I understand the judgments, in some of the cases it has been assumed that although a general custom of the country or of the province as to privacy has been found

(1) 5 W.R. 208.

or judicially declared, such general custom is not to be given effect to, whilst a local custom of privacy may be treated as establishing the right. It appears to me that a general custom of the country or of a province ought to have as much effect as a local custom, unless the local custom curtails or extends the general custom which prevails over the larger area of which the smaller area of the custom is a portion. I [376] have always understood that the common law of England was, or was considered to be, founded upon the common custom of the realm, if it was not in fact the common custom of the realm judicially declared. The custom of Guzerat as to privacy, so far as I have been able to ascertain, appears to be applicable to all the towns in Guzerat and not to those towns only in Guzerat in which a local custom of privacy has been found to exist.

The next reported decision of the High Court at Calcutta on this subject which I have found is that of *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1) decided in 1870. It does not appear from the report of that case whether or not any custom of privacy had been found by the lower Courts. The judgment of Jackson, J., in that case was apparently based partly on a judgment delivered by himself and Steer, J., in an unreported case decided by them on the 18th June, 1862, in which they said: "We are not aware that where two owners of houses live contiguous, but separated by an intervening space, the custom of the country requires that neither party shall make any improvement on his property, if such improvement has the effect of depriving the other of a certain degree of privacy. We should rather say that when the one opens a window which overlooks the other, it is the custom of the country that the other raises a screen or adopts some other contrivance to counteract the effect of the opening made in his neighbour's house." This quotation I have taken from the Judgment of Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (2). Jackson, J., in that unreported case did not say that if a custom of privacy was established, a substantial interference with that right would not give a cause of action. Jackson, J., in his judgment in the case of *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1), also relied upon the view of the law expressed by Markby, J., in *Mahomed Abdur Rahim* (2) and stated that he adhered to the view of the law expressed by Markby, J., in that case. Consequently my comments on that case apply to the judgment of Jackson, J., in *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1). The judgment of Glover, J., in *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1) was as follows:—"I concur. Privacy is not an inherent right of property like a right to ancient lights and air. In this case, more-[377]over, the houses of plaintiff and defendant are separated by a public road and by the house of a third party." As to this judgment, it is only necessary to observe that he differentiated the right of privacy claimed from a right to ancient lights and air, on the ground, that the latter was an inherent right of property. So far as I am aware, a right to light and air is a right which can only be acquired by grant, prescription, or estoppel: it may certainly be reserved, but it is not in any sense an inherent right of property. If a right of privacy can be acquired, I fail to see how the fact that a public road and the house of a third party intervenes between the house of a plaintiff and defendant can prevent a plaintiff having or acquiring in respect of his house as against a defendant a right of privacy.

The next reported case decided by the High Court at Calcutta on this subject is that of *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (3)

(1) 6 B. L. R. App. 76. (2) 5 B. L. R. 676. (3) 18 W. R. 14.

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decided in 1872. In that case, Glover, J., in delivering the judgment of the Court (Kemp and Glover, JJ.), said :—" At the same time we agree with the Subordinate Judge in thinking that the right of privacy is not an inherent right; and that if it exists at all, it must be shown to exist by some local usage, by special permission, or by grant. and in this case there is no such local usage, permission or grant proved ; and the decision in the case of *Mahomed Abdur Rahim* v. *Birju Sahu* (1) lays down what we consider to be the right view of the law in deciding questions of this sort; and following that decision, we must uphold the judgment of the Subordinate Judge." That case as reported in 14 Weekly Reporter 103, merely gives the judgment. If the attention of Kemp and Glover, JJ., had been drawn to the report of that case in the 5 Bengal Law Report, they would have found it stated at p. 677 that " on appeal, the Subordinate Judge held that the females of the plaintiff's family were *parda-nashin* women ; and that, according to the usage of this country, if the privacy of any houses occupied by *parda-nashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury." Further, Kemp, J., was one of the two Judges (Kemp and Seton-Karr, JJ.) who, on the 10th of August, 1865, had held that " the opening of the windows complained of is a violation of the privacy to which the plaintiff has a [378] right. There is nothing contrary to law in this finding, and it is *certainly in conformity to the usage of the country.*" Kemp, J., did not explain what it was which had caused him to alter his opinion between 1865 and 1872. In the decision which he in 1872 relied upon and followed, the Judges had overlooked or ignored a similar finding by the Subordinate Judge. I infer from the judgment of Kemp and Glover, JJ., in *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (2) that they did not consider that a right of privacy could be acquired by prescription, although they considered that it might be acquired by a local usage, by a special permission, or by grant. If such a local usage was valid, I cannot see why the usage of the country "or the usage of this country" to the same effect should not be valid.

The only reported decision on the question of a right of privacy of the Courts at Madras of which I am aware is that of *Kamathi* v. *Gurunada Pillai* (3), which was decided on the 30th of June, 1866, by Holloway and Innes, JJ. Those learned Judges, applying the law of Westminster Hall and the House of Lords, dealing with a case of the rights of parties in England, and ignoring the decisions of the Courts in India on the subject, held that there is in India no right of privacy, the interference with which, is a wrong, for which a remedy is given. It does not, however, appear from the report of that case that the right of privacy was claimed by reason of any custom, grant, prescription, acquiescence, or estoppel ; but I think it may be inferred from the judgments in that case that those learned Judges would have held that no such right could be acquired by custom, prescription, or otherwise. It was correctly said by Markby, J., in his Judgment in *Mahomed Abdur Rahim* v. *Birju Sahu* (1), that " [illegible] v. *Gurunada Pillai* (3) the Madras High Court held that there was no right of privacy , but the question, for reasons which do not appear upon the face of the judgment, was discussed with reference to European and not with reference to Hindu or Muhammadan law." He might have added that it was decided not according to European law, but according to the law of England. For all that, it appears to me that that decision of the

(1) 5 B. L. R. 676. (2) 18 W.R. 14. (3) 3 M. H. C. R 141.

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Madras High Court may have had a considerable influence [379] on those Judges who subsequently held that a right of privacy did not exist in India.

The usage of Guzerat relating to the right of privacy which the Bombay Courts held to be established and to be valid was by Tucker and Gibbs, JJ., in 1867, in *Manishankar Hargovan* v. *Trikam Narsi* (1), stated thus : "A series of decisions extending over a long number of years have settled the question that, in accordance with the usage of Guzerat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy: and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law." Tucker and Gibbs, JJ., declined to follow the decision of the Madras High Court in *Kamathi* v. *Gurunada Pillai* (2).

In *Kuvarji Premchand and others* v. *Bai Javer* (3) decided in 1869, Warden and Lloyd, JJ., say: "We see no cause to interfere with the decision of the lower Court that the privacy of the plaintiff is invaded by the newly-opened windows. The existence of a public road between the houses makes no difference according to the custom of Guzerat."

All that was decided by Melvill and Kemball, JJ., in 1871, in *Keshav Harkha* v. *Ganpat Hirachand* (4), was that the opening by the defendant of a window which looked, not into the plaintiff's private apartments, but into an open courtyard outside his house, was not an invasion of the plaintiff's privacy which would entitle him to have the window closed.

In the case of *Shrinivas Udpirav* v. *Reid and others* (5) decided in 1872, the plaintiff, whose house was in Dharwar, had been prevented by a Magistrate's order from opening a window in a wall of his house. The Acting Judge of Dharwar found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, without his permission, and that, as a matter of fact, the plaintiff [380] making an opening in his wall would expose to view the women of the household of one of the defendants when they bathed at a well in the compound. The case came up in first appeal before Gibbs and Lloyd, JJ. Their judgment, so far as it is material to the point under consideration, was as follows :—" It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, make the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt some arrangement by which the inconvenience arising therefrom, if any, may be avoided ; and it is more reasonable that the defendant should protect himself, than that the plaintiff should be deterred from improving his own house, for, as was observed by Mr. Justice Markby in the case reported at p. 676 of 5 B.L.R. 'to hold that privacy is a right and the invasion of it an injury would lead, as it appears to me, to the most alarming consequences to the owners of house-property in towns.' It has been recently held by this Court (S. A. Nos. 307 of 1871 and 339 of 1871) that the mere opening of a door in a person's own permises does not constitute

(1) 5 B. H. C. R. A. C. J. 42.
(2) 3 M. H. C. R. 141.
(3) 6 B. H. C. R. A. C. J. 143.
(4) 8 B. H. C. R. A. C. J. 87.
(5) 9 B. H. C. R. A. C. J. 266.

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a cause of action, and after consulting all the authorities that have been referred to, we think, unless we can coincide with the Judge that the local custom has been established, the plaintiff should succeed. With reference to this alleged custom, it must be observed that it was not set up in the written statement, and though certain witnesses depose to the effect that it was not customary to allow doors and windows to be opened without permission, if the privacy of neighbours is thereby interfered with, it appears to us that their evidence is too vague, and that to establish the point it should be shown that the custom was approved or immemorial, or that it had been judicially recognised. The various decisions quoted by the Judge refer seloly to a custom prevailing in Guzerat, and this Court, as has been said, would be very unwilling to extend this exceptional privilege without the most satisfactory proof that it prevailed elsewhere. The authorities which had been referred to in the arguments in that case were *Gibbon* v. *Abdur Rahman* (1); *Mahomed Abdur Rahim* v. *Birju Sahu* (2); *Kamathi* v. *Gurunada* [381] *Pillai* (3), two unreported judgments of Melvill and Kemball, JJ.; *Kuvarji* v. *Bai Javer* (4), and *Mani Shankar* v. *Trikam Narsi* (5). Gibbs and Lloyd, JJ., apparently considered that a custom of privacy, if proved, would be valid.

In *Gibbon* v. *Abdur Rahman* (1) no question of privacy appears to have arisen. The females, if any, of the plaintiff's family, judging by his name, were not likely to have been *parda-nashin* women. It was an anticipated trespass, not an interference with a right of privacy of which the plaintiff complained.

Owing to the copies of the Punjab Record for 1869 and 1876 not being in the Library of this Court, I have been unable to examine the decisions of the Chief Court of the Punjab, 21 and 91 of Punjab Record, 1869, and 90 of Punjab Record, 1876, in which Sir Meredyth Plowden in his judgment in *Yasin* v. *Gokal Chand*, No. 19 of 17, Punjab Record Civil Judgments 72, states "that the right of privacy has beyond doubt been acknowledged." I shall give two short extracts from that judgment. At page 72 Sir Meredyth Plowden says:—

"The object of this suit is to compel the defendant to build a screen on the top of the upper story recently added to his house, so that persons using the roof of the latter shall not command a view of the interior of the plaintiff's premises." And at page 73 he says:—"When, therefore, a suit is brought to restrain the owner of a house from adding an upper story to his own house, or to compel him to make some addition for the protection of the plaintiff's privacy, it is only just to demand from the plaintiff strict proof, first, that the custom of domestic privacy is observed among that section of society of which he is a member, and in his own household; and secondly, that the domestic privacy of individuals is generally regarded among the community of the locality where the plaintiff resides, as being of so much importance that by common consent it is considered incumbent upon owners of land and houses either to abstain from elevating their houses, or to elevate them with precautions against the violation of such privacy." And further on he says:—"This right when it exists is in its nature an easement, but I am not aware that any attempt has yet been [382] made to define or describe it. Being founded upon local usage, it seems to me that the Courts are fully

(1) 3 B. L. R.A.C.J. 411. (2) 5 B. L. R. 676. (3) 3 M. H. C. R. 141.
(4) 6 B. H. C. R. A. C. J. 143. (5) 5 B. H. C. R. A. C. J. 42.

justified in demanding that the proof of the customary right shall extend to and include proof of the customary mode of recognition."

In that case Plowden and Brandreth, JJ., dismissed the plaintiff's appeal, being of opinion that the plaintiff had failed to prove a custom in Basti Ghuzan, where the houses were, by which a proprietor was compelled to build a screen or desist from building. I infer from their judgments that in their opinion such a custom might be proved, or, if proved, would be good in law.

The decisions of the Judges of the High Court at Calcutta on the question as to whether any right of privacy exists or can exist by custom or otherwise, or at all, are conflicting; but I think it may be inferred from some of those decisions that where a custom of privacy has been clearly proved, any substantial interference with it would be an actionable wrong, provided of course that such interference was not by the consent or acquiescence of the party complaining.

The solitary decision of which I am aware of the High Court at Madras on the question of privacy, apparently ignores the possibility in law of a right of privacy existing in India.

The High Court at Bombay has clearly recognised and given effect to the custom in Guzerat by which a right of privacy is enjoyed where that custom prevails.

The High Court at Bombay, in *Shrinivas Udpirav* v. *Reid and others* (1) recognised the possibility in law of a custom similar to that of Guzerat existing elsewhere, and in *Mani Shankar Hargovan* v. *Trikan Narsi and others* (2) refused to consider the decision of the High Court at Madras in *Kamathi* v. *Gurunada Pillai* (3) as an authority which could be followed, where, by the usage of the district, a right of privacy exists.

The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced.

I have consulted all the reports available to me of the cases in the High Courts at Calcutta, Madras, and Bombay, and of the [383] Chief Court of the Punjab of which I am aware, which deal with the question of a right of privacy. Owing to the absence from our Library of the reports which contain the series of decisions referred to by the High Court at Bombay in *Mani Shankar Hargovan* v. *Trikan Narsi* (4) as having settled the question as to the usage of Guzerat, I have been unable to ascertain whether that custom was first established by a finding of fact on evidence given in Court, or whether it was a well-known and immemorial custom of which the Judges of the High Court at Bombay or their predecessors took judicial notice.

Shortly put, the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of this High Court where the question of the right of privacy has arisen may be summarized as follows:—

In 1855, in a Delhi case, Begbie, Smith and Jackson, JJ., recognised the existence of a right of privacy.

In 1862, in an Allahabad case, Ross and Roberts, JJ., did not suggest any doubt that a right of privacy could exist.

In 1867, in a Benares case, Morgan, C. J., and Spankie, J., expressly recognised the existence of a right of privacy.

(1) 9 B.H.C.R. 266.
(2) 5 B.H.C.R.A.C.J. 42 (45)
(3) 3 M.H.C.R. 141.
(4) 5 B.H.C.R.A.C.J. 42. (44)

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In 1868, in a Moradabad case, Roberts and Pearson, JJ., expressly recognised the existence of a right of privacy.

In 1869, in a Jaunpur case, Pearson and Turner, JJ., either adopted the finding of the Munsif that there would be no interference with the privacy claimed, or they may have thought that there would be no material interference. They did not expressly hold that there could be no right of privacy.

In 1871, in an Allahabad Case, Morgan, C. J., and Spankie, J., decided the appeal apparently on the ground that there was in that case no privacy to be interfered with, and not on the ground that no right of privacy could exist.

In 1874, in a Cawnpore case, in which the District Judge of Cawnpore had in his judgment stated that the custom of the country recognised a right of privacy, Pearson and Turner, JJ., either [384] ignored that finding or treated it as a finding of a custom which could not exist in law.

In 1877, Stuart, C. J., and Oldfield, J., merely decided that the right of privacy claimed in respect of a lane did not exist. They did not suggest that no right of privacy could exist in these provinces.

In 1878, in a Moradabad case, the claim of privacy was on appeal abandoned for some reason which is not stated.

In 1882, in an Agra case, Straight and Brodhurst, JJ., apparently considered that a right of privacy might exist, but that the facts found did not show how any such right was interfered with.

In S. A. No. 8 of 1886, Straight and Mahmood, JJ., evidently considered that a right of privacy could exist in respect of a house in the city of Allahabad.

In a Cawnpore case, *Lachman Prasad* v. *Jamna Prasad* (1), Oldfield and Mahmood, JJ., when making the first order of remand, evidently considered that a right of privacy could exist; and Oldfield and Brodhurst, JJ., when making the second order of remand, must have considered that such a right could exist by custom. On the second remand, the Subordinate Judge of Cawnpore found that such a custom was proved, and on that finding Brodhurst, J., and I decreed the relief asked for.

Owing to the destruction of records during the Mutiny of 1857, I am unable to ascertain whether the existence of a custom of privacy in this part of India had ever been proved or called in question prior to 1855; and owing to the same cause and to the absence from the report of the case of *Nut Mull* v. *Zuka-oollah Beg and Kureem-oollah Beg* (2) of information on the point, I am unable to ascertain whether the Judges of the Sadr Diwani Adalat of the North-Western Provinces were in that case following the law as they found it existing, or were deciding that case on facts found.

With the exception of the Jaunpur case in 1869 and the Cawnpore case in 1874, which were decided by Pearson and Turner, JJ., I have not found any case in which any Judge of the [385] Sadr Diwani Adalat of the North-Western Provinces or this Court has expressed any opinion from which even an inference could be drawn that he considered that a right of privacy could not exist in law, or could not be obtained by custom; indeed, with the exception of those two cases, the inference has been the other way. It is a matter worthy of notice that the finding of the District Judge of Cawnpore as to a custom of privacy which

1 A. W. N. (1887) 295 = 19 A. 162.

2 S. D. A. N. W. P. 1855, p. 92.

Pearson and Turner, JJ., in 1874, either overlooked, ignored, or treated as a finding of a custom which could not exist in law, has been supported by the finding of the Subordinate Judge of Cawnpore in *Lachman Prasad* v. *Jumna Prasad* (1). If Pearson and Turner, JJ., in the cases decided by them in 1869 and 1874, meant to decide that there could be no custom and no right of privacy in these Provinces, they neither discussed nor referred to any authorities on the subject as I would have expected them to have done, having regard to the previous decisions on that point.

In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to that difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England. In India, or at any rate in these Provinces, the custom of the *parda* has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Muhammadans except the poorest. It cannot be doubted that the male relations of a *parda-nashin* woman and the woman herself would consider it a disgrace were her face to be exposed to the gaze of male strangers, and whilst that is the view of those amongst whom the custom of the *parda* prevails, I think it is more reasonable that a neighbour should not be allowed to erect new buildings or to open or extend doors or windows in old buildings in such a way as would substantially interfere with those parts of his neighbour's house or premises which are used by *parda-nashin* women of the latter's family than to hold [386] that the latter's only remedy is to build a wall on his own land, which, although it would maintain his privacy, might deprive his house of light and air and render it uninhabitable, or to screen his windows with probably the same result. We know as a matter of common knowledge that in these Provinces great numbers of *parda-nashin* women in the hot weather are, I may say, compelled from the severity of the climate to sleep in the open air, that is, either in the courtyards or the verandahs of their houses. In such cases, where the privacy in fact exists and is or has been enjoyed, I can see nothing unreasonable in a custom that such privacy shall be protected.

I cannot see that by holding that a right of privacy may exist; any such alarming consequences to the owners of house-property in towns as apparently influenced the mind of Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (2) will ensue. Every case must depend on its own facts. A primary question must in all cases be :—Does the privacy in fact and substantially exist and has it been and is it in fact enjoyed? If it were found that no privacy substantially exists or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that privacy did substantially exist and was enjoyed, the next question would be :—Was that privacy substantially or materially interfered with by acts of the defendant done without the consent or acquiescence of the person seeking relief against those acts? In the case of old buildings, what can an owner of one of the old buildings have to complain of, if a usage or custom exists, by which he cannot so alter his old building, as to deprive his neighbour's old building, of the privacy

(1) A.W.N. (1887) 295 = 10 A. 162.

(2) 5 B.L.R. 676.

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which has been enjoyed, and make it unavailable as a *zenana*, or, in other words, deprive it of all residential value and in this way depreciate its market value? Such a custom where it exists in India is merely an application of the maxims "*Sic utere tuo ut alienum non laedas*" and "*Ædificare in tuo proprio solo non licet quod alteri noceat.*"

I do not suggest that these maxims would, in a case like this, be applicable in England, where no such right of privacy is known to the law. In the case of a building for *parda* purposes newly erected, [387] without the acquiescence of the owner of an adjacent building-site, it appears to me, that a custom which would prevent the owner of such an adjacent site from building so as to interfere with the privacy of the first new building, would be an unreasonable, and consequently, a bad custom in law. If, however, the owner of such an adjacent building-site, were without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting buildings or premises for the use of *parda-nashin* women, I think a custom which would prevent him subsequently interfering with the privacy of such new building, would not be unreasonable in this country.

Having given the best consideration which I can to this question, I am of opinion that such a right of privacy as that to which I have already referred exists, and has existed in these Provinces, apparently by usage, or, to use another word, by custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of dominant tenement affords such owner a good cause of action.

In the present case, the defendant in her deposition distinctly admitted that the southern doors of her newly-erected house, and consequently her verandah, overlooked and intruded upon the privacy of the female apartments of the plaintiff's house. After that admission her vakil decided to call no further witnesses on her behalf. It was contended before us by the defendant's vakil that as the other portions of the plaintiff's house and part of the courtyard of his house were overlooked from the houses of other people, there could be no substantial interference with any privacy of the plaintiff's house. If the facts on which that contention is founded exists, then it appears to me that the doors and the verandah of the defendant's house, which interfere with the privacy which the defendant has admitted that the plaintiff's premises have enjoyed, must materially interfere with such privacy as has existed, and that the result of allowing that contention to be valid would be to deprive the plaintiff's house of all privacy..

I am of opinion that this appeal should be allowed with costs, the decree of the District Judge set aside with costs, and the decree of the Munsif restored.

[388] MAHMOOD, J.—The learned Chief Justice has fully and exhaustively dealt with the difficulties which arise in this case owing to the conflicting nature of the case-law, and I agree with him so fully that it is not necessary for me to deliver a separate judgment. But as a native of India myself, I may without hesitation say that in the territories subject to the jurisdiction of this Court the *parda* system prevails alike among Hindus and Muhammadans, and that both these sections of the community by immemorial usage and custom, regard invasion of privacy as actionable. Indeed, if we were to hold any view other than that which the learned Chief Justice has expounded, we should really be reducing

even the market value of thousands of houses inhabited by the female portion of the population, if not also the value of houses used by male members of the Hindu and the Muhammadan population of these Provinces. There is no statute-law applicable to these Provinces to govern the decision of a case such as this, and I fully concur with the learned Chief Justice in his opinion that the importation of the English law, as to the invasion of privacy being unactionable, is not only not justified, but positively opposed to the customs, habits, and conditions of life of the populations living under the jurisdiction of this Court. Even in Europe, countries whose principles of law are derived from or founded on the civil law, recognise invasion of privacy as an actionable wrong, a doctrine which no doubt owes its origin to the conditions of life in those countries, regulated as their conditions must necessarily be by the climate and the social and religious habits of the population.

The *parda* system which in India is based both on religious and social notions may have its faults ; but Judges take facts as they are, and we, sitting here as Judges with a duty to adjudicate upon such disputes must take cognizance of those facts, and administer justice between the parties.

The learned Chief Justice has pointed out that under conditions of life, such as they are in these Provinces, the custom that invasion of privacy is actionable far from being an unreasonable custom and the custom itself is so well recognised, that Mr. *Moti Lal* for the respondent in the course of his argument stated that it **[389]** was wholly unncessary to remand the case for ascertaining the custom.

I concur in all the views to which the learned Chief Justice has given expression. I have no doubt that those views will be greeted by the entire Hindu and Muhammadan population of these Provinces ; and I hope that His Lordship's exhaustive judgment will place the law, as administered by this Court, upon a firm and ascertainable footing rendering ineffective the rulings to the contrary, which have unfortunately done much to disturb the comfort of neighbours in towns, and have, I am afraid, encouraged unnecessary invasion of the immemorial right of privacy, and consequent litigation.

Appeal decreed.

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10 A. 389 = 8 A.W.N. (1888) 51.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KASSA MAL (*Defendant*) v. GOPI (*Plaintiff*).*
[30th January, 1888.]

Execution of decree—Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—Civil Procedure Code, s. 243—"Such Court"—Civil Procedure Code, ss. 235 (d), 581, 583.

An appeal lies from an order passed under s. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor.

The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to ss. 235 (d), 581 and

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* Second Appeal, No. 865 of 1887, from a decree of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 16th April, 1887, reversing a decree of Maulvi Muhammad Samiullah Khan, Subordinate Judge of Farukhabad, dated the 25th January, 1887.

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583, that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.

The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court but granted by the District Court. On appeal by defendant to the High Court, *held* that an appeal lies from the order, and the Judge's order was correct.

Mittun Bibi v. *Buzloor Khan* (1) disapproved.

[F., 20 M. 366 (367); 3 O.C. 42 (43, 44); 130 P.R. 1908 = 205 P.L.R. 1908; R., 41 P.R. 1904 = 59 P.L.R. 1904.]

[390] THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad* and Babu *Jogindro Nath*, for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts necessary for the disposal of this appeal are the following:—A suit was instituted by Musammat Gopi, plaintiff-respondent, judgment-debtor, for recovery of money and other reliefs of a cognate character to which I need not refer. The suit was finally dismissed in appeal by this Court on the 27th November, 1886, by which decree a sum of about Rs. 1,000 was found due by the said Musammat Gopi to Kassa Mal, the decree-holder, appellant, before me.

Thereupon, it is admitted before me by Pandit *Sundar Lal* on the one hand and Mr. *Kashi Prasad* on the other, that a suit was instituted by the aforesaid Musammat Gopi against the aforesaid Kassa Mal in the Court of the Subordinate Judge of Farukhabad, and during the pendency of the suit an application was made by the decree-holder, Kassa Mal, on the 4th January, 1887, for the recovery of the above-mentioned item of Rs. 1,000, costs of the former litigation. Thereupon, Musammat Gopi by her application of the 25th January, 1887, applied under s. 243 of the Civil Procedure Code for stay of execution of the decree, but the application was rejected by the Court in which the second suit was pending, namely, the Court of first instance, on the 25th January, 1887, that is, the same day as the one upon which the application was made.

From this order Musammat Gopi preferred an appeal to the learned Judge of the lower appellate Court, and, by his order of the 16th April 1887, he held that, under the circumstances of the case, the execution of the decree of the 27th November, 1886, should have been stayed pending the decision of the new suit.

From that order, this second appeal has been preferred, and in supporting it Pandit *Sundar Lal* has argued, in the first place, that inasmuch as the order of the Subordinate Judge of the 25th January, 1887, was passed under s. 243 of the Civil Procedure Code, no appeal lay to the learned Judge of the lower appellate Court [391] and in support of his contention he relies upon a ruling of a Division Bench of the Calcutta High Court in *Nehal Chand* v. *Rameshari Dassee* (2), in which it was held that in a case such as this no appeal would lie, because the order passed under s. 243, Civil Procedure Code, was not such an order as

(1) 8 W.R. 392. (2) 9 C. 214.

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would fall within the purview of cl. (c) s. 244, of the Code, so as to render it appealable as a "decree" within the meaning of the definition of the word in s. 2 of the Code.

The ruling is no doubt in favour of the learned pleader's contention, but in a judgment of my own in the case of *Ghazidin* v. *Fakir Bakhsh* (1) I, with the concurrence of my brother Straight, held an opposite view, of the law; and that view, I find, was adopted by another Division Bench of the Calcutta Court itself in *O. Steel & Co.* v. *Ichhamoyi Chowdhrain* (2) in which the view laid down in the case of *Nehal Chand* v. *Rameshari Dassee* (3) was repudiated. I still adhere to the views which I expressed in the case of *Ghazidin* v. *Fakir Bukhsh*, (1) and I have no doubt that an appeal did lie to the lower appellate Court.

And holding this view, I need not deal with the contention pressed upon me by Mr. *Kashi Prasad*, on behalf of the respondent, that if an appeal did not lie to the lower appellate Court, this appeal would, *a fortiori*, not lie, and the only possible remedy for the appellant, in that event, would have been, perhaps, an application under s. 622 of the Civil Procedure Code for revision.

The next point which has been argued before me at considerable length by Pandit *Sundar Lal* on behalf of the appellant, is that the words "*such Court*" as they occur in s. 243, Civil Procedure Code, limit the exercise of the powers contemplated by that section to decrees passed by the Court in which the suit is pending; and upon this ground the learned pleader goes further and contends that the decree sought to be executed, namely, the decree of the 27th November, 1886, being a decree passed in appeal by the High Court, the Court of first instance, even as a Court executing this Court's appellate decree, could not apply the provisions of s. 243 to such a case. The reason of the contention put before me by the learned pleader is that a Full Bench of this Court in *Shohurt Singh* [392] v. *Bridgman* (4) has held that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts, as such, may not be referred to and applied by the Court executing such decree. Taking the Full Bench ruling as the central point of the argument, the learned pleader contends that the decree of the 27th November, 1886, could not be dealt with under s. 243, as it was not a decree passsed by the Court in which the suit was pending.

I cannot accept this contention. There is no doubt that I am bound to accept the authority of the Full Bench ruling upon which the learned pleader relies, but it is not inconsistent with that ruling to say that the decrees of the Courts of appellate jurisdiction are, by reason of ss. 581 and 583 of the Civil Procedure Code, subject to the same rules as those decrees which have been passed by the Court of original jurisdiction. S. 581 of the Code simply specifies how appellate decrees are to be dealt with, and *inter alia* it goes on to say that such decree "shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits."

Now the next matter which has to be considered is, how such decrees are to be executed; and upon this point, I think Mr. *Kashi Prasad* was right in calling my attention to s. 235, cl. (*d*), which in stating the contents of application for execution of decree, directly contemplates that the application for execution is to state any modifications or reversals, &c.,

(1) 7 A. 73. (2) 13 C. 111. (3) 9 C. 214. (4) 4 A. 376.

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which the appellate Court's decree may have introduced in the decree. What Pandit *Sundar Lal* contends is that, notwithstanding the provisions of ss. 581 and 583 of the Code, a Court in exercising the powers under s. 243 of the Civil Procedure Code is limited to *its own* decrees, and that such powers do not apply to decrees passed either by a Court of co-ordinate jurisdiction, or by a Court of appeal, even though such decrees may, under the rules of procedure, have to be executed by the Court to which an application under s. 243 is presented. In supporting this contention the learned pleader has, in the first place, called my attention to s. 228 of the Code, which relates to the execution of decrees transmitted by other Courts for execution to a Court, and he argues that it is only because that section specifi-[893]cally states that the powers possessed by the Court to which the decree is sent, are to be co-extensive and similar in respect of such decrees that the provisions of s. 243 would be applicable, and he contends that because s. 243 does not contain any specification of such a character with reference to appellate decrees, therefore that section would not be applicable to this case. But it seems to me that this contention is somewhat inconsistent, because as Mr. *Kashi Prasad* has contended, provisions corresponding to s. 228, so far as their application to the general rules as to execution of decrees is concerned, are to be found in s. 583 of the Code.

That section, in stating how an appellate Court's decree is to be executed, goes on to say that "such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits."

Just as I have before now held that the provisions of s. 582 of the Civil Procedure Code render the earlier rules as to original suits applicable *mutatis mutandis* also to the procedure in appeals, so I also hold that the effect of the provisions of s. 583 is to render all the antecedent rules as to execution of decrees in Courts of original jurisdiction, applicable also to the execution of decrees passed by Courts of appellate jurisdiction.

And once this view is accepted, not only the provisions of s. 243 but of various other parts of the Code become applicable. For instance, the proviso to s. 246, which in stating how cross-decrees are to be dealt with for the purposes of setting off one decree against another, goes on to say (consistently with the principle which I have accepted as the basis of the rule), that "the decrees contemplated by this section are decrees capable of execution at the same time, and by the same Court." I think it is clear that by reason of this rule, the provisions of s. 228, as also of s. 243, as also of s. 583, would become applicable, and the Court executing its own decree could set off that decree against the decree passed by another Court, if that decree has been transmitted to it or is a decree of the appellate Court, when such decree is before the Court for execution. This reasoning, however, is applicable only by analogy, because the exact point before me is simply whether or not, within the meaning of s. 243 read with s. 583 of the [394] Code, are included in the decrees not only of the Court in which the suit is pending but also decrees of appellate Courts. As I have already said, I hold that the suit being pending before the Subordinate Judge of Farukhabad, and the High Court's decree of the 27th November, 1886, being before the Court for execution, that Court or the Court to which an appeal would lie for the purpose of the decree, had jurisdiction to stay execution within the meaning of s. 243 of the Civil Procedure Code.

The only ruling against this view which Pandit *Sundar Lal* has cited

to me is the case of *Mittun Bibi* v. *Bazloor Khan* (1), which turned upon the interpretation of s. 209 of the old Code of Civil Procedure (Act VIII of 1859), which section corresponds to s. 243 of the present Code of Civil Procedure. It was in interpreting that section that Jackson, J., laid down the rule that "when an application to stay execution of a decree is made to a Court in which a suit is pending against the decree-holder, the Court's competency under s. 209, Act VIII of 1859, to grant the application depends on the decree being its own decree." The other learned Judge before whom the case was argued was Hobhouse, J., who began his judgment by stating that he had some doubts in consequence of the provisions of s. 362 of the same Code (Act VIII of 1859) which section corresponds to s. 583 of the present Code upon which Mr. *Kashi Prasad* has relied. It seems to me that the doubts of Hobhouse, J., were well founded, and although he deferred to the views of Jackson, J., the rule of law laid down in the case is, as I respectfully think, unsound, opposed as that rule seems to me to the broad and fundamental principles of the equitable doctrines of compensation and set-off upon which I dwelt at some length, with the approval of my brother Straight in *Ishri* v. *Gopal Saran* (2), which, though a suit for pre-emption, involved considerations not dissimilar to those in the case, so far as the question of principle is concerned. It is doubtful whether the ruling of Jackson, J., has since been followed by the Calcutta Court itself, because Pandit *Sundar Lal* has not been able to show me any such ruling. On the contrary, the general *ratio decidendi* upon which the ruling of my brother Straight and myself in *Ghazidin* v. *Fakir Bakhsh* (3) **[395]** proceeded and the *ratio decidendi* of the cases to which it refers, are opposed to the ruling of Jackson, J., in the case above cited, and the ruling of my brother Straight and myself, as I have already said, was adopted by the Calcutta Court in the latest case of *O. Steel & Co.* v. *Ichamoyi Chowdhrain* (4).

The only other point which I have to deal with is whether or not upon the merits of the case, the learned Judge of the lower appellate Court was right in staying execution of decree pending the decision of the present suit. Upon this point I think I need not say much, because it is admitted before me that the suit which ended in dismissal by this Court on the 27th November, 1886, was a suit filed by Musammat Gopi, the present judgment-debtor respondent; that the suit failed on a technical point of law as to whether or not the suit in its then form was maintainable, that the suit now pending before the Subordinate Judge of Farakhabad is a suit by the same Musammat Gopi against the same Kassa Mal, for purposes of a remedy which is now prayed for in lieu of that which was prayed for in the former unsuccessful litigation; that the costs awarded by the decree of the 27th November, 1886, are costs in the former decree of the older litigation, and that if the suit now pending before the Subordinate Judge succeeds, the costs might not have to be paid by Musammat Gopi, but on the contrary, she might have to recover considerable sums of money from the present decree-holder appellant, Kassa Mal, or at least, might be entitled to claim set-off for her decree against the decree for costs held by the appellant.

If the costs were a simple debt instead of being a judgment-debt, the defendant might possibly have pleaded the amount as a set-off under s. 111, Civil Procedure Code, against the claim of Musammat Gopi in the suit now pending; but without deciding this question, I may add, that

(1) 8 W.R. 392. (2) 6 A. 351. (3) 7 A. 73. (4) 13 C. 111.

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whilst it is not shown that the stay of execution will materially prejudice the decree-holder appellant, there are indications in the circumstances of the case, to suggest the suspicion that the execution has been prayed for by the decree-holder, mainly with the object of hampering the respondent Musammat Gopi, in prosecuting the suit now pending against the decree-holder.

[396] I think, under these circumstances, the learned Judge of the lower appellate Court exercised a sound discretion in staying execution of the decree of the 27th November, 1886. I dismiss the appeal with costs.

Appeal dismissed.

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10 A. 396 = 8 A.W.N. (1888) 72.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

NAGAR MAL AND OTHERS (*Plaintiffs*) *v.* ALI AHMAD AND OTHERS (*Defendants*).* [9th February, 1888.]

Act XXIII of 1871 (*Pensions Act*), ss. 3, 4, 6, 9—*Grant of land revenue—Suit by assignees zemindars for arrears—Right of plaintiffs admitted by Government—Suit not barred for want of Collector's certificate.*

The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly.

Held, that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiffs' right thereto, came within section 9 of the Pensions Act (XXIII of 1871) and was not barred by sections 4 and 6 by reason of no certificate having been obtained as therein provided.

[F., 6 Bom. L.R. 423 (427); R., 29 B. 489 (490) = 7 Bom. L.R. 497; 8 N.L.R. 107 (112).]

BY a proceeding of the Special Commissioner for the districts of Meerut, Agra, Bareilly and Delhi, held on the 26th July, 1843, the lands described in the plaint filed in the suit, as also other lands which together formed the area of mauza Dumchandpur in pargana Deoband, were released from payment of revenue to Government in perpetuity, such revenue being assigned by Government to certain persons who were muafidars of the village, among whom the assignors of the plaintiffs in this suit were some. In the year 1861, when the settlement of the village was renewed, the zemindars of the village in their engagement with Government promised to pay the revenue assessed on it to the muafidars according to a separate statement prepared at the time.

The defendants, who are some of the zemindars of the village, did not pay to the plaintiffs for the three fasli years from 15th November, 1882, to 15th June, 1885, the portion of revenue payable to them, and so the sum of Rs. 301-8-9, became due. The [397] plaintiffs therefore instituted this suit for recovery of the amount and also for a declaration of their rights as representatives of the original assignees from Government

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* Second Appeal, No. 1481 of 1886, from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 28th June, 1886, reversing a decree of Maulvi Shah Amjadullah, Munsif of Deoband, dated the 22nd March, 1886.

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of the revenue payable in respect of certain land to receive the same. They based their suit on the *wajib-ul-arz* of the year 1861 and the muafi statement then prepared.

The defendants pleaded several matters, namely, that the suit was not cognizable by the Civil Court; that the certificate mentioned in section 6 of the Pensions Act (XXIII of 1871) not having been obtained, a Civil Court cannot take cognizance of the claim, and that the plaintiffs have no right to sue them for the amount.

The Munsif of Deoband, who tried the suit in the first instance, overruling all the pleas in bar, found on the merits for the plaintiffs and decreed their claim. On appeal by the defendants the District Judge, relying on the authority of *Babiji Ram* v. *Raja Ram* (1), held that the claim was not cognizable by the Civil Court without a certificate from the Collector and dismissed the suit.

On behalf of the plaintiffs it was contended in second appeal that the suit was saved by the provisions of section 9 of the Act, and therefore cognizable by the Civil Court without the certificate from the Collector.

Hon. *T. Conlan*, Hon. *Pandit Ajudhia Nath*, and Shah *Asad Ali*, for the appellants.

Pandit *Moti Lal Nehru*, for the respondents.

JUDGMENT.

STRAIGHT and TYRELL, JJ.—In this case the plaintiffs claim to have paid to them a sum of Rs. 301-8-3 for three years' arrears due to them from the zemindars, defendants, by a declaration of their right thereto, as the representatives of the original assignee from Government, of the revenue payable in respect of certain land. The amount of this revenue was determined at the settlement, and by paragraph 12 of the *wajib-ul-arz* the zemindars promised to pay it. The Munsif decreed the claim, and the learned Judge, in appeal by the defendants, decided all the pleas against them, but being of opinion that the suit was barred by the provisions of s. 4 of the Pensions Act (XXIII of 1871), the plaintiffs not having obtained the sanction required by that section, decreed the appeal [398] and dismissed the suit. The propriety of this decision is the sole point raised in second appeal.

Now it is the well-understood rule that the Civil Courts have jurisdiction to try all suits of a civil nature, the cognizance whereof is not prohibited by any positive enactment, and upon the face of the plaint in the present case it is obvious that the claim of the plaintiffs would ordinarily fall within their jurisdiction. It must further be taken as conceded that the Government has not only recognised the right asserted by the plaintiffs by the action of the officer who conducted the settlement, but at the present moment admits them; that the zemindars themselves undertook to pay the revenue assessed to the plaintiffs, and that the defendants, who stand in the shoes of those zemindars, are under the same liability, but have repudiated it as alleged by the plaintiffs. There is obviously, therefore, no question between the plaintiffs and the Government, but their only dispute is with the defendants, who have denied their right. We have then to examine Act XXIII of 1871 to see if it contains any prohibition to such a dispute being made the subject of determination by a Civil Court, and in doing so it is appropriate to bear in mind what

(1) 1 B. 75.

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was said by Westropp, C. J., in *Ravji Mandlik* v. *Dadaji Dasai* (1), that "an enactment of a character so arbitrary as Act XXIII of 1871, which purports to deprive the subject of his right to resort to the ordinary Courts of Justice for relief in certain cases, ought to be construed strictly, and the Court should not extend its operation further than the language of the Legislature requires." (See also *Gurushidgavda* v. *Rudragavdati*) (2). It must be admitted that the moneys claimed by the plaintiffs are a grant of land revenue, which by s. 3 of the Act in question " includes anything payable on the part of Government in respect of any right," &c., and that *prima facie* they would come within the prohibitions of s. 4 and the accompanying provision of ss. 5 and 6, and the suit would accordingly be barred, no sanction confessedly having been obtained to its institution. It remains then to be seen whether there is any saving clause in the Act to relieve the plaintiffs from the difficulty, and it is obvious that if s. 9 does not help them, there is no other provision in that will. It is to be observed in regard to s. 6 that, [399] while a Civil Court may take cognizance of claims to money payable on the part of Government in respect of a right upon receiving a certificate, " it shall not make any order or decree in *any suit whatever* by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

Now it seems to us that taking s. 6 in contradistinction to s. 9, the kind of claim which is contemplated by the former section is one where, a pension or grant being admitted by Government, there are several claimants to the right to receive it, in whole or in part, the merits of whose respective claims may well be adjudicated upon by a Civil Court, for the purpose of informing Government as to the proper person or persons, to whom, so long as such pension or grant is continued, it shall be paid, though such adjudication in no way binds Government to continue, to pay it. In such a suit it can readily be seen why Government should be regarded as having an interest in the sense that, being ready and willing to pay the pension or grant, it desires to pay it to the right person. Reading ss. 5 and 6 together, they seem to us to provide for two alternative methods of treatment for claims of the kind we have mentioned : first, by application to the Collector and by an order made by him, or, if he thinks it more suitable, by a trial of the claim in a Civil Court on his certificate. In the present case, however, the existence of the grant, the right to which is claimed by the plaintiffs, and the plaintiffs' right thereto, are not only not denied by Government, but, on the contrary, they are admitted and the matter simply stands thus, that the plaintiffs, as the assignees of the Government revenue payable on certain land, whose right thereto is admitted by Government, are primarily suing the defendants, who admittedly are bound to pay such revenue to somebody, for arrears due to them as such assignees. Were the suit limited to this relief merely, it would, under the terms of s. 93 of the Rent Act, lie exclusively in the Revenue Court. But the defendants, not claiming that the land is revenue-free, have denied the title of the plaintiffs as assignees, and have thus driven them into a Civil Court to establish their title, not as against counter-claimants to the assignees' right, but as against persons who withhold revenue, which is incontestibly payable by them, to others, whose right thereto is admitted by Government. It seems to us [400] that such a suit only lies in the Civil Court, that it is one within the spirit of s. 9, and, as such, is saved from the prohibition of s. 4, and that the learned Judge's

(1) 1 B. 523. (2) 1 B. 537.

view was erroneous, and that suit to which the ruling of the Bombay Court in *Babaji Hari* v. *Rajaram Ballab* (1), upon which he relied applies, is distinguishable from the present in the particulars to which we have referred.

We decree the appeal and, reversing the decree of the Judge, restore that of the first Court. The plaintiffs to have their costs in all Courts.

Appeal decreed.

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10 A. 400=8 A.W.N. (1888) 74=13 Ind. Jur. 73.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BALMUKAND (*Decree-holder*) *v.* PANCHAM (*Judgment-debtor*).*
[17th February, 1888.]

Pre-emption—Conditional decree—Appeal—Purchase-money—Costs—Civil Procedure Code, ss. 214, 583.

A Court of first instance decreed a claim for pre-emption conditionally, on the pre emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-3 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to cost. Within the period specified in the appellate Court's decree the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period.

Held by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favour for costs, and that the subsequent payment of Rs.75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realized in execution of the first Court's decree.

Held by Tyrrell, J., *contra*, that although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendants' application should be allowed.

[R., 34 A. 596 (597) = 10 A L.J. 153 = 15 Ind. Cas. 337; D., 3 P.W.R. 1913.]

[401] THIS was an appeal, under s. 10 of the Letters Patent, from a judgment of Mahmood, J.

The facts are sufficiently stated in the judgment of this Court.

Lala *Moti Lal Nehuru*, for the appellant.

Lala *Jokhu Lal*, for the respondent.

MAHMOOD, J.—The facts necessary for the disposal of this appeal may be briefly recapitulated as follows:—

One Musammat Umedi Kuar, by a sale-deed executed on the 10th July, 1883, sold the property now in suit in favour of Balmukand, the

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* Appeal No. 7 of 1887 under s. 13, Letters Patent.

(1) 1 B. 75.

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appellant before me. That sale appears to have been made in contravention of the pre-emptive right possessed by Pancham, the respondent before me, and he sued for the enforcement of that right, and on the 20th December, 1883, obtained a decree awarding him the pre-emptive right and possession of the property on payment of a sum of Rs. 125, together with costs. From that decree an appeal was preferred by the purchaser, Balmukand, and the lower appellate Court, which had to deal with that case, decreed the appeal so far as to increase the sum of Rs. 125 to Rs. 200 as consideration of the sale, and in regard to costs that Court decreed that the parties should pay their own costs. The decree specified that the sum of Rs. 200 was to be deposited by the pre-emptor within a month of the time when that Court's decree would become final, by which it must be understood, as has been held in more than one ruling, to be the date upon which the period of limitation for an appeal would expire.

In the meantime it appears that Pancham, respondent, having obtained the decree of the first Court dated the 20th December, 1883, went with Rs. 125 to the Court which passed that decree, on the 15th January, 1884, and on that date deposited the sum of Rs. 125 which that decree directed. The deposit was undoubtedly within the time allowed by that decree, and there is no question that it was a valid deposit of the purchase-money. But the decree under which the deposit was made also awarded costs amounting to Rs. 39-9-0 to Pancham, and it appears that subsequently, by executing that decree, he realized the sum last mentioned from the Court on the 5th March, 1884. Both these facts [402] are antecedent, of course, to the appellate Court's decree of the 18th April, 1884. It then appears that, in obedience to the latter decree, the said Pancham deposited a sum of Rs. 75 on the 14th May, 1884, in order to make up the earlier deposit of Rs. 125 up to the sum of Rs. 200 as required by the appellate Court's decree.

Certain proceedings then appear to have taken place in the Court of first instance to which it is not necessary to refer beyond saying that they led to an application for review of judgment preferred by Balmukand, the present appellant, to the lower appellate Court, praying for review of that Court's decree of the 18th April, 1884. The application appears to have been granted, and the decree of the 18th April, 1884, was considerably modified in respect of the order as to costs and such modification is indicated in the order passed upon review dated the 3rd February, 1885.

It is the decree as modified by this last-mentioned order in respect of which Balmukand presented the application from which this appeal has arisen. The application was made on the 6th June, 1885, praying that the property in respect of which Pancham had succeeded in enforcing pre-emption might be restored to the applicant, because Pancham had not deposited the whole amount of Rs. 200 within the period limited either by the decree of the 18th April 1884, or by the amended decree of the 3rd February 1885, inasmuch as he had taken away the sum of Rs. 39-9-0 as costs under the decree of the first Court dated the 20th December, 1883, which decree, as I have already mentioned, had been modified by the lower appellate Court as to costs.

Both the Courts have rejected this contention upon the ground that, under the circumstances of the case, Pancham, the pre-emptor, had fulfilled the conditions of the lower appellate Court's decree in respect of the deposit of Rs. 200.

I am of opinion that the conclusion at which the lower Courts have arrived is sound under the circumstances of this case. In the first place,

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the first Court's decree of the 20th December, 1883, was duly obeyed by the pre-emptor Pancham when he made the deposit of Rs. 125 on the 15th January, 1884, and it was in due obedience to that same decree that he realized the sum of Rs. 39-9-0 on the 5th March, 1884, as the cost of the litigation to which he [403] was declared entitled by that Court's decree. The lower appellate Court's decree of the 18th April, 1884, which increased the amount of Rs. 125 to the sum of Rs. 200, was also duly obeyed by Pancham, the pre-emptor, when he made the additional deposit of Rs. 75 on the 14th May, 1884. The effect of such deposit was that, as a matter of fact, Rs. 200 were deposited in obedience to the decree of the 18th April, 1884, which decree in this respect was not modified by the decree passed on review dated 3rd February, 1885.

What is argued now is simply the question that because on the 5th March, 1884, Pancham, the pre-emptor, took away the sum of Rs. 39-9-0 in execution of the decree of the 20th December, 1883, it was his duty, in obeying the decree of the appellate Court of the 18th April, 1884, to have deposited on the 14th May, 1884, not only the sum of Rs. 75 but also the sum of Rs. 39-9-0 which he had already taken away as I have mentioned. It appears to me that this contention involves a conclusion between two different matters which require consideration in this case. Whether or not the order whereunder Pancham took away Rs. 39-9-0 on the 5th March, 1884, was a legal and valid order is one question, and the question whether the deposit of Rs. 125 made on the 15th January, 1884, and the additional deposit of Rs. 75 made on the 14th May, 1884, did or did not amount to a deposit of Rs. 200 within the meaning of the appellate Court's decree, is another. It is only the last question I am called upon to consider. I hold that the lower appellate Court's decree being dated the 8th April, 1884, and the two deposits aggregating to Rs. 200 having been made within the time fixed, the pre-emptor did not forfeit the pre-emptive rights which had been declared in this favour by that decree. The terms of s. 214 of the Code which relate to such matters contain no provisions that under conditions of this character the right already established, proved, and decreed should be vitiated simply because by an order of the Court, erroneous or not, a portion of the price deposited was returned in execution of a decree. It is not necessary for me to decide any question as to the order whereunder Rs. 39-9-0 were taken by Pancham, but I think I may say, that in circumstances such as these, it is likely, there is still open to the present purchaser Balmu-[404]kand, appellant, the remedy to obtain restitution of the sum of Rs. 39-9-0 which Pancham took away under the order of the Court, and that such remedy could be obtained by him under the appellate decree of the 18th April, 1884, amended as it was on the 3rd February, 1885. Upon the general principles relating to the doctrine of restitution, I need only refer to the case of *Jaswant Singh* v. *Dip Singh* (1). This being so, I do not think that the plea urged on behalf of the appellant is sustainable. I dismiss this appeal with costs.

The defendant appealed from this decision under s. 10 of the Letters Patent.

The parties were represented as before.

JUDGMENT.

STRAIGHT, J.—I concur with my brother Mahmood's judgment in Single Bench. It seems to me that when the Munsif accepted the Rs. 125

(1) 7 A. 432.

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on the 15th of January, 1884, as satisfying the condition contained in the decree of the 20th December, 1883, and put the pre-emptor in possession, the purchase-price directed thereby to be paid must be taken to have been then and there *pro tanto* discharged, and the payment ought, in my opinion, to hold good, in any event, as and for the full amount of Rs. 125. The fact that upon another application and by way of executing the decree, which by the payment of the Rs. 125 had become absolute in favour of the pre-emptor and so capable of execution for his costs, a sum of Rs. 39-9-0 was on the 5th March, 1884, paid to the decree-holder in respect of such costs, does not appear to me to alter or qualify the nature of such payment any more than could be the case where a debtor who has paid a sum of money to his creditor for the liquidation of a specific debt, which is accordingly written off as specified, can be said to reduce such payment by the amount of any subsequent loan taken by him from the creditor. *Qua* the Munsif's Court which admitted the decree to execution on payment of the Rs. 125, the whole amount was held to the credit of the vendee from the 15th January, 1884, to the 1st of March, 1884, and he might have withdrawn it at any moment. On the 1st of March it stood as money belonging to the vendee, against which the pre-emptor was entitled to execute for his costs, and that the [405] Court so regarded it is evident by its first paying out the Rs. 39-9 and subsequently receiving the Rs. 75 on the 14th May, 1884, as sufficiently making up the Rs. 200, which the appellate Court had found to be the true price and had called upon the pre-emptor to deposit. The Court having accepted the Rs. 75 as satisfying the requirements of the appellate decree, it would, in my opinion, be most inequitable to hold that it did not, more particularly as the pre-emptor has in the proceedings the subject of the present appeal, expressed his willingness to refund the costs he realized, and for aught that appears to the contrary, has all along been ready to do so. In dealing with the appellate decree, I think the Courts were justified in regarding the Rs. 125, paid in compliance with the Munsif's decree, as a payment to that amount on account of the Rs. 200 subsequently ordered to be paid by the appellate Court, and as in no way involved in distinct questions arising between the parties in reference to costs. I am not prepared, therefore, to hold that the Courts below, whose orders my brother Mahmood has upheld, were wrong in taking the view that there had been no default on the part of the pre-emptor, and I therefore dismiss the appeal with costs.

TYRRELL, J.—On the 20th December, 1883, Pancham, respondent, got a decree under s. 214 of the Civil Procedure Code, enforcing his right, of pre-emption as against Balmukand, appellant, on condition of his paying Rs. 125 as purchase-money within a specified time. This decree also awarded Rs. 39-9-0 as costs by Balmukand to Pancham.

On the 15th January, 1884, Pancham paid this purchase-money of Rs. 125 into Court and obtained from the Court possession of the estate in suit.

On the 5th March, 1884, Pancham drew out of the hands of the Court Rs. 39-9-0 from the purchase-money he had deposited, reducing it thus to a sum of Rs. 85-7-0.

On the 18th April, 1884, the appellate Court, on the appeal of the vendee Balmukand, decreed that the true purchase-money payable to the latter by Pancham was Rs. 200 instead of Rs. 125, and it cancelled the award of Rs. 39-9-0 as costs payable by Balmukand to Pancham. By this decree then, which is the only [406] decree to be looked to in the execution of the case, Pancham's possession of the estate was made conditional

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on his putting the Court executing the decree in a position to pay over Rs. 200, and no less sum, to Balmukand. Now at the date of this decree Pancham had a credit by way of deposit in the Court of first instance which was charged with executing the decreee, to the amount of Rs.85-7-0 only.

On the 13th May, 1884, he deposited Rs. 75 only, making a total deposit of Rs. 160-7-0 only as the purchase-money of the estate. On the 3rd February, 1885, it was brought to the notice of the appellate Court that its decree of the 18th April, 1884, had omitted to provide for the costs of the vendee on the contingency of the pre-emptor not paying the purchase-money. The Court amended its decree by declaring that the pre-emptor failing to pay the purchase-money decreed should pay the vendee Rs.36-11-0 as his costs. It is obvious that the appellate Court would not have allowed this motion for review, which would have been futile and superfluous, if it had regarded Pancham as having complied with its order by depositing Rs. 75, only as mentioned above. On the 6th June, 1885, the vendee Balmukand applied to the Court, under s. 583 of the Civil Procedure Code, to have the property restored to him, in consequence of Pancham's failure to pay the full purchase-money within the decretal period. Both the Courts below, and Mahmood J., here, sitting in jurisdiction over second appeals of small value, have held that Pancham had complied with the decree ordering him to pay Rs. 200 as purchase-money to Balmukand. The main reason for this view seems to be that Pancham did actually once make a payment which at the moment, and for a few days, was a compliance with the decree of the Court of first instance. But it seems to me to be undeniable that Pancham has never complied with the decretal condition of the true decree in the case, the decree directing payment of Rs. 200. The decree of the Court of first instance passed out of existence on the 18th April, 1884, and we need not consider whether the pre-emptor may have complied with its terms or not. It seems to me to be undeniable that the pre-emptor has not at any moment of time from the date [407] of the institution of his suit, to the present hour, had a credit in any Court for Rs. 200, and that he has, therefore, failed to fulfil the condition essential to his possession of the vendee's estate under the decree in the suit. I fail to see how his profession of willingness now, to complete the payment long after the expiry of the decretal period, can alter his position for the better in this respect.

Under these circumstances, I think the Courts below were wrong, but as my brother Straight's decree is decisive of the appeal to the contrary, it is unnecessary to formulate the order which, from my point of view, should have been made in the case.

Appeal dismissed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAMADHIN AND ANOTHER (*Plaintiffs*) v. MATHURA SINGH AND OTHERS (*Defendants*).* [2nd March, 1888.]

Hindu Law—Hindu widow—Gift by Hindu widow of her own interest and that of consenting reversioner.

A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rani Srimuty Dibeah* v. *Rany Koond Luta* (1), *Kooer Goolab Singh* v. *Rao Kurun Singh* (2), *Sia Dasi* v. *Gur Sahai* (3), and *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (4), referred to.

Ramphal Rai v. *Tula Kuari* (5), distinguished.

ONE Lachman Singh died some years ago leaving a widow Dharm Kuar, and a daughter, Piari Kuar. He was possessed of an eight-anna share in mauza Kharsa and some houses and gardens. On his death his widow inherited the same, and her name was recorded in respect thereof. On 25th March, 1879, she executed a deed of gift of the property in favour of one Himmut Singh, a son of her daughter, Piari Kuar. It was stated in the deed that the gift was made with the consent of Piari Kuar. Dharm Kuar died in September, 1879, leaving her daughter and sons by her, *viz.*, the said Himmat Singh and Bhawani Singh.

[408] By a sale-deed dated 26th June, 1879, Himmut Singh conveyed half of the eight-anna share in the mauza to the plaintiffs in consideration of Rs. 7,700. Soon after this Himmut Singh died, and he could not therefore get the sale-deed registered.

After his death the plaintiffs applied to the Revenue Court for entry of their names in respect of the four-anna share conveyed to them, but on the objection of the minor son of Himmut Singh the application was refused. Plaintiffs thereupon instituted this suit for possession of the said four annas with mesne profits, against Mathura Singh, the minor son of Himmut Singh, Piari Kuar, and Bhawani Singh, brother of Himmut Singh.

Mathura Singh contended that Dharm Kuar was not competent to make the gift, and on the death of Dharm Kuar the entire estate devolved on Piari Kuar, and the sale-deed executed by Himmut Singh became void on the death of Dharm Kuar.

Piari Kuar also contested the suit on the above grounds, but she had in a previous suit admitted that the gift by her mother was made with her consent.

The Subordinate Judge holding that property inherited by a Hindu widow cannot be alienated by her, and relying on *Ramphal Rai* v. *Tula Kuari* (5) dismissed the suit. Plaintiff appealed and defendants contended that the only interest that passed under the gift was the life-interest of the widow, and that the consent by the daughter to the gift by her mother would not affect her interest. It was further contended that there could be no gift by the daughter of her reversionary interest.

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* First Appeal, No. 10 of 1886 from a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 19th February, 1886.

(1) 4 M. I. A. 292. (2) 14 M. I. A. 176. (3) 3 A. 362. (4) 5 C. 44. (5) 6 A. 116.

Hon. T. *Conlan* and Hon. *Pandit Ajudhia Nath*, for the appellants.
Babu *Jogindro Nath Chaudhri*, for the respondents.

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JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This is an action for possession of a four-anna share and for mesne profits.

The case of the plaintiff is that one Dharam Kuar, the Hindu widow of Lachman Singh, on the 25th March, 1879, with the consent of her daughter Peari Kuar, a defendant, made a gift of an eight-anna zemindari share to Peari Kuar's son Himmat Singh, and that on the 26th July, 1879, Himmat Singh, having obtained [409] possession, sold a four-anna share of the eight annas to the plaintiff for Rs. 7,700. The plaintiffs applied in 1880 or 1881 for mutation of names. That application was successfully resisted by Himmat Singh's son Mathura Singh. Mathura Singh was the original defendant in the action. After the commencement of the action, Peari Kuar, Himmat Singh's mother, and Bhawani Singh, a son of Peari Kuar and brother of Himmat Singh, were made defendants. It is here admitted on the arguments that Peari Kuar did in fact consent to the gift which was made by Dharam Kuar, and not only consented to the gift by Dharam Kuar of her life-interest but also of the life-interest of Peari Kuar. It could not have been contended on the evidence in this case that Peari Kuar did not consent to that extent. We have before us the written statement which was filed by Peari Kuar in the case of Modho Singh and others on 25th July, 1879. That statement, as explained by Peari Kuar's evidence, is conclusive on the point, and corroborates the statement contained in the deed of gift of March, 1879. Dharam Kuar died in September, 1879. On these facts it has been contended that the only interest which passed under the deed of gift to Himmat Singh was the life-interest of Dharam Kuar, and that the consent of Peari Kuar to the gift made by her mother would not affect Peari Kuar's interest. It has also been contended that there could be no gift by Peari Kuar of her reversionary interest; as she could not give possession of the property at the time of the gift in 1879. The Subordinate Judge found in favour of the defendant on the ground that Dharam Kuar had no power to make the gift, and that Peari Kuar was not comptent to give her consent if in fact she had done so, and he relied in support of that finding in law on the case of *Ramdhal Rai* v. *Tula Kuari* (1). The case there, was one in which another reversioner was impeaching a gift made by a Hindu widow in possession with the consent of her then next reversioner. That case would no doubt have a bearing on the present, if it were necessary for us to decide, whether or not the plaintiffs became entitled to more than the life-interests of Dharam Kuar and Peari Kuar. In this case we have only to consider whether the plaintiffs were entitled to possession and to the *mesne* profits claimed, and we are invited only to consider [410] that question. We have not here to consider who will be the person entitled to the four-annas share on the death of Peari Kuar. That is a question which we leave to be decided in a further action when the time comes. We are of opinion that it is quite clear that a Hindu widow in possession can, with the consent of a reversioner, make a valid gift, which will operate so far as the interest of the widow and that of the consenting reversioner, in this case Peari Kuar, are concerned. It appears to us that that is the principle to be found in the judgment in the Privy Council case of *Rany Srimuty Dibeah* v. *Rany Koond*

(1) 6 A. 116.

1888 MARCH 2. — APPELLATE CIVIL. — 10 A. 407= 8 A.W.N. (1888) 79= 13 Ind. Jur. 232.

Luta (1) and in the judgment of the Privy Council in *Kooer Goolab Singh* v. *Rao Kurun Singh* (2). The judgment of this Court in *Sia Dasi* v. *Gur Sahai* (3) and in the judgment of the Calcutta High Court in *Raj Bullubh Sen* v. *Oomsh Chunder Rooz* (4) support the view of the law which we hold.

There is uncontradicted evidence here that the sale-deed of the 26th July, 1879, was a genuine sale-deed and that the consideration therein mentioned passed. We find as a fact that the sale of 26th July, 1879, was a genuine sale, and that the consideration mentioned in the sale-deed passed.

The plaintiffs are entitled to the possession of the four-annas share at least for the life-time of Peari Kuar; they are also entitled to mesne profits as against Mathura Singh, defendant, from the commencement of the suit to the date of our decree. We decree accordingly, and we direct an enquiry under s. 212 of the Code of Civil Procedure to be made by the Subordinate Judge as to the amount of mesne profits and direct him to report to us, when we will make further orders. The appeal so far will be allowed with costs. We make no declaration as to the title of the rights of the parties at the death of Peari Kuar.

Appeal decreed.

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10 A. 411=8 A.W.N. (1888) 149.

APPELLATE CIVIL.

[411] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

RAM NARAIN (*Defendant*) v. BISHESHAR PRASAD (*Plaintiff*).*
[27th March, 1888.]

Civil Procedure Code, s. 13, Explanation v.—Joint Hindu family—Suit against two members—Second suit against third member—Res judicata.

The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree had been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother.

Held that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 the Civil Procedure Code.

Held also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V of s. 13 of the Code of Civil Procedure.

The case of *Narayan Gop Habbu* v. *Panduranga Ganu* (5) distinguished.

[F.,—29 A. 1=3 A.L.J. 644=A.W.N. (1906) 242; R., 27 A. 37 (45)=2 A.L.J. 237=1 C.L.J. 46; (1913) M.W.N. 96 (99)=24 M.L.J. 79; D., 141 P.R. 1908.]

BISHESHAR Prasad sued two members in a joint Hindu family for trespass to a certain wall. These members were the father, Chhotu, and

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* Second Appeal, No. 1978 of 1886, from a decree of C. Donavan, Esq., District Judge of Benares, dated the 4th September, 1886, reversing a decree of Pandit Rajnath, Munsif of Benares, dated the 17th April, 1886.

(1) 4 M. I.A. 292. (2) 14 M. I.A. 176. (3) 3 A. 362. (4) 5 C. 44. (5) 5 B. 685.

1888 MARCH 27. —— APPELLATE CIVIL. —— 10 A. 411 = 8 A.W.N. (1888) 149.

one of his sons, Ram Prasad. They alleged that the wall did not belong to the plaintiff, but to them. The dispute was referred to arbitration, and the arbitrator decided in favour of the plaintiff, who obtained a decree in accordance therewith. When the plaintiff took out execution of his decree, he was resisted by Ram Narayan, the second son of Chhotu, on the ground that the wall was ancestral property, and he was no party to the decree obtained against his father and brother. The result of this obstruction was the registration of Ram Narayan's claim as a suit between the plaintiff and him. The plaintiff pleaded *res judicata*, this plea being founded on the decree he had obtained against Chhotu and Ram Prasad. The Court of first instance disallowed his plea, and found that the wall did not belong to the plaintiff, and altered the former decree. On appeal by the plaintiff the lower appellate Court held that the former decree was binding on Ram Narayan, defendant, [412] and reversed the decree of the first Court in this case in so far as it altered the former decree.

The defendant appealed to the High Court.

Hon. *T. Conlan* and Munshi *Sukhram*, for the appellant.

Mr. *Howell* and Munshi *Juala Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J.—The plaintiff in this suit had in a previous suit sued a father and son, alleging that they had wrongfully opened a door in a certain wall which stood on his land. That was really an act of trespass. The defendants, amongst other defences, alleged that the wall in question was their property and stood on their land. The matter was referred to an arbitrator. The plaintiff got an award in his favour and on that award a decree was passed on the 26th September, 1885. The defendant in this action opposed the execution of the decree upon that award and on the ground that he was no party to the action. It appears that the defendants in the former action and the defendant in this action were and are members of a joint Hindu family; one of the defendants in the former action being the father, the other being the son. The lower appellate Court considered that this case came within Explanation V of s. 13 of the Code of Civil Procedure, and held that the present defendant was concluded by the findings of the arbitrator, although personally he had not been a party to the former action or award. The lower appellate Court also found that the present defendant was aware of the proceedings which were being taken in the former action. I think that we should be careful in applying Explanation V of s. 13 of the Code of Civil Procedure, and that the explanation should not be applied to any case which does not come within the very wording of that explanation. The defendants in the former action did not claim any right in common for themselves or others within the meaning of Explanation V. What they said was, you cannot maintain your action because the wall is ours. They said nothing about other persons being equally interested in the wall, nor does it appear that they were sued or defended the action as representatives of the family. Mr. *Juala Prasad* for the respondent frankly admitted that Explanation V did not apply to this case. We think it does not. He, however, contended that s. 13 of the Code of Civil Procedure did apply. The parties here were [413] not the same parties as those in the former action, nor can the defendant here be said to claim under either of the defendants in the former action. The Hindu son in a joint family, as I understand the law, becomes entitled by reason of his birth and in his own right, to a right which he can enforce against his father.

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He does not claim under his father within the meaning of s. 13 of the Code of Civil Procedure. A person is said to claim under another when he derives his title through that other by assignment or otherwise. We have been pressed with the case of *Narayan Gop Habbu* v. *Pandurang Ganu* (1). In that case the learned Judges found that the other members of the Hindu family whom they held to be bound by the previous proceedings had been actually assenting members of the Hindu family, who had assisted in the previous proceeding the manager of the Hindu family. They evidently treated that manager as a person who had conducted the previous litigation as the representative and on behalf of the whole family. Here the only thing that appears is that the present defendant knew that the previous action and arbitration was going on. We have also been presssed with cases in which it has been held that a decree obtained against a Hindu father for a debt, is binding against the other members of a Hindu family. Those cases are not analogous to the present. They depend, I think, more on the obligation of a Hindu son to pay his father's debts not improperly incurred, and upon the presumption in some of those cases that the action was brought against the father as the representative of the family and the family property.. On the face of this case I see no such presumption. In fact, if the father was sued as representative of the Hindu family, it is not easy to see why one of his sons, namely, Ram Prasad, was made a defendant with him. In my opinion s. 13 of the Code of Civil Procedure does not apply to this case, and in coming to this conclusion, I am supported by the judgment of my brother Straight in *Ramanand* v. *Koleshar* (2). The lower Appellate Court has not gone into the merits of the case. The case will be remanded for trial under s. 562. This appeal is decreed, and the decree of the lower Appellate Court set aside ; the costs will abide the event.

MAHMOOD, J.—I concur.

Remanded.

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10 A. 414 = 8 A.W.N. (1888) 129 = 13 Ind. Jur. 76.

REVISIONAL CRIMINAL.

[414] *Before Mr. Justice Tyrrell.*

QUEEN-EMPRESS *v.* MUNNA LAL AND ANOTHER.*
[27th March, 1888.]

Criminal Procedure Code, s. 289—" No evidence"—Acquittal of accused without taking opinions of assessors—Criminal Procedure Code, s. 537.

The words " there is no evidence " in s. 289 of the Code of Criminal Procedure, 1882, cannot be extended to mean *no satisfactory, trustworthy or conclusive evidence* ; but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record, any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty.

But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of

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* Application for Revision, No. 135 of 1888, of the order passed by H. D'Moule, Esq., Sessions Judge of Cawnpore, dated 13th September, 1887, acquitting Munna Lal and Badri ; committed for trial to the Court of Sessions on a charge under s. 302, Indian Penal Code.

(1) 5 B. 685. (2) A.W.N. (1887) 217.

jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure.

In the matter of the Petition of Narain Das (1) referred to.

[F., 9 C.P.L. 24 (25) (Cr.); **Appr.**, 16 B. 414 (422); R., 24 M. 523 (536) = 2 Weir, 346.]

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REVISIONAL CRIMINAL.

10 A. 414 = 8 A.W.N. (1888) 129 = 13 Ind. Jur. 76.

IN this case two persons, named Munna Lal and Badri, were tried before the Sessions Judge of Cawnpore on a charge of murder. The Judge, at the close of the case for the prosecution, and without taking the opinions of the assessors, acquitted the accused by a judgment in the following terms :—

"I have without hesitation closed the proceedings in this case, without calling upon the accused to enter on their defence; and I proceed, under the third clause of s. 289 of the Criminal Procedure Code, to record a finding without taking the opinion of the assessors. The deceased, Sahib Din, was taken out of a well in the accused's compound, or *Ihatah*, dead. The medical evidence shows that there was one slight bruise on the deceased's forehead and no other marks of injury. The surgeon gave it as his opinion that death had been caused by drowning, but could not speak positively on this point. The theory of the prosecution is this: that deceased was sent for by the accused on account of a dispute pending between them; that he was beaten by the two accused with sticks in a large enclosure, or *Ihatah*, adjoining their house; that this *Ihatah* is [415] commonly used as a thoroughfare by all sorts of people going to and fro, and that it can also be easily seen into from various outside points; that the beating took place at 10 A.M. on market day; that the deceased was killed or stunned by the beating, and was then carried by the two accused to the large *pucca* well close by and thrown in; that this crime was witnessed by a number of eye witnesses, most of them friendly to the decased; that not one of these witnesses interfered to prevent the murder; that none of them made any remark on the subject to one another or to the accused; that they, each and all, went quietly home and mentioned what they had seen to none until sent for by the police, when the inquiry into the case began.

"Such a wildly improbable theory would have to be supported by the most absolutely reliable, consistent, and unprejudiced evidence to gain any belief whatever. But in this case, not only are the witnesses mostly prejudiced against the accused, but there are gross discrepancies between the statements which they have made at various times, and improbabilities in their method of explaining difficulties, which would be sufficient to discredit a really probable and reasonable theory.

"It is not difficult to guess what really occurred in this case. But it is not part of the duty of this Court to frame conjectures unsupported by formal evidence.

"It is enough to say that the deceased must have either fallen into the well or thrown himself into it, for some reason which has not been fully disclosed. The whole body of evidence for the prosecution being utterly discredited, there are no grounds for framing any charge of a lesser offence, such as assault or hurt, against the accused. They must be acquitted."

The complainant in the case, one Misri Lal, son of the deceased, applied to the High Court for revision of the Sessions Judge's order, principally on the following grounds :—

(1) 1 A. 610.

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"1. Because the order of the lower Court, under para. 3 of s. 289 of the Criminal Procedure Code is illegal, as it cannot be said that there was no evidence against the accused on the record.

[416] "2. Because the learned Judge should have allowed the case to go to the assessors, and he and they should have decided on the credibility of the evidence.

"3. Because the order of acquittal in this case, which was improperly given, was illegal, and should be set aside, and a new trial ordered."

Mr. *W. Colvin*, for the petitioner.

Mr. *G. T. Spankie* and the Munshi *Nawal Bihari Bajpai*, for Munna Lal and Badri.

Mr. *G. E. Ross* (Public Prosecutor), for the Crown.

JUDGMENT.

TYRRELL, J.—This is an application arising out of a Sessions trial held at Cawnpore, in which Munna Lal and Badri were tried on a charge of murder, in a prosecution instituted on the complaint of one Misri Lal, the son of Sahib Din, deceased. The case for the prosecution appears to have been closed, the trial being held with the aid of assessors; the examination of the accused had been put in evidence, and the accused had expressed their intention of calling witnesses, when the presiding Judge closed the trial holding that there was *no evidence* that the accused had committed the offence of murder, and the Judge proceeded to record a finding of acquittal. This applicatioion is made for revision of this order, on the ground that the Judge was not competent, under the circumstances of this case, to make such an order. The order was made under the third paragraph of s. 289 of the Code of Criminal Procedure. If there had been no evidence on behalf of the prosecution, the order was right and legal. On the other hand, if there was any evidence which would be legal proof of the guilt of the accused in the event of the evidence being held to be trustworthy, the order was illegal.

Now, the Judge recorded that "a number of eye-witnesses" had deposed to seeing Sahib Din murdered, but he refused to believe them, because he thought them prejudiced and discrepant in their statements. It has been argued by Mr. *Spankie* for the acquitted persons, Munna Lal and Badri, that the words "there is no evidence" in s. 289 of the Criminal Procedure Code may be extended so as to mean *no satisfactory, trustworthy, or conclusive evidence*; but I do not think that this view is correct. If we were [417] to understand the words in this sense, it would be competent to a Sessions Judge to exclude his assessors from their share of the trial whenever he thought the evidence unsatisfactory or inconclusive. He might terminate any trial before him without consulting the opinion and using the judgment of the assessors, by finding that the evidence was not to be believed, and by directing a verdict of acquittal to be recorded. It is clear that it is not the intention of the Legislature that the Sessions Judges should have such a power, or that assessors might be confined to the function of giving their opinions on the evidence, in those cases only, in which the Judge was inclined to believe the evidence for the prosecution. Several rulings have been cited here to-day in support of the contrary proposition. They are to be found in *Queen* v. *Musammat Mina Nuggerbhatin* (1), *Queen* v. *Bhugwan Lall* (2), *Queen* v. *Rutton Dass* (3),

(1) 3 W.R. Cr. 6. (2) 15 W.R. Cr. 3. (3) 16 W.R. Cr. 19.

in re Hurro Shaha (1), and *Queen* v. *Matam Mal* (2). I have no doubt that the meaning of the third paragraph of s. 289 of the Criminal Procedure Code is, that if at a certain stage of a Sessions trial the Court is satisfied that there is not upon the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged against the accused, then the Court has power, without consulting the assessors, to record a finding of not guilty. But the Sessions Judge, acting with the aid of assessors, has no such power because only he considers the evidence unsatisfactory, untrustworthy, or inconclusive. In my view a Court acting in this way acts without jurisdiction, and its order in discharging the accused is illegal. But I have been referred by the learned counsel for the acquitted persons to a ruling of this Court *in the matter of the petition of Narain Dass*, (3), in which procedure of this kind was designated as "a serious irregularity." I am willing to treat the order made by the Sessions Judge of Cawnpore, in this case, as being no more than a serious irregularity; and it would then be necessary to see whether, under s. 537 of the Criminal Procedure Code, the irregularity was one which has occasioned a failure of justice. To my mind it is obvious that there may have been, and perhaps must have been, a failure of justice in consequence of the way in which the [418] trial has been held. It is obvious that the prosecution must have been prejudiced by the omission of some important steps in the progress of the trial. The prosecution was debarred from summing up the case, and the Sessions Judge precluded himself from the advantage of taking the opinion of the assessors upon the evidence. Serious effects might have been produced upon his mind, if he had had the advantage of the opinion of the assessors, in a case, in which the whole question was, whether a considerable number of native witnesses of the lower ranks of life, had or had not told probable stories on behalf of the prosecution. And further, it is conceivable that if the case had proceeded to its legal termination, the proceedings which have since, in consequence of the Judge's order of acquittal, been taken against the son of Sahib Din and against his witnesses, might not have been instituted. But whether the Sessions Judge's order is illegal, as made without jurisdiction, or is a serious irregularity, I hold that it must be set aside, and I hereby set it aside and cancel all the proceedings held in the trial which terminated on the 13th September, 1887.

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Acquittal set aside.

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10 A. 418 = 8 A.W.N. (1888) 93.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GADU BIBI AND OTHERS (*Plaintiffs*) v. PARSOTAM (*Defendant*).*
[23rd March, 1888.]

Limitation—Acknowledgment signed by one of several partners—Act XV of 1877 (Limitation Act), s. 21.

The word "only" in s. 21, of the Limitation Act (XV of 1877), is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it

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* Second Appeal, No. 1452 of 1886, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 16th July, 1886, confirming a decree of Babu Isri Prasad, Subordinate Judge of Mirzapur, dated the 4th May, 1886.

(1) 16 W.R. Cr. 20. (2) 22 W.R. Cr. 34. (3) 1 A. 610.

1888 MARCH 23. can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him.

[R.—17 B. 173 (176), 12 Ind. Cas. 70 (72) = 14 C.L.J. 639.]

APPELLATE CIVIL.

10 A. 148 = 8 A.W.N. (1888) 93.

THE facts of this case are stated in the judgment of the Court.

Pandit *Bishambar Nath* and Munshi *Juala Prasad*, for the appellants.

Munshi *Hanuman Prasad* and Mr. *Simeon*, for the respondent.

JUDGMENT.

[419] BRODHURST and TYRRELL, JJ.—The appellants are owners of a cloth business in Mirzapur. They sued the members of a firm called Sheoambar-Ram Narain for a balance, due on an account signed for the firm, by a member thereof named Mata Prasad. The Subordinate Judge of Mirzapur, who tried the original suit, gave the plaintiffs a decree against Mata Prasad only, exempting the other member of the firm, named Durga Prasad. The learned District Judge of Mirzapur in first appeal confirmed this view and refused the plaintiffs relief against Durga Prasad.

Durga Prasad died after the institution of this appeal in this Court, and upon the application of the appellants, Parsotam, a minor under the guardianship of his mother, was brought into the appeal as respondent by an order of one of the Judges of this Court. A preliminary objection was taken to-day to the hearing of this appeal by the learned pleader of the respondent, who contended that the application to bring the legal representative of the deceased Durga Prasad on the record, not having been made within the period allowed by law, the appeal had abated. We disallowed this objection, as we held that the appellants had shown sufficient cause why the application was not made within the term allowed. We are satisfied that the appellants had no knowledge of the death of Durga Prasad, and under their peculiar circumstances, had no ordinary means of knowing about the death of Durga Prasad, until after the period of limitation for making the application had expired.

As to the appeal itself, the learned District Judge found upon the evidence before him that Durga Prasad was a member of the Sheoambar-Ram Narain firm. He also found that Mata Prasad had unquestionably acknowledged a balance of Rs. 1,036-9-0 to be due on Pus badi 15, Sambat 1940, from the firm of Sheoambar-Ram Narain to the plaintiffs in this case. He said :—" I have compared and found this correct—Mata Prasad." The learned Judge also found that this examination, comparison, and acknowledgment of the debt due by the Sheoambar-Ram Narain firm to the plaintiffs, was effected by this Mata Prasad in the ordinary course of the partnership business of that firm. He found that Durga Prasad had similarly signed for the firm and made acknowledgments for the firm on other occasions. He held that Durga Prasad by his [420] conduct indicated that he had authority to act as the agent of his partner, Mata Prasad, and similarly Mata Prasad had authority to act as the agent of his partner. Durga Prasad. In other words, the learned Judge found that the acknowledgment and signature of this entry was a transaction such as is contemplated in s. 251 of the Indian Contract Act. Having found these facts, the learned Judge would have proceeded to give the plaintiffs the relief they claimed against Durga Prasad, if he had not conceived that he was precluded by the terms of s. 21 of the Indian Limitation Act, from giving effect to the acknowledgment against Durga Prasad. We think that in this point the learned District Judge was wrong. The section in question is as follows :—

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"Nothing in ss. 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowlegment signed, or of a payment made by, or by the agent of, any other or others of them."

Apparently the Court below reads this section as if the word "only" did not stand in it—that is to say, reads the section as prescribing that nothing in ss. 19 and 20 would render a written acknowledgment of one joint contractor an acknowledgment on behalf of his brother contractors. But the word "only" is not to be treated as surplusage. The meaning of the word "only" in that section, in our opinion, is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners, unless also it can be shown that he had power to bind that partner for the purpose of making such an acknowledgment, and in effect purported so to bind him. This view of the section has been taken in the ruling of *Premji Ludha* v. *Dosssa Doongersey* (1), and is in conformity with the law laid down in similar cases by the English Courts. It appears to us that, upon the finding of the learned District Judge, Mata Prasad was competent to acknowledge the balance, not only for himself, but for his partner, and that he did so when he wrote the words "Pus badi 15, Sambat 1940, balance of Rs. 1,086-9-0, signed by Sheoambar-Ram Narain, compared and found correct by pen of Mata Prasad."

[421] This being so, the decree of the Court below was wrong, and the appellants should have obtained the relief they sought, not only against Mata Prasad, but against his deceased partner Durga Prasad. We set aside the decree of the Court below and decree the plaintiff's claim and also this appeal with costs.

Appeal decreed.

10 A. 421 = 8 A.W.N. (1888) 127.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MULCHAND AND ANOTHER (*Defendants*) v. MADHO RAM (*Plaintiff*).*
[25th April, 1888.]

Evidence—Exclusion of evidence of oral agreement—Act I of 1872 (*Evidence Act*), *s.* 92—"*Between the parties.*"

The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favor a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

M. conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held* that s. 92 of the Evidence Act will not preclude plaintiff from showing by oral evidence that he alone was the real

* Second Appeal No. 2151 of 1886 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 6th August, 1886, confirming a decree of Maulvi Zain-ul-Abdin Khan, Subordinate Judge of Moradabad, dated the 23rd March, 1886.

(1) 10 B. 358.

1888 APRIL 25. — APPELLATE CIVIL. — 10 A. 421 = 8 A.W.N. (1888) 127.

purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.

[R., U.B.R. (Civil) (1892—1896), 354 at p. 357, 3 O.C. 260 (262), U.B.R. (1907), 2nd Quarter, Evidence, 92.]

THE facts of this case were as follows:—On the 13th March, 1877, a deed of sale of certain houses and other premises was excuted by one Murlidhar, and purported to be in favour of two brothers, named Ganga Prasad and Mulchand, jointly, for Rs. 1,000. The deed was registered on the 14th March, 1877, and one of the endorsements made at the time of registration set forth that Murlidhar, the vendor, acknowledged that Rs. 200 had been previously paid, and that the balance of Rs. 800 had now been paid to him, before the Sub-Registrar, by both Ganga Prasad and Mulchand.

On the 6th January, 1886, the present suit was brought by Ganga Prasad against Mulchand, the plaintiff, praying in substance **[422]** for a declaration that he alone was the real purchaser from Murlidhar under the deed of the 13th March, 1877, and for the ejectment of Mulchand and his son Babu Ram from a portion of the premises of which they had some years previously obtained possession by his license, but to which they now asserted a proprietary title. The plaintiff alleged that although Mulchand's name also was entered in the deed, the whole of the purchase-money had come out of his (the plaintiff's) pocket; that he alone had for some time subsequent to the sale been in possession of the property in suit; that he had subsequently lent a sitting-room to the defendants, and that when he asked them to vacate it for the purpose of having certain part of the premises rebuilt, they refused to do so, and obstructed him in the re-building. In defence, the defendants pleaded that Mulchand was in fact, and not merely nominally, a purchaser under the deed of the 13th March, 1877, that he had paid Rs. 500 of the purchase-money out of his own pocket, and that he had been in proprietary possession of the premises in his occupation from the date of purchase. Pending the suit the plaintiff died, and his son Madho Ram was brought on the record in his place.

The Court of first instance (Subordinate Judge of Moradabad) found that the plaintiff's allegations were established by the evidence, and decreed the claim. On appeal, the District Judge of Moradabad affirmed the Subordinate Judge's decree, relying mainly if not wholly upon the fact, which he apparantly held to be established, that the plaintiff had paid the whole amount of the consideration for the sale.

From the lower appellate Court's decree the defendants appealed to the High Court.

Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.
Babu *Jogindro Nath Chaudhri*, for the respondent.

ORDER.

BRODHURST and TYRRELL, JJ.—We had heard this appeal out on the merits on both sides, and were proceeding to remand some issues or questions of fact to the lower appellate Court, which had determined the single question of payment of the sale-price only, when a legal plea in bar of the action was raised by the learned **[423]** vakil for the defendants. It is based on the rule of s. 92 of the Indian Evidence Act, which excludes evidence of an oral agreement as between the parties to any instrument of the kind contemplated in that section, for the purpose of contradicting, varying, adding to, or subtracting

from its terms. It was contended that the enquiries which we propose to make will involve the consideration of oral evidence, which may have the effect of varying the terms of the sale-deed under which the plaintiff and defendants jointly acquired the premises in suit. We heard argument and gave careful consideration to this proposition, and we have had the advantage of conferring with the learned Chief Justice and our brother Straight on the point. We are of opinion that the answer to the learned Pandit's contention is to be found in the proper interpretation of the phrase, "as between the parties to any such instruments," the words "the parties" being rightly read to imply the persons who on one side and on the other came together to make the contract. In the case before us, the "parties" in this sense would be the vendor on the one part and the two vendees on the other part. "As between" the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer, oral evidence to show that both were not parties to the buying of his house. Neither vendees could resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract, on a plea intended to show that one of the two was a nominal party only to the contract. Similarly, one of the several obligors of a bond or bill of exchange would not be allowed in answer to the obligee's action on the joint instrument to maintain a plea that he was a surety only; except of course in a case where a money-lender made advances on the security of a joint and separate note, being well aware at the time that one of its makers was a surety only. In such a case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence and prove that he was known by the lendor to be a surety when the note was made, and that without his consent, the principal had had time given to him by the lender. (See the cases cited in note 6, para. 1054, p. 1004, Taylor on Evidence, vol. ii, ed. 1872). Such a case as this would fall probably under proviso 1 to s. 92. But on the other hand, we think that this section would not apply to [424] questions, like that of the present case, raised by the parties on one side *inter se*, and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to or subtract from the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show *as between themselves*, the two vendees to wit, which was the real purchaser, or rather whether Mulchand was not the trustee only of his brother Ganga Prasad. Analogously in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor. If we were to give to the terms of s. 92 a more extended interpretation, and to read them as excluding the admission of oral evidence to vary the terms of an instrument as between the parties on *one side only* thereto, as much and in the same way as the section certainly excludes the admission of such evidence as between the parties on both sides to the instrument, we should have, we fear, to close our Courts to many applications, no matter how justly founded, for equitable relief in cases such as we noticed passingly above: cases between co-promisors, co-obligors, co-debtors of accommodation bills, and the like, in which our Courts daily interfere to relieve parties in variation or even in contradiction of the written terms of an instrument of contract, to which they were parties on the one side together.

1888 APRIL 25. — APPELLATE CIVIL. — 10 A. 421 = 8 A.W.N. (1888) 127.

Taking this view, we overrule the contention of the appellants on this point, and we must dispose of the appeal of Mulchand on the merits. The Court of first instance on a review of all the evidence found, that he was not a real but was a nominal party only to the purchase of the house property in question, and it gave the plaintiff a decree. The lower appellate Court confirming this decision, has left several important issues undetermined. It has decided in uncertain terms, and on somewhat inconclusive grounds, that the sale-price, Rs. 800, was found by Ganga Prasad, no part of the fund having been contributed, at the time of the sale at least, by Mulchand. But obviously this finding does not conclude the question. The brothers were apparently joint purchasers, [425] with joint interests, and the payment by one may have been for both, or may have been open to subsequent adjustment *inter se*. To enable us to decide whether Mulchand was a substantial party to the purchase or nominal only, whether he stands in the sale-deed as a beneficial owner, or merely as a trustee for Ganga Prasad, we must have findings on certain other questions, namely :—

1. If Mulchand had no substantial interest in the contract, why was he associated with Ganga Prasad, in the making, execution, and registration thereof?

2. At the date of the contract, were Ganga Prasad and Mulchand associated as joint in any respect, in living, in estate, or in particular business?

3. When did Mulchand get possession of any part of the premises?

4. In what way did he enter?

(*a*) By right in the ordinary course of things as beneficially interested?

(*b*) By license of Ganga Prasad or by trespass?

Ten days will be allowed for objections. *Issues remitted.*

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10 A. 425 = 8 A.W.N. (1888) 157.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DAWAN SINGH (*Defendant*) *v.* MAHIP SINGH (*Plaintiff*).*
[2nd July, 1888.]

Defamation—Personal insult—Cause of action—Verbal abuse—Special damage—Witness—Privilege.

The plaintiff was cited as a witness by one *S.* in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant; the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate.

Held, by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely privileged.

[426] *Per* Mahmood J. (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, has not been tried and the order remanding the case for trial on the merits was right.

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* First Appeal No. 2 of 1888 from an order of Maulvi Mahmood Said Khan, Subordinate Judge of Jaunpur, dated the 13th December, 1887.

Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

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That whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown.

That when the defendant is not absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

That the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase.

That even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good.

The following cases were referred to in the judgments—*Scott* v. *Stansfield* (1), *Munster* v. *Lamb* (2), *Mackay* v. *Ford* (3), *Seaman* v. *Netherclift* (4), *Dawkins* v. *Rokeby* (5), *Henderson* v. *Broomhead* (6), *Srikant Roy* v. *Satcori Shaha* (7) *Ibn Husain* v. *Haidar* (8), *Parvati*, *Mannar* (9), *Roberts* v. *Roberts* (10) *Lynch* v. *Knight* (11), *Abdul Hukim* v. *Tej Chunder Mukarji* (12), *Sri Raja Sitarama Krishna Rayadappa Ranga Baz Bahadur Garu* v. *Sri Raja Sanyasi Razu Pedda Baliyara Simbhula Bahadur Garu* (13), *Oodai* v. *Bhowanee Pershad* [427] (14), *Subbaiyar* v. *Kristnaiyar* (15), *Pitamber Dass* v. *Dwarka Pershad* (16) *Queen-Empress* v. *Dhun Singh* (17).

[R., 29 A. 685 (703) = 4 A.L.J. 605 = A.W.N. (1907), 235 = 6 Cr. L. J. 197; 17 B. 127 (128); 32 C. 1060 (1063) = 9 C.W.N. 847 = 2 C.L.J. 396; 23 M.L.J. 39 (50) = (1912) M.W.N. 476 = 11 M.L.T. 416 = 14 Ind. Cas. 275 = 13 Cr. L. J. 275; 14 Ind. Cas. 659 (662) = (1912) M.W.N. 393; D., 11 A. 104 (107); 28 C. 452 (464).]

ONE Sheobadan Singh had instituted a suit in the Court of the City Munsif of Jaunpur against defendant and cited plaintiff as a witness. Plaintiff's evidence was taken on the 10th May, 1887, and he concluded it by deposing that there was no ill-feeling between him and defendant. Thereupon the Munsif examined the defendant, who stated that there was enmity between him and plaintiff in respect to eating and drinking, and in explanation thereof he stated, referring to plantiff:—"*Iske ma bap me farq hai; aur is wajeh se khana pina nahi hai.*"

In consequence of these words plaintiff instituted this suit, alleging that on 10th May, 1887, while he was giving evidence in the above case, "defendant abused him, making imputations upon his mother"; that, the

(1) L.R. 3 Ex. 220. (2) L.R. 11 Q.B.D. 588. (3) 29 L.J. Ex. 404.
(4) L.R. 2 C.P.D. 53. (5) L.R.H.L. 744. (6) 28 L.J. Ex. 360.
(7) 3 C.L.R. 181. (8) 12 C. 109. (9) 8 M. 175.
(10) 33 L.J.Q.B. 248. (11) 9 H.L. Cas. 577. (12) 3 A. 815.
(13) 3 M.H.C.R. p. 4. (14) N.W.P.H.C.R. 1866, p. 264.
(15) 1 M. 383. (16) N.W.P.H.C.R. 1870, p. 435. (17) 6 A. 220.

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abuse caused great insult to him and he suffered much mentally and there was loss of respect amongst the brotherhood."

Defendant denied using any abusive language and averred that, in reply to a question asked by the Court, he made a statement explaining why he had ceased to eat with plaintiff, and why there consequently was enmity between him and the plaintiff. Munsif framed three issues, *viz.* :—

(1) Whether defendant abused the plaintiff, and if so, whether a suit would lie for slander.

(2) Whether the imputation was as a matter of fact true, and, (3) What ought to be the measure of damages.

Then examining the parties and without taking any evidence in the case he recorded the following judgment dismissing the suit :—"I took down the statement on oath of the plaintiff. He stated in his cross-examination that when Dawan Singh,defendant,was being examined by this Court in the former case he was questioned by the Munsif Saheb 'Then what was the reason that Mahip Singh came to swear against you? In answer he said—*Iske ma bap me farq hai ; aur is wajeh se khana pina nahi hai.*' Hence it is proved that defendant then was in the witness-box, and as such he was [428] *bona fide* answering a question put to him. I am therefore of opinion that he was privileged, and the suit does not lie, for statement of witnesses can never be the subject of an action."

The plaintiff in appeal contended that the abusive language used towards him was uttered by the defendant after his deposition had already been taken by the Court, and that abusive language insulting to him was actionable.

The Subordinate Judge, holding that the use of abusive language was actionable, and defendant made the statement complained of after his examination as a witness in the case had been over, remanded the case for trial on the points left undetermined by the Munsif. The defendant appealed.

Munshi *Kashi Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENTS.

BRODHURST, J.—In this case Mahip Singh, the plaintiff-respondent, stated in his plaint that one Sheobadan Singh had instituted a suit in the Court of the City Munsif of Jaunpur against Dawan Singh, the present defendant-appellant, and that in that suit Sheobadan Singh had cited him (Mahip Singh) as a witness; that on the 10th May, 1887, whilst he was being examined as a witness before the Munsif, Dawan Singh abused him, making imputations against his mother, whereby he (Mahip Singh) was greatly defamed, was subjected to mental pain, and suffered loss of honour and of respect among his equals, and he therefore prayed that, with reference to the defendant's means, a decree might be passed in favour of him, (the plaintiff), against the defendant for Rs. 300, with costs.

Dawan Singh, in his written statement, denied that he had used any abusive language and averred that he had, in reply to a question asked by the Court, made a statement explaining why he had ceased to eat with Mahip Singh, and why there consequently was enmity between Mahip Singh and himself.

The Munsif recorded the deposition of each of the parties.

Mahip Singh stated :—' The defendants abused me whereby I was dishonoured among the members of my brotherhood. As I was considered

before the defendant abused me, so am I now also [429] considered ; no loss has occurred in this respect. He abused me, imputing bad conduct to my mother. At the time of giving evidence on a question asked by the then Munsif, the defendant gave abuse to me. On the deposition being concluded the Munsif asked Dawan Singh the question, 'What is the reason that so respectable a man (as the witness Mahip Singh) came to tell a lie,' and thereupon Dawan Singh uttered abuse. He said:—'Mahip Singh *ke ma bap me farq hai* ; *is wajeh se khana pina nahin hai.*"

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Dawan Singh deposed :—"I was being examined in my case, in which the plaintiff had come to give evidence on behalf of my opponent. I told the Munsif that there existed enmity between Mahip Singh and myself. The Munsif asked me,—'What is the enmity?' I replied : There is enmity between myself and Mahip Singh in respect to eating and drinking. The Munsif again asked 'What is the enmity and why has eating and drinking (together) ceased ?' Thereupon I replied that food and drink were forsaken on account of Mahip Singh's mother."

Of three issues framed by the Munsif, the first and the only one that need be specially referred to is,—"Did the defendant abuse the plaintiff, and if he did, does the suit lie for slander ?"

The Munsif recorded the following judgment :—

"*Issue* I.—I took down the statement on oath of the plaintiff. He stated in his cross-examination that when Dawan Singh, defendant, was being examined by this Court in the former case, he was questioned by the Munsif Saheb—'Then what was the reason that Mahip Singh came to swear against you ?' In answer he said : '*Iske ma bap me farq hai* ; *aur is wajeh se khana pina nahin hai.*' Hence it is proved that the defendant then was in the witness-box, and, as such, he was *bona fide* answering a question put to him. I am therefore of opinion that he was privileged and the suit does not lie, for statements of witnesses can never be the subject of an action (*vide* para. 2, p. 117, Underhill's Torts). There are many cases in Addison's Torts. The plaintiff's pleader quoted I. L. R. 12, Calc., 109. That ruling has no bearing upon this case, for here the defendant was in the witness-box, whereas in the case cited the defendant abused when the plaintiff was in a *mandir* or temple, and so on. I need not, therefore, enter into the merits of the other issues.

[430] "It is therefore ordered that the plaintiff's suit be dismissed with costs. He is to bear his own costs."

From this judgment the plaintiff preferred an appeal. The appeal was disposed of by the Subordinate Judge. He framed the following issues :—

1. Is abuse actionable ?
2. Was the defendant privileged in uttering it ?

And in his judgment the Subordinate Judge observed : "On the first point I find that abuse in this country is certainly actionable. A suit for damages can be preferred against the persons who take so much liberty in Court without any provocation. The defendant pleads that he was privileged in doing so. He was bound to produce a copy of his deposition in support of his contention that he had used abuse while he was standing in the witness-box and answering questions put to him, of this there being no iota of evidence. The plaintiff, in his deposition, has plainly stated that he was abused after the defendant's deposition, was over. If this is a fact, and probably it is so in absence of any evidence to the contrary, then, in my opinion, he had no right to use the ill expression towards the plaintiff, a respectable person in his retired life. The Court

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of first instance has misconstrued his deposition, in which he stated that after the deposition of the defendant. in answer to the question put to him by the Court, and not during the course of his examination in the witness-box, he was abused. The privilege of a witness lasts so long only as he is deposing on oath in the witness-box, but not after it."

With reference to these remarks the Subordinate Judge allowed the appeal and remanded the case to the first Court, under s. 562 of the Civil Procedure Code, for re-trial on the merits.

The pleas taken before us in second appeal are :—

(1) Because the Court below has erred in ruling that abuse is actionable.

(2) Because the learned Subordinate Judge has misconstrued the respondent's deposition, which, taken as a whole, fails to disclose any cause of action.

(3) Because the statement was admittedly made in answer to a question put by the Court.

[431] The suit as shown by the plaint, was brought merely with reference to statements made by Dawan Singh on the 10th May, 1887, in the Court of the City Munsif of Jaunpur. We have called for the former record and have examined it. The deposition of Dawan Singh does not contain any question or answer as referred to above and as admitted by both the parties to this suit. The evidence of Mahip Singh, however, is concluded with the following remarks :—" There is no dispute between me and Dawan Singh."

This tends to show that ill-feeling between Mahip Singh and Dawan Singh had been alleged, and it affords corroboration to the statements of the parties.

The whole of the parol evidence was recorded on the 10th May, 1887, and the following order :—

Plaintiff's witnesses.
Mahip Singh.
Dhan Lal Dubey,
Defendant's witnesses.
Jugrup Dasondhi.
Debi Dayal Singh.
Persons examined by the Court.
Dawan Singh, defendant.
Sheobadan Singh, plaintiff.

Not only was Dawan Singh examined in compliance with the order of the Munsif, but his evidence, as recorded in the vernacular, clearly shows that he was certainly twice called up and examined by the Munsif on the 10th May, 1887.

It was optional with the Munsif to re-examine Dawan Singh as often as he thought necessary whilst Dawan Singh was in Court and the suit was pending.

It will be noticed that Mahip Singh's evidence was recorded first of all and that of Dawan Singh last but one. From the concurrent statements of the parties to this suit there is not, I think, any room for doubt that the Munsiff, after having recorded the evidence of Dawan Singh as shown in the vernacular record, asked him why Mahip Singh had given evidence against him, and that, in reply to the Munsif's question, Dawan Singh stated that **[432]** there was enmity between them, and when pressed by the Munsif to explain the cause of enmity, answered that there was enmity in respect to eating and drinking, and on being further pressed to explain what the

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reason for discontinuing eating and drinking togethter was, he replied, "*Iske ma bap me farq hai ; aur is wajeh se khana pina nahin hai,*" which no doubt means there is a difference (of caste) between his father and mother, and on this account there is no eating and drinking ('together between him and myself').

I see no reason to think that Dawan Singh would have made use of the expressions taken objection to had he not been required to reply to questions put to him by the presiding Munsif. It is not Dawan Sing's fault that the Munsif asked him those questions and did not record the questions he put and the answers he received.

That such questions were asked of Dawan Singh by the Munsif is proved by the statements of both parties, and to punish Dawan Singh because the Munsif omitted to record the questions would be most inequitable.

Dawan Singh is a mere cultivator. Apparently he replied to the Munsif's questions on the spur of the moment. In doing so he did not make use of any coarse expression, and, in fact, it would be almost impossible for any witness who, in answer to questions put to him by the presiding Judge, thought himself called upon to state that another witness, referred to by the Judge, was illegitimate, to convey his meaning in more delicate language than was used for that purpose by this illiterate peasant.

When the Munsif asked the questions of Dawan Singh, he doubtless did not expect to elicit the answer he finally received ; and when that answer was given, the Munsif may, not unnaturally, have thought that all the questions and answers on that point had better be omitted from the record.

Witness-boxes are not amongst the articles of furniture supplied to our Civil Courts, but when a witness, after having been duly sworn, is during the pendency of the suit being examined or re-examined in Court, either by counsel, by vakil, or by the presiding Judge, he is, in the "witness-box" within the ordinary acceptation of the phrase, and, with reference to what I have above written, I have no hesitation in holding that Dawan Singh at the time he [433] answered the question put to him by the Munsif, was in the " witness-box."

The only point now remaining for consideration is whether, under the circumstances I have mentioned, Dawan Singh, in deposing as he admits he did, was privileged or not.

In *Seaman* v. *Netherclift* (1) the head-note is as follows :—

"A witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.

"A statement as to another matter, made to justify the witness in consequence of a question going to the witness's credit, has reference to the enquiry within the above rule.

"Defendant, an expert in hand-writing, gave evidence in the trial of *D.* v. *M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding Judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a Magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D.* v. *M.*

(1) L.R. 2. C.P.D, 53.

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and whether he had read the Judge's remarks on his evidence. He answered 'yes' counsel asked no more questions, and defendant insisted on adding, though told by the Magistrate not to make any further statement as to D. v. *M.*, 'I believe that will to be a rank forgery, and shall believe so to the day of my death.'

"An action of slander having been brought by one of the attesting witnesses to the will:—

"*Held*, that the words were spoken by defendant as a witness and had reference to the inquiry before the Magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned, and that the defendant was absolutely privileged."

Cockburn, C.J., observed: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy [434] of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins* v. *Lord Rokeby* (1), after which to contend the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious, and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different."

With reference to the circumstances of this case and to the above ruling, I am of opinion that Dawan Singh was absolutely privileged in making the statements that he admittedly did make when he was examined as a witness in the Court of the City Munsif of Jaunpur.

I would therefore allow the appeal, reverse the judgment of the lower appellate Court, and restore the decree of the first Court dismissing the suit, and I would further order that all costs should be borne by the plaintiff-respondent.

MAHMOOD, J.—The plaintiff in this case came into Court alleging what has been briefly stated by the Munsif in this case in the following words:—

"That the plaintiff is a respectable person and was in the service of the Government. Sheobadan Singh had brought a suit against the defendant in this Court, and in that case Sheobadan had cited the plaintiff (present) as his witness; that on the 10th May, 1887, the plaintiff was giving his deposition when the defendant abused him, making imputations upon his mother; that the abuse caused great insult to him and he suffered much mentally, and there was loss of respect amongst the brotherhood: hence the suit."

The learned Judge of the lower appellate Court in describing the suit has stated it to be one "for recovery of Rs. 300, the compensation of pain to plaintiff's soul and defamation," by which [435] terms I understand that the action is one *ex delicto* for recovery of damages arising out of the action of the defendant in having used insulting expressions on the 10th May, 1887. The expressions then used were, as

(1) L.R. 7 H.L. 144.

stated in the judgment of the first Court, that with reference to the plaintiff the defendant said: "*Iske ma bap me farq hai; aur is wajeh se khana pina nahin hai,*" which, as interpreted in English, means that the plaintiff's descent was illegitimate, and that he was therefore out of caste. This language was used in open Court and in answer to a question put to the defendant by the Court itself.

It does not appear that in the suit brought by Sheobadan Singh against the defendant Dawan Singh any question as to the legitimacy or illegitimacy of the plaintiff, or as to his being in or out of caste was a matter in issue, or otherwise relevant in the strict sense of the law of evidence, and indeed Mr. *Kashi Prasad*, who appears for the defendant in this Court, has conceded that the language was in its signification abusive, and that the grounds upon which it would not furnish a cause of action for a suit such as this would be only two—the *first* being that no special damage having accrued to the plaintiff by reason of the abusive language having been used, no action would lie; and, *secondly*, that even if the language by itself were to be taken as abusive and actionable, it was privileged and such as would not furnish a cause of action for recovery of damages in a suit such as this.

It is not disputed that the language, taken in its ordinary Hindustani meaning, was abusive and, as such calculated to hurt the feelings of the plaintiff, to lower him in the estimation of his fellow castemen and such as might involve his being out-casted, if these statements were believed.

The defence set up is represented by the Munsif in the following words:—

"The defendant contends that he did not abuse the plaintiff; that the plaintiff had deposed that he could not eat with the defendant whereupon the defendant had thrown some hints about its cause; that the suit cannot lie for slander; that the plaintiff has inflated his status: he is a cultivator and a pensioner."

[436] Upon this state of the pleadings the Munsif as the Court of first instance framed three issues, the *first* being whether the defendant abused the plaintiff, and if so, whether a suit would lie for slander; the *second* issue was whether the imputation was, as a matter of fact, true, and the *third* issue related to the measure of damages.

The Munsif, however, after examining the parties, did not take evidence upon the issues, but held that the statement was made in the witness box, and that the defendant "was *bona fide* answering a question put to him," and, as such, was not liable to the action, because such statement was privileged. In holding this view the Munsif has relied upon the cases cited at page 117 of Underhill's Law of Torts, where the summary of the cases is to the effect that "statements of a Judge acting judicially, whether relevant or not, are absolutely previleged: *Scott* v. *Stansfield* (1); and so are those of counsel, however irrelevant and however malicious: *Munster* v. *Lamb* (2). Solicitors acting as advocates have a like privilege: *ibid* and *Mackay* v. *Ford* (3) Statement of witnesses can never be the subject of an action: *Seman* v. *Netherclift* (4); and a military man giving evidence before a military Court of Enquiry, which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a Court of justice: *Dawkins* v. *Rokeby* (5). If the evidence is false, the remedy is by indictment: *Henderson* v.

(1) L.R. 3 Ex. 220. (2) L.R. 11 Q.B.D. 588. (3) 29 L.J. Ex. 404.
(4) L.R. 2 C.P.D. 53. (4) L.R. 7 H.L. 744.

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Broomhead (1)." The Munsif has also relied upon the English Law of Torts as contained in the work of Addison on that subject.

Upon this ground of law alone the Munsif, without entering into the merits of the case or taking any evidence in it other than the statements of the parties, dismissed the suit; but upon appeal the learned Judge of the lower appellate Court, reversing that order, has remanded the case for trial under s. 562 of the Civil Procedure Code. The view taken by the learned Judge of the lower appellate Court seems to be based upon two propositions, one being that the abusive language used by the defendant was in itself actionable without proof of special or actual damage; and the other that the defendant could not be held to be privileged in making the statement which he did make. In remanding the case, the learned [437] Judge of the lower appellate Court was inclined to hold that the abusive language used by the defendant towards the plaintiff was uttered after the defendant's deposition had already been taken in the Court, and the learned Judge goes on to say: " The privilege of a witness lasts so long only as he has been deposing on oath in the witness-box, but not after it."

Holding this view, the learned Judge was of opinion that this particular point as to whether or not the use of abusive language above mentioned was made under circumstances of privilege had not been duly dealt with by the first Court on evidency, as no evidence on the issue had duly been taken. And the remand proceeds upon that hypothesis.

What we have to determine in this case are two important questions of law:—

The *first* is whether abusive language which aims at insulting a person is not *per se* actionable in tort under the law of British India (when the language is such that it causes injury to the feelings of the person towards whom it is used), without proof of any special or actual damage.

The *second* question is whether under the circumstances of this case the words used by the defendant were such as can be held to be privileged by any rule prevailing in this country as a rule of law.

Upon the first of these points Mr. *Kashi Prasad* in arguing the case for the appellant, has relied upon the authority of English cases as they are represented in the latest edition of Addison on Torts, the general effect of which cases is that abusive language is not *per se* actionable, unless it falls within certain limitations imposed by the Common Law of England. Indeed, all that Mr. *Kashi Prasad* relies upon is best formulated in Folkard's Treatise(2) and in the most recent work upon the Law of Tort by Mr. Frederick Pollock at page 206 of his work, where the law of England, as it now stands, is laid down in the following words:—

" Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:—

"Where the words impute a criminal offence.

[438] " Where they impute having a contagious disease which would cause the person having it to be excluded from society.

" Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling."

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1 28 L.J. Ex. 860.
2 Starkie's Law of Slander and Libel, by Folkard, 4th ed. 70.

Relying upon the authority of English law, the learned pleader argues that, inasmuch as in this case no special damage is either alleged in the plaint or proved, the action was in itself not maintainable, because it did not furnish sufficient elements for a cause of action in tort. I have no doubt that the learned pleader is perfectly right so far as the English law of torts is concerned upon this particular point, and that if the suit had to be dealt with by me as a Judge sitting in England, I should have accepted his contention and decreed this appeal, one effect of which would be to dismiss the suit. But the matter, in my opinion, does not rest upon the exact position taken up by either the common law of England or the cases decided there. There is no authority with which I am acquainted which entitles any Court of justice sitting here in India to apply the English common law to the lives and liberties of the people of this country, irrespective of statutory provisions and of the rule of "justice, equity and good conscience," where no statutory provisions are available. There is no statute which renders that law applicable to this country, and if difficulties arise in dealing with questions such as those with which we have to deal in this case, it is because the Legislature has not yet thought fit to frame any special rules which would govern actions of this character. And further difficulty which arises in such cases is what, in the absence of statutory provisions, should be the line of action upon which the Courts of justice should proceed in British India. Speaking for myself, I am perfectly willing, sitting here as one of Her Majesty's Judges, to take the responsibility of saying that for the purpose of deciding such questions which affect a population vastly different to that of England in nationality, creed, and social conditions, the English common law, though it must always be referred to for guidance in questions of difficulty and regarded with respect, is not necessarily fit to be adopted in its integrity, irrespective of the conditions of this country. These, [439] however, are views which affect the Legislature more than the Bench, and holding as I do that the law of British India upon this particular point is silent so far as legislative enactments are concerned. I proceed to state, or rather repeat what I have said before now as to what should be the rule in determining such questions when they arise for adjudication.

There is, indeed, a series of decisions to be found in the published reports upon the subject, but they are so silent as to general principles and so conflicting with each other that I cannot accept them to represent any defined rule of the common law of India. The state of the present law and my views thereupon are represented in what I have before now said elsewhere in the following words :—

" Defamation, as representing slander and libel consolidated, is an offence against reputation only, and, therefore, as the English law now stands, publication to a third person or persons is a condition precedent to its being regarded as actionable wrong; so that insulting words of however grave a nature, when addressed only to the plaintiff, do not amount to a tort, even though the insult be directly followed by mental distress or vexation leading to inability to attend to one's ordinary avocations of life. Again, even where insulting words are orally uttered in public, proof of special or actual damage is necessary, except in certain well-defined cases, to render them actionable. An 'imputation, for example, by words however gross and on an occasion however public, on the chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special temporal damage to her;

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neither it is actionable to call a man a swindler or a cheat, a blackguard or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander' (Addison on Torts, p. 37).

"The truth seems to be that the English law of tort, whilst attaching considerable importance to physical injuries and to matters which result in pecuniary loss, does not attach sufficient significance to mental distress, and does not, therefore afford sufficient protection against personal insult as distinguished from [440] bodily injury and defamation. It is a question of no small consequence whether this characteristic of the English system should be introduced in India. I use the word "introduced", because, as the case-law now stands, the weight of authority is undoubtedly in favour of recognizing mental distress caused by insulting words as in itself actionable, irrespective of special or actual damage. The following rulings of the Calcutta High Court are authorities for this proposition:—

(1) *Kanoo Mundul* v. *Rahumooullah Mundul.*
(2) *Moulvie Ghulam Hossein, Vakeel* v. *Hur Gobind Doss, Tashildar.*
(3) *Shaikh Tukee* v. *Shaikh Khoshadel Biswas.*
(4) *Osseemoodeen* v. *Fateh Mahomed.*
(5) *Gour Chander Puteetundee* v. *A. L. Clay.*
(6) *Sreenath Mookerjee* v. *Komol Kurmokar.*
(7) *Kalee Coomar Mitter* v. *Ramguttee Bhuttacharjee.*

"The reports of these various cases are not very complete, but so far as they go they leave no doubt that injury to feeling has been held as sufficient in itself to constitute a cause of action for recovery of damages regardless of actual loss or harm. In the first of these cases, Norman, J.C. observing that 'the words, which are of the coarsest abuse, I do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste,' goes on to say: 'No doubt, actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for preservation of peace and order, it is a matter of the greatest importance that Courts of justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse.' In the second and the third cases it was held that actual injury and damage was not necessary to render the action maintainable, and it was observed in the latter case that [441] 'injury might result to a man's feelings such as would entitle him to damages' and the same view was adopted in the fourth case. These rulings were followed in the fifth case, where it was observed that it does not follow that because a man's professional position or gains are not injured by abuse received by him that his feelings are not injured and outraged.' Again, in the sixth and the seventh cases similar rules were laid down, mental distress being taken to be a sufficient cause of action. Similarly, the Bombay High Court in *Kashi Ram* v. *Bhadu Bopuji* (8), after stating that the English law upon the subject was different, adopted the view of the Calcutta High Court as the suit was brought in the mufassal and the parties to it were Hindus.

"In none of these cases does it appear that the question of publication was raised or determined, and injury to feelings seems to have been

(1) W.R. January to July 1864, 269. (2) 1 W.R. 19.
(3) 6 W.R. 151. (4) 7 W.R. 259. (5) 8 W.R. 256.
(6) 16 W.R. 83. (7) 16 W.R. 84, note. (8) 7 B.H.C.R. p. 17 W.C.

regarded as the sole ground of action. On the other hand, in *Phoolbasee Koer* v. *Barjun Singh* (1), and *Chundarnath Dhur* v. *Issurree Dassee* (2), the Calcutta High Court, without noticing any of its previous rulings, laid down the rule that abusive and threatening language without proof of actual damage did not constitute a cause of action at all for recovery of damages. Again a learned Judge of the same Court (Pontifex, J.) in *Nilmadhub Mookerjee* v. *Dookeeram Khottah* (3) observed that 'actions for verbal slander ought not, in my opinion, to be encouraged, and that, unless there are special damages proved, the Court will be very reluctant to give any damages.'

"It can scarcely be doubted that these various rulings leave the law in a very unsatisfactory condition and there is need for legislative interference. What form the interference should take is a question which, in my opinion, should be determined according to the conditions of life and the feelings of the people of India. And, looking at the matter from this point of view, I have no doubt that the seven rulings of the Calcutta High Court which I have enumerated above lay down the rule most suitable for India, though it is more in conformity with the Roman than the English law. There [442] is a passage* in Starkie's *Law of Slander and Libel*, by Folkard, 4th ed., p. 19, which shows that even in Scotland anything defamatory is the foundation of an action without proof of special damage. The case of *Aitken* v. *Read* (4) is relied upon for this proposition, and it is stated that in the case of *Mackenzie* v. *Read* (5) the Court, after observing that the law on the subject of slander in England was very particularly defined, added that anything that *produces uneasiness of mind is* actionable in Scotland.

"I confess I can see no reason why personal insult and consequent mental distress should not be recognized as constituting a substantive cause of action in our proposed law of torts. In enumerating personal rights, the Civil Code of New York (s. 27) lays down that every person has

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* "Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the *mens rea*, the contumelious intention, was wanting; in England such a defence, if the act were voluntary, would be unavailable. By the Roman law, a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt. Thus, a father was entitled to recover, in respect of a contumelious injury offered to his wife, children, or domestics, provided the offender knew the relationship of the party so offended. So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory of the deceased. Etsi forte cadaveri defuncti fit injuria cui hæredes bonorum possessores exsitimus, injuriarum nostro nomine habemus actionem. Spectat enim ad existimationem nostram si quæ ei fiat injuria. Idemque et si *fama ejus cui heœredes exstitimus acessatur*. The same decree of indefiniteness which characterizes this branch of the Roman law naturally pervades, also, the codes of those nations which have adopted the principles of that law. In Scotland, for instance, the limits of civil as well as criminal liability are exceedingly wide. Thus in the case of *Aitken* v. *Read and Fleming* (4), the Judge observed, 'There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, *anything defamatory* is the foundation of an action.' In the case of *Mackensie* v. *Read* (5) the Conrt, after observing that the law on the subject of slander in England was very particularly defined, added '*here* anything that *produces unsasiness of mind* is actionable."

(1) 12 W.R. 369. (2) 18 W.R. 531, (3) 15 B.L.R. 161.
(4) 2 Mur. Rep. 149, (5) 2 Mur. Rep. 159.

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'the right of protection from bodily restraint or harm, from *personal insult* from defamation, and from injury to his personal relations.' If, then, personal insult is a wrong as distinct from defamation as assault, there seems no reason why it should not be regarded as distinct tort. A tort is [443] only an injury to a legal right not arising out of contract between the wrong-doer and the person wronged ; and, in my opinion, if the right of protection from personal insult is violated, such violation should be recognized as a cause of action for recovery of damages as much as assault. Such is apparently the rule of the Roman Civil Law and of the law of Scotland, both of which recognize mental distress as in itself constituting an injury. Moreover, the view which I have here ventured to express would, if adopted, be in keeping with the notion of injury as understood in the Indian Penal Code (s. 44), where it is taken to denote 'any harm whatever illegally caused to any person in body, *mind*, reputation or property.'

"The observations which I have ventured to make above do not, however, necessarily lead to the conclusion that anything should be added to the law of defamation in which the doctrine of publication to third persons naturally occupies an essentially important position. According to my view, the exigencies of the matter would be sufficiently met by adding '*personal insult*' as a distinct head under the category of personal wrongs, the question whether the insult is offered in public or in private being left to take its place as an element bearing upon the assessment of damages, as in cases of assault. The effect of this would, of course, be that personal insult would be a wrong in itself, irrespective of the question whether the abusive language is published or not and whether it is expressed orally or in writing. As an illustration of my meaning, two cases to be found in the Indian Reports may be referred to. In *Kumul Chunder Bose* v. *Nobin Chunder Ghose* (1) Macpherson, J., held that a letter addressed to the plaintiff himself, though containing insulting and abusive language, did not constitute a cause of action in tort, because 'the only damage alleged is damage to the feelings of the plaintiff caused by the receipt of the letter ' and ' such injury is not in itself a ground for giving damages in a civil action.' . The ruling was followed by the Allahabad High Court in *Mahomed Ismail Khan* v. *Mahomed Tahir* (2) and is no doubt in conformity with the English law. In the latter of these cases I was myself engaged as Counsel for the plaintiff, and I well remember how I failed to induce the Bench to [444] depart from the rule of English law and to adopt the view that personal insult causing mental distress should in itself be recognized as actionable wrong in India, apart from the subject of defamation.

" The reasons ordinarily employed against this view are that 'abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt but not defined ; they may depend on the tone of voice, the gestures, even looks by which they are accompanied, and, in some instances, silence may be more contemptuous and insulting than direct expressions ' (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment, &c.) in which mental suffering is recognised

(1) 10 W.R. 184. (2) N.W.P.H.C.R. 1874, p. 38.

as an element of assessing damages; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation. The cases cited in Addison's Treatise (p. 151) show that the state of the English case-law as to what words are actionable is of a most unsatisfactory and contradictory nature; and judicial opinion seems to have wavered from time to time between discouraging actions for slander and favouring them. 'The opinions of later times,' observes Holt, C. J., 'have been in many instances different from those of former days in relation to action for words, and judgments have gone different ways; but, for my part, whenever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of peace.

"If, then, rendering verbal slander actionable contributes to the preservation of the peace, the recognition of personal insult would **[445]** *a fortiori* achieve a similar result. Defamation is an offence against reputation, having *falsehood or misrepresentation* as its instrument. Personal insult, on the other hand, would be an offence independent of the element of *misrepresentation*, the primary object of the offender being not injury to *reputation*, but the humiliation of his victim or injury to his *peace of mind*. This distinction, which does not seem to be clear in the English law, has probably gone far to throw *personal insult* into the background and to prevent its being recognised as a tort in itself. Thus distinct wrong remained practically without a remedy; and Bentham, in his Principles of Penal Law, Chap. XIV, has shown how the practice of duelling arose out of this circumstance. In India violent breach of the peace often results from abusive language; and, indeed, the Indian Penal Code (s. 504) recognises insult as a distinct offence from defamation (s. 499), provided that it is likely to cause breach of the peace. This limitation is no doubt suited to the genius of the criminal law, but why should this limitation be imposed upon *personal insult as a civil wrong?* Mr. Starkie, as usual with English text writers, does not recognise personal insult as a wrong distinct from defamation, and after stating that 'the only mode of proceeding in respect of mere abusive and unmannerly and insulting language is by causing the offender to be bound over to good behaviour,' goes on to say that 'it is expedient on principles of general policy and convenience that the law should define by sufficient limits, in what instances simple defamation unaccompanied by special damage should constitute a substantive ground of action.' But whatever limitations it may be expedient to impose upon defamation, it does not necessarily follow that those same limitations should be imposed upon the law of personal insult, because, as already observed, the one is an injury to *reputation*, and the other constitutes an offence against *mental comfort*. Mr. Starkie himself admits that 'it is obvious that the application of these principles in particular instances must, in a great measure, depend on the state and circumstances, manners and habits of the society for whose use such rules are to be applied.' And bearing this in mind, it seems to me that unadvanced countries like India present a state of society where personal insult needs more checks than in more civilized countries like England.

[446] "Another objection, so far as I can gather from the English

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text-books, to recognising personal insult as a distinct tort, is that it would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suit for trifling causes.' The answer to such an argument is, I think, furnished best by the celebrated dictum of Lord Holt in *Ashby* v. *White* (1); 'As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have this action, for it is a personal injury. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense.' Indeed, the objection that vexatious litigation will be multiplied if personal insult is recognised as a civil wrong, seems to me to raise a general question applicable to all kinds of torts, *viz.*, the question whether slight injuries should not form an exception to the general principles of liability for civil wrongs. The Indian Penal Code (s. 95) lays down the general rule that 'nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.' Whether this rule should be adopted wholly or in a modified form in the law of civil wrongs is a question which I shall discuss later on; but I may observe here that in most cases the ordinary common sense of mankind may be taken as a sufficient guarantee against trifles being made the subject of litigation.

[I may add that if any further guarantee is required, it is furnished by the discretionary power conferred by the rules of procedure in England and America, and by s. 220 of our own Code of Civil Procedure in regard to the apportionment of costs.]

"The real question seems to be whether personal insult causing mental distress deserves a substantive place in the list of civil wrongs. In other words, should protection from personal insult be [447] recognised as a right in itself distinct from the right of protection from defamation? If no such right exists, personal insult cannot, of course, constitute civil injury, nor would any remedy be needed. Such, however, is practically the state of the English law of torts, which provides no remedy for unpublished insult, which does not recognise mental distress in itself as a civil wrong, and which even, where the insult is publicly offered causing distress of mind, insists, except in certain well-defined cases, upon proof of special or actual damage before granting any remedy. Speaking of personal insult, I may quote the language of Bentham in support of my view:—

"'In order to understand all the evil which results from these offences, they must be considered without reference to any remedies: it must be supposed that there are none. According to this supposition, these offences might be repeated at will; an unlimited career would thus be opened to insolence; the person insulted to-day might be insulted to-morrow, and the day after, everyday and every hour; and each new affront would facilitate the next and render more probable a succession of outrages of the same class............Thus the individual obliged by his relative weakness to submit at the pleasure of his persecutor to similar vexations,

(1) Smith's L.C. 268.

and deprived, as we have supposed, of legal protection, would be reduced to the most miserable condition. Nothing more is required for establishing on the one part an absolute despotism, and on the other, an entire slavery'."

I still adhere to the views expressed by me in the above quotation, and I am of opinion that personal insult and abusive language by itself, whether such insult or abuse does or does not amount to actionable slander in England, is in this country a cause of action for maintaining a suit such as the present. In this view I am supported by the authority not only of the cases which have already been referred to in the above quotation, but also by more recent rulings. Among these perhaps the most important is the case of *Srikant Roy v. Satcori Shaha* (1), in a foot-note to the report of which case many of the previous rulings have been referred to, and which case was followed by the Calcutta Court in *Ibu Hosein* [448] v. *Haider* (2). The effect of this last case seems to me to be somewhat misrepresented in the head-note. I say this because I understand the effect of this last ruling to be that (to use the words of Field, J,, who delivered the judgment of the Court in that case) "language which, having regard to the respectability and position of the person abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable." In the case before the learned Judges it does not appear from the report that any special or actual damage was proved, and the judgment appears to have proceeded upon the ground that injury to personal feelings, that is, mental distress, caused by abusive language, is *per se* a cause of action for a suit of this character, and, as such, actionable without proof of any further damages, pecuniary or temporal, in any other sense.

I am of opinion that the view taken in the case last cited is the right view of the law as applicable to British India, that view being consistent with the ruling of Mitter, J., and Maclean, J., in the case of *Srikant Roy* v. *Satcori Shaha* (1) which it followed. In the case last mentioned the question seems to have been similar to the one with which we are concerned in this case, because here, as in the case last referred to, the obvious object in using the abusive language was due to discredit the plaintiff, who had been summoned as a witness. But among the Indian reported cases upon the subject none is more important than the ruling of the Madras High Court in *Parvathi* v. *Mannar* (3), where Turner, C. J., in delivering the judgment of the Court, held that the rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by Courts of British India; and that learned Chief Justice, in considering the matter, went on to say, with the concurrence of Mr. Justice Muttusami Ayyar :—

"In this country we are not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest [449] respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have its origin in the circumstance that the most frequent

(1) 3 C.L.R. 181. (2) 12 C. 109. (3) 8 M. 175.

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instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salked, 694), has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction must be regarded as an absolute peremptory rule not founded on any obvious reason or principle. In *Roberts* v. *Roberts* (1) Cockburn, C. J., and Crompton and Blackburn, JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight* (2) the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (Introductory Reprot. Note, p. 7, Macaulay's Works, p. 546). The civil law does not recognise the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay's Commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India."

There is thus ample authority in the Indian case-law to show that the English Law of Torts, as to verbal abuse and slander, is not the law of British India, and that we should be importing that law, regardless of the conditions of the people, if we were to apply wholesale the very peculiar rules of that law on this point denounced by many eminent English lawyers themselves, and called by Lord Brougham as "not only unsatisfactory but barbarous."

There is one more point which was pressed upon us by Mr. *Kashi Prasad*, and that is, that if the statement of the defendant as to the plaintiff being "illegitimate and out of caste" (because such is the only interpretation which the idiom of Hindustani [450] would warrant in respect of the words used by the defendant) be true, no cause of action arises for such an action. Now, in the first place, this contention, which amounts to raising a plea of justification, was not clearly raised in the defence, and in the next place, even if it had been clearly set up, I hold, for reasons to be presently stated, that such a plea could not by itself furnish a full defence to the action.

It is perfectly true that under the English law of defamation a plea of justification supported by proving the truth of the statement is a valid defence to a civil action, though even under that law such plea was not allowed in criminal proceedings until recent legislation provided that "the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published" (Starkie, p. 718). Similar is the effect of the criminal law of India (s. 499 of the Penal Code, Except. 1), and my brother Straight in *Abdul Hakim* v. *Tej Chandar Mukarji* (3) went the length of saying that "although the provisions of the Penal Code with regard to defamation are applicable to criminal charges, the principles therein embodied are well adapted to supply the tests by which the liability or otherwise of defendants to civil suits should be decided."

It is, however, not necessary for me to rule how far I am prepared to adopt either the English law of defamation as to the plea of justification in civil cases or the *dictum* of my brother Straight, which I have just

(1) 33 L. J. Q. B. 248. (2) 9 H.L. Cas. 593. (3) 3 A. 815.

quoted; though I confess I incline to the latter view, as I think the distinction drawn by the English law between civil and criminal liability (so far as the plea of justification is concerned) proceeds upon grounds (Starkie, pp. 529, 718) which can scarcely be reconciled with juristic reasoning.

I do not regard the case now before me as one of defamation, pure and simple, but one of *personal insult*, though it may be that that insult was conveyed by words of a defamatory character.

In the long quotation which I have already made in this judgment, I have stated my reasons for holding that *defamation* must not be confounded with *personal insult*: the one being an **[451]** offence against reputation having falsehood or misrepresentation as its instrument, the other an offence independent of the element of misrepresentation, the primary object of the offender being not injury to reputation, but the humiliation of his victim or injury to his peace of mind. Personal insult therefore is in itself a substantive wrong, and independent either of the falsehood of the statements contained in the abusive language employed, or of publication, though the publicity of the occasion may be an element for consideration in assessing damages.

I am aware that in laying down this rule I am departing from the English Common Law, but there is no legislative authority for holding that that law is applicable to such cases in the mufassal, whilst the case-law of British India, as I have already shown, does not adopt the rules of the English law on the subject, the reason being that such rules in their entirety are not fitted for the conditions of the Indian population. Language may be abusive and insulting, though it states the truth, and it may cause grave injury to the most tender feelings of the human heart. No person who, for example, is illegitimate or an out-caste or has a bodily infirmity, likes to be reminded of these facts in abusive terms, and if the gentlest touch or even attempt to touch under certain circumstances amounts to assault and battery and as such an actionable wrong, I fail to see why violent abuse should not be an actionable wrong, unless, indeed, it can be said that mental pain is not to be compared with bodily suffering in granting compensatory relief.

But whilst laying down this rule, I must guard myself against being understood to hold that malice is not a necessary element of the wrong, for I am of opinion, that when abusive and insulting language is employed, the law will infer and presume malice, unless the defendant proves his conduct to be *bona fide* or shows that the occasion was privileged. I wish also to point out that nothing that I have said is to be understood as contradicting the rule laid down by the Madras High Court in *Sri Raja Sitarama Krishna Rayadappa Ranga Baz Bahadur Garu* v. *Sri Raja Sanyasi Razu Pedda Baliyara Simhulu Bahadur Garu* (1), where it was held that the omission of a mere courtesy cannot be taken to be equivalent to **[452]** slandering or libelling a man and is not an actionable wrong. The case was not dealt with as one of personal insult nor was the question of malice or the question of special or actual damage considered in the case. It may have been that the omission complained of was *bona fide* and having beeen made in a judicial proceeding was privileged. Again, the ruling of this Court in *Oodai* v. *Bhowanee Pershad* (2) and of the Madras High Court in *Subbaiyar* v. *Kristnaiyar* (3) are no authorities against my view, because in both those case the turning point of the decision was

(1) 2 M. H. C. R. 4. (2) N.W.P.H.C.R.1866, p. 261. (3) M. 383.

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that male members of a family cannot sue for the injury or insult which they have sustained indirectly in consequence of ill-treatment of certain female members of the family. Indeed, in the former of these cases it was left an open question whether the female members of the family who had been insulted could not maintain an action in their own behalf, whilst the latter case, leaving the same question open, proceeded entirely upon the technical ground of the absence of *locus standi* in the plaintiff. How far I am prepared to accept the ground upon which those two rulings proceeded is a question which I am not called upon to determine in this case, though both those rulings are consonant with the English law, so far as I can understand those cases from the facts stated in the published reports. There is, however, another case to which I wish to refer—*Pitumber Dass* v. *Dwarka Pershad* (1), in which it was held that making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation of character for which a suit for recovery of damages will lie. The case was no doubt dealt with as falling under the rule of the English law of libel, though the learned Judges in regarding the case as one of defamation do not appear to have considered how far the effigy and its maltreatment were subject to the plea of justification. Under the English law of libel, if no such plea could be raised, the conduct of the defendants would no doubt be actionable ; but according to the view which I have taken, I should probably have regarded the case as not one of defamation as understood in the English law of slander and libel, for which falsehood and misrepresentation are necessary elements, but simply as a case of [453] personal insult and, as such, actionable, *per se*, as a substantive tort in itself, without proof of actual or special damage.

I now proceed to deal with the second question in this case, *viz.*, the plea of privilege. And in dealing with this part of the case, I think the analogies of the English law furnish a good guide, though of course that law deals with the matter as relating to defamation, and not to mere abusive or insulting language, for that law does not recognize personal insult as in itself an actionable wrong. The grounds of privilege as to statements made in the course of judicial proceedings are stated to be those of public policy in the interest of justice, and they are well set forth at p. 173 of Starkie's work, and the same author summarizes the English law so far as it relates to the privilege of witnesses (p. 179) in the following words :—"By the general policy of the law the witness is privileged ; and therefore no action will lie for a statement made by him in the course of a judicial proceeding, whether by affidavit or *viva voce*, even though it be alleged to have been made falsely and *maliciously*, and without any reasonable or probable cause, and that the plaintiff has suffered *damage* in consequence." The same seems to be the effect of the cases cited by Mr. Bigelow (*Leading Cases on Torts*) at p. 162 of his work. The question of the extent of the privilege of a witness in making statements was, however, well considered in a more recent case—*Seaman* v. *Netherclift* (2), in which there are valuable *dicta* of Cockburn, C.J., Bramwell, J. A., and Amphlett, J,A., who presided in the Court of Appeal. The judgments of those eminent Judges show that whilst they were not fully agreed upon all minor points, they were unanimous in laying down the broad proposition of law that the privilege of a witness is limited to the time when he is actually under examination. Whether such privilege has application to statements having no reference to the matter which the Court is investigating was left an open

(1) N.W.P.H.C.R. 1870, p. 435. (2) L.R. 2 C.P.D., p. 53.

question in that case. Cockburn, C.J., after laying down hat "a witness is privileged to the extent of what he says in course of his examination," went on to say: "Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are [454] not strictly relevant to the issue." But he added: "I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected." Upon the same point Bramwell, J. A., in delivering his judgment, drew a distinction between relevant facts in evidence and matters "*having reference to the enquiry*," and he held that the latter phrase was preferable to and wider than mere questions of *relevancy*, as defining the limits of the privilege of a witness. And in dealing with the argument of counsel, the learned Judge went on to say (p. 60):—"Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose, while the witness is in the box, a man were to come in at the door, and the witness were to exclaim 'that man picked my pocket.' I can hardly think that would be privileged. I can scarcely think a witness would be protected for any thing he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything witness said as a witness should be protected than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that I think the words '*having reference to the inquiry*' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the Judge would give ground for a new trial, but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness."

Amphlett, J.A., in delivering his judgment in the same case, after saying that there were "many reasons why a witness should be absolutely protected for any thing he said in the witness-box" went on to say: "Any thing that tended to disparage the credit of a witness may be said to be *relevant* to the enquiry in which the [455] witness is giving his evidence......... No doubt the strong language the defendant used, which was quite unnecessary, prejudiced him with the jury; but the unnecessary strength of the language cannot affect the question of privilege."

In the present case the plaintiff's deposition shows, and the lower appellate Court has interpreted it to mean, that "he was abused *after* the defendant's deposition was over," and that Court goes on to say: "If this is a fact, and probably it is so in the absence of any evidence to the contrary, then in my opinion he (defendant) had no right to use the ill expressions towards the plaintiff, a respectable person in his retired life ....The privilege of a witness lasts as long only as he has been deposing on oath in the witness-box, but not after it."

The passage in the plaintiff's deposition to which these remarks refer clearly shows that the abusive language was employed by the defendant against the plaintiff after the defendant had finished his deposition and was no longer in the witness-box. But this question, as pointed out by

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the lower appellate Court, has not been tried upon the merits, and I may observe, that the deposition given by the present defendant in the suit of *Sheobadan Singh* v. *Dawan Singh* would be, perhaps, the most important piece of evidence for determining whether the abusive language now complained of in this suit was uttered by the defendant in the course of his examination as a witness. The language is stated to have been uttered in answer to a question put by the Munsif who presided in the Court, requiring the defendant to give some explanation why the present plaintiff had deposed against the case set up by the present defendant, who was also defendant in the former action.

I agree with the lower appellate Court in holding that the case has not been tried upon the merits, and I shall uphold the order of that Court now under appeal directing a trial *de novo*.

But because the points of law which have arisen in this case are of considerable importance; because upon these points the Legislature has not yet settled the law; because the English common law of torts, in my opinion, is not in its integrity applicable to this country; because I have in this judgment departed from [456] that law in some important points, I consider it necessary before concluding this judgment to formulate the exact propositions of law upon which this judgment proceeds. Those propositions are the following:—

Firstly, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

Secondly, that whilst the English law of defamation recognizes no distinction between defamation as such and personal insult in civil liability, the law of British India recognizes personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

Thirdly, that such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation.

Fourthly, that malice is an element of liability for abusive and insulting language.

Fifthly, that such malice will be presumed or inferred unless the contrary is shown.

Sixthly, that where the defendant is not absolutely privileged and protected by reason of the office or the occasion on which he employed such language, he renders himself subject to a civil liability for damages irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

Seventhly, that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness.

Eighthly, that such statements when made in the witness-box are privileged and protected, even though made maliciously and [457] falsely, so long as they are relevant to the inquiry, or have reference to the inquiry in the broadest sense of the phrase.

Ninthly, that even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that such statements were made in good faith for the public good.

As the case has not been tried upon the merits, it is impossible to determine at this stage which or how many of these propositions would be applicable to the facts, beyond the rule that abusive and insulting language is actionable *per se* without proof of special or actual damage, unless such language is excused or protected by some other rule of law.

The case was therefore rightly remanded by the lower appellate Court for trial upon the merits, and that trial must, in my opinion, proceed with reference to the legal propositions which I have already enunciated. My brother Brodhurst is, however; of opinion that the case as it stands already is ready for final adjudication, and that the question of privilege obviates the necessity of entering into the vaster question as to whether abusive and insulting language in actionable *per se*. I wish I had been able to take the same view of the record of the case as it now stands. But I find that in the first place, the plea of privilege was neither pleaded by the defendant before the Munsif, nor was it made the subject of an issue so as to enable the parties to produce evidence upon that issue. The record of the case shows that the issues were framed on the 7th November, 1887, and the Munsif examined the parties on the same day, and without taking any further evidence dismissed the suit. Under these circumstances, I cannot help agreeing with the lower appellate Court in the view that, even in respect of such defence as the doctrine of privilege might furnish, there has been no proper trial upon the merits, and that the Munsif in this omission was influenced entirely by a misapprehension of the meaning of the plaintiff's deposition. According to the view which my learned brother is inclined to take of the doctrine of privilege in such cases, the question of good faith is a question of fact, which must be determined upon its own individual merits, with reference to the circumstances of each case, proved by evidence, for producing which the parties must have such opportunities as the law [458] of procedure allows them. This was not done here, because, as the record shows, the examination of the parties was virtually an examination such as ss. 117, 118, and 119 of the Code contemplate, an examination the primary object of which is to enable the Court to frame proper issues. In this case neither the question of privilege at large nor the question of *bona fides* was made the subject of an issue, and I should have been willing to consent to any order made by my learned brother such as would admit the trial of those points of fact before final adjudication.

But the facts which might sustain a plea of privilege have not been ascertained by judicial trial in this case, nor has the question of *bona fides* been made the subject of inquiry. I have indeed, in deference to my learned brother's views, consented to an order sending for the record of the former suit, that is, the one in the course of which the defendant used the abusive language complained of in this action. But the record of that case affords no help, even if we as a Court of second appeal could deal with that record as evidence in this case. That record, if it shows any thing, shows that the abusive language was not incorporated in the defendant's deposition, and in the absence of a total want of the trial of the point as to privilege, it cannot be the result of a judicial inquiry, but a mere surmise to hold that the abusive language complained of was employed whilst the defendant was under examination as a witness, or that it was so employed *bona fide*.

It is perfectly true, as admitted in this case, that the abusive language was employed in an answer to a question put by the Munsif. But it is

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equally true that the question was not needed, and it would be extending the doctrine of privilege far beyond its bounds, even as known to the English law, to hold that the mere incident of such a question being put by the Court is to afford the person to whom such question is put an unbounded privilege of abusing another in open Court, without a proper ascertainment by trial of the facts which might furnish a legal basis for such a privilege, a trial which we as a Court of second appeal can scarcely hold ourselves.

So far as the question of *bona fides* is concerned, I hold the same opinion as my brother Straight expressed in *Abdul* [459] *Hakim* v. *Tej Chander Mukerji* (1), and re-affirmed by him in *Queen-Empress* v. *Dhum Singh* (2). And I may add that so far as the *quantum* of damages claimed is concerned, nothing that I have said in this judgment must be taken to lay down any rule as to assessment. The considerations which regulate the assessment of damages in such cases necessarily rest upon the determination of the facts and circumstances of each case, and I do not think that the case is in its present state ready for any adjudication as to the amount of damages. The question will, however, no doubt be determined by the Court of first instance, to which, by the order of the lower appellate Court, the case has been remanded for re-trial.

I would dismiss this appeal with costs. *Appeal dismissed.*

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10 A. 459 = 8 A.W.N. (1888) 169.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* DURGA. [23rd June, 1888.]

Act V of 1861, ss. 8, 29—*Police Officer—Suspension—Breach of order.*

A police constable was suspended and ordered to remain in the lines during suspension. Despite the order he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861.

Held, s. 29 of Act V of 1861, contemplates that the person to be charged with an offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police officer is suspended, he ceases to be a police officer; the conviction was therefore wrong.

The Queen v. *Dinonath Gangooly* (3) followed.

THE facts of this case are stated in the judgment of the Court.

The *Public Prosecutor* (Mr. *G. E. Ross*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This case has been reported by the learned Judge of Banda for consideration as to whether the conviction of the accused under s. 29 of Act V of 1861, which contains the statute law on the subject, can be sustained. S. 29 of the Act which I have referred provides :—" Every police officer who shall be guilty of any violation of duty, or wilful breach or neglect of any rule or regulation or lawful [460] order made by competent authority ; or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months ; or who shall engage, without

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(1) 3 A. 815. (2) 6 A. 220. (3) 8 B.L.R. App. 58.

authority, in any employment other than his police duty; or who shall be guilty of cowardice; or who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both."

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In this particular case it appears that the man Durga was a police constable employed in the police force of these Provinces; that for some misconduct upon his part he had been ordered by his District Superintendent to be suspended and to remain in the lines during such suspension; that despite the order that he was to remain in the lines, he absented himself therefrom without leave; and it was in respect of his doing so that he has been charged under s. 29, Act V of 1861, and convicted by the Magistrate. When this reference came before me, I thought the matter of sufficient importance to invite the learned *Public Prosecutor* to be good enough to give me the benefit of his valuable assistance, more particularly as there was to be found in the Bengal Law Reports, Vol. VIII, Appendix, page 58 (*The Queen* v. *Dinanath Gangooly*), a decision which, if a right decision, governs this case and settles the question as to whether such a conviction as that which had been had against Durga can be sustained. I have heard the learned *Public Prosecutor*, and I have had an opportunity also of carefully considering the terms of the judgment of the two learned Judges of the Calcutta High Court, and I am constrained to come to the conclusion that they were right. The provision contained in s. 29 of Act V of 1861 contemplates that the person to be charged with an offence under that section must have been, at the time of his having done the act in respect of which the charge is preferred, a police constable within the meaning of that statute; and by s. 8, read in conjunction with the form to be found in the schedule attached to the Act, it is clear, that when once a police officer has been suspended, it is his duty to hand over to his superior officer the certificate under which he is appointed a member of the police [461] force: so that the effect of the statute, as pointed out by the two learned Judges of the Calcutta Court, is that a police officer who has been suspended, from the mere circumstance of that suspension, ceases to be a police officer, because it is ordered by the Act that when he is suspended his certificate, hitherto in operation, shall cease to have effect, and shall be immediately surrendered to his superior officer. I cannot help concurring with that view, though, with the profoundest respect for the framers of the law, the policy or convenience of such a provision seems to me doubtful. Indeed, with reference to what transpired yesterday in the course of the case of *Muhammad Mian Khan* (1), and from what appears in the present case, it is difficult to see how the discipline of the police force can be properly preserved unless the District Superintendents have larger and more clearly defined statutory powers to deal with insubordination. It is no use framing rules and formulating police manuals, if such rules and the directions in such manuals are not authorized by or are in hostility with the statute, and I think the subject is one which may fairly claim attention at the hands of the Local Government, specially just now, when there are so many complaints of the working of the present police system, and a thorough overhauling and re-organization seems desirable.

I quash the conviction and sentence of Durga, because on the terms of the statute it seems to me I have no option, and he will stand acquitted.

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(1) Unreported.

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I direct that a copy of this order be forwarded to the Local Government and to the Inspector-General of Police. Under these circumstances the reference must be accepted, the conviction and sentence being set aside, the accused will stand acquitted.

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10 A. 462=8 A.W.N. (1888) 200.

[462] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

KACHWAIN (*Defendant*) *v.* SARUP CHAND AND OTHERS (*Plaintiffs*).*
[20th March, 1888.]

Execution of decree—Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionery right of grantor—Act VIII of 1859, s. 205—*Civil Procedure Code* (*Act XIV of* 1882), s. 266 (*k*)—"*Expectancy.*"

One *N*, the sole owner of a certain village, had a son *J*. *J* had two wives. By his first wife he had a son *U*. *J's* second wife was *G*, by whom he had a son whose widow is *K*, the defendant in the suit. *J*. died, leaving *U*. his son, *G*, his widow, and *K*, his son's widow, and on his death *U* inherited the village. Prior to the year 1874 *U* had made a gift to *G* of 105 bighas situate in the village. In 1874 the rights and interests of *U* in the village were sold by auction and purchased by *T*, the ancestor of the plaintiffs. *G* by a deed of gift conveyed the 105 bighas to *K* and ultimately died on 26th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to *G* in lieu for her maintenance which she was to hold rent free for her life and that she had been in possession thereof for twenty years. Further that *U* had the right to resume the land and assess it to rent on the death of *G* and that all the rights and interests of *U* in the land were attached and sold in 1874. On second appeal it was contended that the interest of *U* in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that *U* gave to *G* the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of *U* in the land was of the same character and carried with it the same consequences, as the reversion which the lessor would have for land leased for life or years and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That *U* had a vested right in the land which was capable of being sold, and that right passed to the auction-purchaser at the sale of 1874.

Counsel for appellant cited the following cases in the course of his argument: *Koraj Koonwar* v. *Komul Koonwar* (1), *Ram Chunder Tantra Doss* v. *Dhurmo Narain Chukerbatty* (2), *Tuffuzzool Hossein Khan* v. *Raghoonath Pershad* (3).

ONE Nirand Singh was the sole owner of a certain village. On his death the village was inherited by his son Jawahir Singh. Jawahir Singh had two wives. By his first wife he had a son called Umrao Singh. By his second wife, Musammat Galotan, he had a son who married Musammat Kachwain. Jawahir Singh died, leaving Umrao Singh, Galotan, and Kachwain surviving him. [463] On his death Umrao Singh inherited the village. On the 20th August, 1874 the rights and interests of Umrao Singh in the village were put up for sale in execution of a decree and were purchased by one Tara Chand.

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* Second Appeal, No. 582 of 1886, from a decree of A. Macmillan, Esq., Judge of Mainpuri, dated 6th January. 1886, confirming a decree of the Subordinate Judge of Mainpuri, dated 17th September, 1883.

(1) 6 W.R.C.R. 34. (2) 15 W.R.F.B. 17. (3) 14 M.I.A. 41.

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Galotan had on the 26th July, 1882, transferred certain land in the village to Kachwain, by a deed of gift, and died on the 26th January, 1883.

The plaintiffs in this case, who were the representatives of Tara Chand, sued Kachwain, to set aside the gift and for possession of the land. The contention for the plaintiffs was that Tara Chand had purchased the village including the land in suit; that the land had been given to Galotan for her life only; that she had no power of alienation; and that as she was dead, the defendant Kachwain was no longer entitled to possession of it. The contention for the defendant was that the sale to Tara Chand did not pass the land to him; that the land had not been given to Galotan for life only; that Nirand Singh had given the land to Galotan rent-free as "*pan masala*," and after his death Jawahir Singh had allowed the land to remain in Galotan's possession as *stridhan*, and she had become the absolute owner of it, and that holding it at the time of the gift as absolute owner she had power to make the gift. The Court of first instance gave the plaintiffs a decree for the possession of the land, which on appeal the lower appellate Court affirmed.

On second appeal by the defendant, Edge, C.J., and Mahmood, J., remanded to the lower appellate Court the following issues for trial:—

1. Who made the gift of the land in suit to Musammat Galotan for maintenance during her life?

2. What were the terms of the grant?

3. How long was she in possession?

4. What interest, if any, had Umrao in the land in suit at the date of the sale, *i.e.*, on the 20th August, 1874.

5. Was such interest actually attached, proclaimed, and sold at that sale?

[464] 6. What were the terms of the order of attachment, of the proclamation, and of the order confirming the sale?

On the 1st issue the lower appellate Court found that Umrao Singh had granted the land to Galotan for maintenance during her life. On the 2nd issue it found the terms of the grant to be that Galotan should hold the land rent-free for her life-time in lieu of maintenance. On the 3rd issue it found that Galotan was in possession under the grant for twenty years. On the 4th issue the finding was, that the interest which Umrao Singh had in the land on the 20th August, 1874, before the sale took place was a right to resume the land and assess it to rent on the death of Galotan. On the 5th issue the Court found that the interest, which Umrao Singh had in the land on the 20th August, 1874, before the sale took place was not specifically attached and sold at that sale, but as the whole rights and interests of Umrao Singh in the village were attached and sold, such interest must be considered to have passed to the purchaser. On the 6th issue it found that the proclamation of sale had been destroyed and its terms could not be ascertained, but that the orders of attachment and confirmation of sale showed that the whole rights and interests of Umrao Singh in the village had been attached and sold.

On the return of these findings objections were taken by the defendant-appellant.

Mr. *W. Colvin* and Hon. Pandit *Ajudhia Nath*, for the appellant.

Pandit *Sundar Lal* and Babu *Sital Prasad Chatterjee*, for the respondents.

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APPELLATE CIVIL.

10 A. 462 = 8 A.W.N. (1888) 200.

JUDGMENT.

EDGE, C. J.—This is an action brought by the representatives of a purchaser at an auction-sale of the interest of one Umrao Singh in a village sold in execution of a decree on the 20th August, 1874. One Rao Nirand Singh had a son named Jawahir Singh. Jawahir Singh had two wives. By his first wife he had a son Umrao Singh, who is still alive, and whose property was sold. Jawahir Singh's second wife was Musammat Galotan. By her he had a son, whose widow, Musammat Kachwain is the defendant in this action and appellant in this appeal. Rao Nirand Singh and Jawahir Singh died previous to the 20th August, 1874. Musammat Galotan, on the 26th July, 1882, executed a deed of gift in [465] favour of the defendant-appellant, and on the 26th January, 1883, Musammat Galotan died. The deed of gift related to 105 bighas of land which were situate in the village in question and form the subject of the claim in this action. The plaintiffs contended that Umrao Singh had given those bighas in dispute to Musammat Galotan for her life for maintenance. The finding on remand is in accordance with that contention. The defendant, on the other hand, contends that the bighas in dispute had been given by Rao Nirand Singh to Musammat Galotan, and that the gift had been confirmed by Umrao Singh's father, Jawahir Singh. That contention has been disposed of by the findings on remand. Many questions were raised by the appellant before us. It was contended that at the date of the sale in 1874, Umrao Singh had no interest remaining in the bighas in question that could be sold under s. 205 of Act VIII of 1859, and it was contended that after the gift made by Umrao Singh to Musammat Galotan, Umrao Singh stood in no better position than that of a first expectant reversioner to property in possession of a childless Hindu widow. It appears to me that the position of Umrao Singh was very different to that of such a reversioner. What had been done in effect was this. Musammat Galotan, being entitled to maintenance, Umrao Singh, who was the full owner of the whole village, gave her for her life the usufruct of these 105 bighas in lieu of her maintenance, limiting the grant to her for her life, and she accepted the bighas on those terms. Umrao Singh's interest, as it appears to me, was much more than the mere expectancy of a reversioner to property on the death of a Hindu widow. It was of the same character, and carried with it the same consequences, in my opinion, as the reversion which the lessor would have for land leased for life or years, and would be analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. It is misleading to use in connection with such a right the term "expectancy." On the determination of the life-interest, the right to possession would be in Umrao Singh or his assignee, or if he had not assigned and had died, then in his heirs. I think that the cases cited by Mr. Colvin (*Koraj Koonwar* v. *Komul Koonwar* (1), *Ram Chunder Tantra Doss* v. *Dhurmo Narain Chukerbutty* (2) do not apply. The case which [466] was cited to us, namely, *Tuffuzzool Hossein Khan* v. *Raghoonath Pershad* (3), obviously does not apply. That was a case in which the thing which was sold at auction was the chance of the success of a party in an arbitration. It was said on behalf of the appellant further that the bighas in question, having been granted by Umrao Singh to Musammat Galotan in lieu of maintenance, they became her *stridhan*, and that Umrao Singh ceased to have in them a saleable interest. That proposition would be a correct view of the law if Galotan's interest had not been

(1) 6 W.R.C.R. 94. (2) 15 W.R.F.B. 17. (3) 14 M.I.A. 41.

limited to an interest for her life. This was not an absolute gift by Umrao Singh, but merely a grant to operate during the lifetime of Musammat Galotan. There was a considerable amount of legal argument as to the rights of a Hindu widow in the property left by her husband in respect of her right of maintenance. I do not think that any of those arguments assist us in the determination of this case, which is not one of partition, but is one of a private arrangement between Umrao Singh and Musammat Galotan, by which he agreed to give to her and she agreed to receive from him, these bighas for her life only and as a mode of payment of her maintenance. In my opinion, whatever might have been the position of Musammat Galotan if this had not been the arrangement that had been come to, we must give effect to that arrangement or agreement, and consider the effect of that agreement only. In the result I have come to the conclusion that Umrao Singh had a vested right to these bighas in question which was capable of being sold at the auction-sale, and that that right, that is, the right of possession on the death of Musammat Galotan passed to the auction-purchaser at the sale on the 20th August, 1874. The appellant before us may or may not be entitled to maintenance out of these lands in question. That point has not been raised in the action and no issue has been framed relating to it, and consequently I do not think I would be justified in giving any opinion on the subject. In my opinion this appeal should be dismissed with costs.

MAHMOOD, J.—I am of the same opinion.

Appeal dismissed.

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10 A. 467 = 8 A.W N. (1888) 179.

[467] REVISIONAL CIVIL.

Before Mr. Justice Mahmood.

MUHAMMAD HUSAIN (*Petitioner*) v. AJUDHIA PRASAD AND OTHERS (*Opposite party*).* [6th April, 1888.]

Civil Procedure Code (Act XIV of 1882), *s.* 401, *Explanation.—S.* 622—*High Court's powers of revision—Practice—Suit* in forma pauperis—"*Pauper*"—*Inquiry into pauperism.*

On an application to sue *in forma pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to s. 401 of the Code of Civil Procedure, and in deciding it to ascertain the exact property, its market value and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.

All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code, *Chatterpal Singh* v. *Raja Ram* (1) notwithstanding.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.

THE facts of this case are stated in the judgment of the Court.

The applicant appeared in person.

Pandit *Bishambur Nath* for the opposite party.

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* Miscellaneous Application, No. 235 of 1887.

(1) 7 A. 661.

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REVISIONAL CIVIL.

10 A. 467 = 8 A.W.N. (1888) 179.

ORDER OF REMAND.

MAHMOOD, J.—This is an application made under s. 622 of the Civil Procedure Code, invoking the revisional powers of this Court in the interests of justice within the meaning of that section.

The application relates to an order passed by the lower Court under s. 407 of the Civil Procedure Code disallowing the petitioner's prayer to be allowed to sue *in forma pauperis* under the special provisions of Chapter XXVI of the Code.

The facts out of which the application has arisen may be briefly stated to be the following :—

The petitioner, Muhammad Husain, by a deed executed by him on the 6th August, 1881, unfructuarily mortgaged certain villages belonging to him to Shah Kirpa Dayal and others who are the [468] opposite party to the application. Under the terms of the mortgage a certain date, that is three years, was mentioned to be the period when the mortgage was either to be extinguished or to be liquidated. Similarly, on the 23rd December, 1881, the aforesaid Muhammad Husain executed another usufructuary mortgage-deed in respect of certain other property under terms and conditions similar to those of the previous mortgage, the rate of interest again being 12 per cent. per annum.

It is admitted before me by the petitioner Muhammad Husain in person and by Pandit *Bishambar Nath* on behalf of the opposite party that whilst under the terms of the two mortgages themselves the opposite party would be entitled to obtain possession as usufructuary mortgagees of the property, by certain transactions subsequent to the mortgages, namley, on the 23rd September, 1881, and on the 6th June, 1882, the mortgagees accepted from the present petitioner Muhammad Husain *kabuliats* either leaving him in possession or replacing him in possession in lieu of payments of certain sums of money which were to be paid by the mortgagor to the mortgagees as money due under the *kabuliats*, the money being probably equivalent to such usufruct as the mortgagees would be entitled to take from the property in lieu of interest at 12 per cent. per annum.

Upon the statement of the main allegations between the parties, into the merits of which allegations I am not required to enter, the present petitioner came into Court alleging (to put the matter in the broadest terms), that the defendants, as mortgagees and also as the executants of the *kabuliats* abovementioned, had infringed the terms of those contracts; that they had wrongfully ousted the plaintiff from the possession of the mortgaged property and had committed acts of waste; and upon these allegations the petitioner alleged that he was entitled not only to possession of the mortgaged property, but also to a considerable sum of money which he claimed as compensation or damages which had accrued to him by the wrongful acts of the defendants.

The suit began, as it should have done, under s. 401 of the Civil Procedure Code, that is, by an application such as s. 403 of the Code requires. The application appears to have been registered, [469] not as a suit, but, as an application to be allowed to sue *in forma pauperis*.

The application was resisted by the defendants mainly upon the grounds that the petitioner's allegation as to pauperism was not true, and that he could not sue in the proper form.

The issue having been so raised the learned Judge of the lower Court appears to have allowed the parties to produce evidence of witnesses upon the issue. Having examined the witnesses he has recorded a judgment,

the main portion of which may be quoted to be in the following terms:—

"On a consideration of the statements of the witnesses for the parties, this Court is of opinion that the applicant is not a pauper, inasmuch as it appears from the mode in which the claim has been made and the objections taken thereto by the opposite party, the allegation with which the claim has been made, and the form in which it has been brought, are not such as to render the suit fit for being heard or decided *in forma pauperis.*"

The learned Judge, after making these observations, goes on to surmise that the claim of the plaintiff may be taken to be extravagant and, as such, unfit for being dealt with *in forma pauperis.*

The first question which I have to deal with here has arisen out of the preliminary objection taken by Pandit *Bishambar Nath* on behalf of the opposite party, namely, that upon the findings of the lower Court, it is not open to this Court, as a Court of revision, to interfere under s. 622 of the Code, and in support of this contention the learned pleader has relied upon the Full Bench ruling of this Court in *Chatterpal Singh* v. *Raja Ram* (1), and also upon various other rulings of this Court which, according to the learned pleader's contention, restrict and limit the revisional powers of this Court. So far as the ruling in the Full Bench case is concerned, all I need say is, that the facts of the case were vastly different from those to which this application relates; that the learned Judges who signed the judgment of the majority of this Court, did not lay down any *general* principle of law applicable to the matter; and that, so far as I am concerned, I, in delivering my judgment, guarded myself against being understood [470] to exclude all orders under s. 407 from the exercise of the revisional powers of this Court. A similar question has been quite recently considered by me in the case of *Ali Hamza* v. *Ahsan Ali* (2). Pandit *Bishambar Nath* further relies upon the other rulings of this Court under s. 622. I think nearly all these rulings were considered and cited by me in the case of *Dhum Singh* v. *Basant Singh* (3), where I gave expression fully to my views as to what I understood to be the effect of the Privy Council ruling in *Amir Hassan Khan* v. *Sheo Baksh Singh* (4) and the Full Bench ruling in *Badami Kuar* v. *Dina Rai* (5) and the other cases. Adhering as I do to the views I then expressed, I cannot but hold, consistently, with those views, that in this case there has been a wrong exercise of jurisdiction by the lower Court, and that the application can be entertained in revision.

Now, in the present case, I am far from being satisfied that the learned Judge of the lower Court had consulted the exact definition of the word pauper as contained in the *Explanation* to s. 401 of the Civil Procedure Code, nor am I satisfied that, in dealing with the weight of evidence in the case, he was clear as to the exact person upon whom the *onus probandi* as to pauperism lay in a case such as this, or as to the requisites of legal proof before an alleged pauperism, upported as it must necessarily be by a duly verified statement, can be held not to have been made out. Further, I am not satisfied that the learned Judge did not mix up considerations as to the likelihood or the chance of the plaintiff's success in the suit as an element in guiding his decision as to whether or not the petitioner was a pauper.

The plaintiff's statement that he had no property other than that which he had mentioned in the application could, no doubt, be

(1) 7 A. 661. (2) A.W.N. (1888) 150. (3) 8 A. 519. (4) 11 C. 6. (5) 8 A. 111.

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contradicted by other evidence; but before that evidence could be trusted as sufficient to disallow the petitioner the privilege of suing *in forma pauperis* it was necessary to find clearly whether such additional property as might be proved to belong to the plaintiff was sufficient to pay the fee prescribed by law within the meaning of the *Explanation* to s. 401. The manner in which the learned [471] Subordinate Judge has dealt with the case shows that he did not consider it necessary to ascertain either the exact amount of court-fees which would be due upon plaintiff's plaint or the exact nature or value of the property which was alleged to belong to the petitioner over and above the subject-matter of the suit. Indeed no attempt in that direction appears to have been made, because the judgment of the learned Subordinate Judge does not even specify the property which he held the petitioner to be possessed of, much less is there the smallest trace of any issue as to the value of the property. General and vague statements as to the petitioner who comes into Court to sue *in forma pauperis* cannot be regarded by me as adequate to divest him of a remedy which on proof of pauperism the law would award him, and I cannot hold that there is any finding in the judgment to show that the plaintiff is possessed of means which would enable him to maintain the action in the usual form.

The learned Pandit, whilst conceding that there is no documentary evidence to prove the title of the petitioner as to the property alleged to belong to him, has asked me to go into the merits myself and to adjudicate upon the exact effect of the oral evidence of witnesses produced by his clients, and to determine, upon the record as it now stands, questions as to the title and value of the various properties the ownership whereof was attributed by the witnesses to the petitioner. I have no hesitation in laying down the rule that if, as I have frequently said before, in second appeals it is not the duty of this Court to enter into the merits of the evidence, *a fortiori*, it is not the duty of this Court to enter into the merits of the evidence in cases of revision. I may add that any other view would impose upon Courts of revision duties not dissimilar to those of the Courts of first appeal. All that this Court as a Court of revision is required to do is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure or exercise of jurisdiction is such as would justify interference by this Court.

I am of opinion that this is one of those cases in which those revisional powers should be exercised, and without prejudice to [472] either party to the litigation the order which I think is necessary to make in the case is, to set aside the order of the learned Judge of the lower Court, to require him to deal with the question of pauperism with reference to the definition contained in the *Explanation* to s. 401 and, in deciding the question, to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under s. 407, irrespective of any surmises as to the reason why the plaintiff has valued his claim at such a high figure. In dealing with the case under that section the learned Subordinate Judge will, of course, be at liberty to decide whether, even if the petitioner's pauperism is established, his case falls under any of the other clauses of the enactment.

I have considered it necessary to go into the matter so fully because, whilst I hold that pauper suits when frivolously brought should not be encouraged, I also hold that enough has already been done by the Legislature in the Code of Civil Procedure, not only in s. 407 but also in

later sections, to provide checks upon such litigation. But it is equally clear that if these checks are too severely administered, in the sense of the various requirements of the law not being duly carried out before a pauper is kept out of Court, the effect will be far from what the Legislature aims at. Courts of Justice should be open alike to the rich and the poor. This is a revision case, and all that I am required to do is to allow the petition, and setting aside the order of the learned Judge of the lower Court to require him to dispose of the case again with reference to the observations which I have made.

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Costs will abide the result. *Cause remanded.*

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10 A. 472 = 8 A.W.N. (1888) 177 = 13 Ind. Jur. 114.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

SAKINA BIBI (*Plaintiff*) v. AMIRAN AND OTHERS (*Defendants*).*
[6th April, 1888.]

Pre-emption—Wajib-ul-arz—Pre-emptor out of possession of his own share—His own share lost by him pending appeal—Muhammadan Law.

The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged to be a co-sharer with the vendors. The [473] defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of first instance dismissed her suit. In appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January, 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that, as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favour.

Held, that this Court as a Court of Appeal have only got to see what was the decree, which the Court of first instance should have passed, and if the Court of first instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favour in the Court of first instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

Held, by Mahmood, J., that the passage from Hamilton's Hedaya by Grady, p. 562, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership.

[R., 2 N.L.R. 150 (156); D., 21 A. 441 (442); 125 P.L.R. 1901 = 95 P.R. 1901 157 P.L.R. 1901 = 49 P.R. 1901.]

Azima Bibi, Wasiha Bibi, and Yusuf Ali, three Muhammadan co-sharers, sold their three-pie share in village Khataula Khurd to Rahim Ali

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* Second Appeal, No. 51 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 22nd December, 1886, modifying a decree of Lala Manmohan Lal, Subordinate Judge of Azamgarh, dated the 12th June, 1886.

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and Assid Ali for the sum of Rupees three hundred. As regards Muhammadan co-sharers, the Wajib-ul-arz of the village provided that sales of shares of co-sharers should be governed by the Mahammadan law of pre-emption. On the sale taking place, Amiran and Karim Bakhsh instituted a suit for pre-emption in respect of the share, and obtained a decree. Plaintiff (Sakina Bibi) instituted this suit on 1st April, 1886, against the above-named vendors, vendees and the pre-emptors to enforce her right of pre-emption, on the ground that she and the vendors are co-sharers and partners in the property sold which was their paternal estate, while the vendees were strangers, and the pre-emptors were sharers in a thoke of the village other than that in which the property sold was situated. On the same day that she filed this suit [474] she also instituted a suit for possession of her share in the estate left by her father.

The vendors-defendants did not defend the action; the vendees contended that the sale to them was made with the knowledge of the plaintiff, who did not offer to buy; and the pre-emptors (defendants) urged that, inasmuch as plaintiff was not in possession of her share in the paternal estate in respect of which she claimed the right of pre-emption, she could not maintain the suit.

The Subordinate Judge finding that the plaintiff was not in possession of her share in the estate left by her father dismissed the suit. On the 9th July, 1886, plaintiff appealed to the District Judge, and that officer, agreeing with the Subordinate Judge, dismissed the appeal as against the rival pre-emptors, but directed that if they did not avail themselves of the decree they had obtained, then plaintiff should obtain the property on payment of the purchase-money.

On the 12th January, 1887, plaintiff preferred this second appeal, contending that whether she was or was not in possession of her share in the paternal estate, she was still a co-sharer in the village and entitled to maintain the suit.

On the 20th January, 1887, the plaintiff's share in the village out of which she alleged that her right arose was sold in execution of a decree against her in some other case.

The appeal came on to be heard before Mahmood, J., who referred it to a Bench of two Judges with reference to the contention on behalf of the respondents that the plaintiff's own share in the village and out of which alone her claim to pre-emption in respect of the share sold had arisen, having been sold by auction and so lost to her, she was no more entitled to a decree in the suit. In support of their contention the respondents cited the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1).

The appeal was then heard before EDGE, C.J., and MAHMOOD, J.

Mr. *G. T. Spankie*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

ORDER OF REMAND.

[475] EDGE, C. J.—This was an action for pre-emption. The defendants Amiran and Karim Bakhsh were also claimants for pre-emption in the share sold. The Subordinate Judge dismissed the claim. The District Judge in effect dismissed the action as against Amiran and Karim Bakhsh, but gave the plaintiff a right to obtain the share if Amiran and Karim Bakhsh did not avail themselves of the decree which they had obtained in the action. From that decree this appeal has been brought.

(1) A.W.N. (1884) 169.

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Mr. *Abdul Majid* for the respondents has raised a preliminary objection. The objection is this:—He says, and it is not denied on behalf of the appellant, that pending the appeal to this Court, that is to say, since the appeal to this Court was filed, the share out of which the plaintiff alleged that her right arose was sold in the execution of a decree in some other case. He contends that under these circumstances we cannot pass a decree in her favour. He bases his contention on a passage cited to us from Shama Churun Sircar's Muhammadan Law (1) in which it is stated that "if the *shuffi* previous to the decree of the *kazi* sell the house from which he derives his right of *shuffa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related."

I do not accede to Mr. *Abdul Majid's* contention. It appears to me that sitting here as a Court of Appeal, we have got to see what was the decree which the Court of first instance should have passed, and if the Court of first instance wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution of a decree in another suit. It could not be contended, I think, if the plaintiff had obtained a decree in the Court of first instance, that her right to maintain the decree either on review or appeal could possibly be affected by a subsequent sale of the share out of which her right of pre-emption arose. The subsequent sale could not have been alleged as a ground of appeal for instance. It was not a matter which could have made the decree of the Court of first instance, in such a case, wrong in law or in fact; and I can see no distinction between the case in which the plaintiff obtains a decree for pre-emption in the Court of first [476] instance, and a case in which she proves to a Court of appeal that she was entitled to a decree in the Court of first instance which she did not obtain. In consequence of this view the preliminary objection fails.

Now, as to the actual appeal before us, it appears that the plaintiff, at the date of the institution of the suit, was not in physical possession of the share out of which the right of pre-emption arose, and that she continued dispossessed up to the time of the judgment in the lower appellate Court. The lower appellate Court appears to have considered her case as one in which she had not proved her right against the other pre-emptive claimants on the ground that she was not in possession of the share out of which her right was alleged to have arisen. Now as to these circumstances, I think it was the duty of the lower appellate Court to ascertain whether the plaintiff was, at the date of the suit, entitled in law to the share out of which her right of pre-emption was alleged to have arisen. The mere fact of her not being in possession of it was immaterial except in so far as that fact might be urged as showing that she was not entitled to it. Now this is the question which the lower appellate Court has not tried. There is another material question in the case which has not been tried, and it is as to whether, assuming that the plaintiff is entitled to the share out of which the right is alleged to have arisen, she has only an equal right of pre-emption with Amiran and Karim Bakhsh or whether she has an inferior or superior right. The nature of the decree, if the plaintiff is entitled to one, will depend upon the findings on those points. I merely refer to these issues not as expressing exhaustively the issues that have not been tried, because the lower appellate Court has not tried any issues at all.

(1) Tagore Law Lectures, 1873, p. 535.

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The decree of the lower appellate Court is set aside, the appeal decreed, and the case remanded under s. 562 of the Civil Procedure Code.

Costs to abide the event.

MAHMOOD, J.—I am of the same opinion, but as the Judge who referred the case to a Bench, I wish to say that the reasons and the facts which rendered it necessary for me to refer the case are stated in my order of the 1st February, 1888. The central [477] reason of the reference was, whether the sale of the pre-emptive share, that is to say, of the rights and interests of Musammat Sakina Bibi during the pendency of the appeal would render the dismissal of the appeal a necessary result. The appeal was admitted on the 12th January, 1887, and its aim and object of course was to have it decreed by this Court that, in respect of the sale of the 25th July, 1885, the plaintiff should have, on the 12th June, 1886, when the first Court dismissed her suit, had her suitdecreed instead.

Mr. *Abdul Majid* argued that the sale of Musammat Sakina's rights and interests, which sale took place exactly eight days after the admission of this second appeal, namely, on the 20th January, 1887, was sufficient to deprive her of her pre-emptive right, and for this contention he relied upon the passage to which the learned Chief Justice has referred, namely, the passage at page 535 of the Tagore Law Lectures for 1873, and the passage from the Hedaya, to be found at page 562 of Grady's edition of Hamilton's Hedaya, which runs as follows:—

"Besides, it is an express condition of *shuffa*, that a man be firmly possessed of the property from which he derives his right of *shuffa* at the time when the subject of it is sold—a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *shuffi* remain firm until the decree of the *kazi* be passed, and as this does not hold on the part of the deceased *shuffi* the *shuffa* is therefore not established with respect to any one of his descendants, because of the failure of the conditions."

The learned counsel argued that the passage in the Hedaya meant that actual physical possession of a share, that is to say, of the pre-emptive share, was a condition precedent to the exercise of the right of pre-emption. The translation as made by Mr. Hamilton is somewhat loose, but it is clear that what is intended to be conveyed by the author of the Hedaya was, that, in what I may call the pre-emptive tenement, the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership. For instance, in the [478] case of a usufructuary mortgagee who is in possession, the application of the passage would require holding that no right is possessed by such a mortgagee. I do not think that any other interpretation can be placed upon the passage, and I hold also that such is the case-law as shown by some of the reported cases.

Then as to the question, whether a sale such as the sale of the 20th January, 1887, falls within the rule contended for by Mr. *Abdul Majid*, I agree with the learned Chief Justice in holding that we, as a Court of Appeal, are concerned with the question what the decree of the first Court should have been and not with the matters which have happened since the decree was passed, other than those relating to the array of parties which occurred subsequent to the decree of the Court of first instance. I may say, as I understand the text of the Hedaya, namely, the text at pages 601 and 602, that I have no doubt that although the Muhammadan

Law requires that, if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the pre-emptive tenement, then the decree cannot be given in his favour; yet the rule cannot be carried to Courts of Appeal, or Courts of Error, as the Courts concerned with rectification of the decrees of the Courts below. There is also some doubt in my mind whether the passage so far as it relates to sale by a pre-emptor of his pre-emptive tenement before the decree of the *kazi*, is applicable to compulsory sales such as the sale of the 20th January, 1887. The sale may or may not have been validly made. It may possibly be the subject of a separate litigation in the execution department to which execution proceedings the present defendants, Mr. *Abdul Majid's* clients, would possibly be no parties, and the fate of the litigation may be in favour of Musammat Sakina Bibi or against her. Such facts cannot be taken notice of at this stage in a litigation, which, if the pre-emptor's case is established, was rightly commenced and should have ended in the decretal of her claim.

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In connection with the latter point I think it my duty to refer to the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1) in which a Division Bench of this Court held that, because subsequent to a **[479]** decree for pre-emption, and during the pendency of the appeal, in a totally separate litigation a decree had been passed which directed that the pre-emptor was not entitled to the pre-emptive tenement, namely, the tenement which gave him the right to sue, therefore such adjudication deprived such pre-emptor of his pre-emptive right and rendered the decree for pre-emption null and void. The case is not on all fours with the present case. If the case were applicable to this case I should have very great hesitation in holding that it was correct law. The rule of *lis pendens* is a broad doctrine, and the maxim *pendente lite nihil innovetur* is sufficiently broad to invest this question with some difficulty.

This case has not been tried upon the merits, and there are other questions in the case to which I have not referred, because I agree in the order of the learned Chief Justice that the case should go back under s. 562, of the Civil Procedure Code and be tried on the merits by the lower appellate Court, which Court should frame a decree such as the findings may require.

Costs to abide the result.

Case remanded.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

ANGAN LAL (*Plaintiff*) v. GUDAR MAL AND ANOTHER (*Defendants*).*
[2nd May, 1888.]

Execution of decree—Deceased Judgment-debtor—Execution against a person not the legal representative.

The defendants, along with one *N* and *C*, had brought a suit against one *A* in the Civil Court at Peshawar in the Punjab and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881, application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no

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* First Appeal No. 198 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 16th September, 1886.

(1) A.W.N. 1884, 169.

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steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad District, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Luchman Prasad and others, sons of Ajudhya Prasad, residents of Kundarkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal [480] himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of *A*, deceased, yet he always lived separate and carried on business separately; that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as *A* left issue, it was wrong to call him as heir to *A*, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased, and had realized the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge, and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie.

Held, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection, and lastly, of its being allowed or disallowed, and these do not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor.

Mirza Mahomed Aga Ali Khan Bahadur v. *Balmukund* (1), *Sayid Nadir Hossain* v. *Bipen Chund Bassarat* (2) were referred to.

THE facts of this case are stated in the judgment.

Hon. *T. Conlan* and Hon. Pandit *Ajudhia Nath*, for the appellant.

Mr. *G. E. Ross* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

STRAIGHT, J.—The suit to which this appeal relates is one of a peculiar character, and it is necessary for the purpose of making intelligible the view at which I have arrived to state as succinctly and clearly as I can the circumstances under which the plaintiff comes into Court. It appears that the defendants in the present suit, along with one Narain Das and Chela Ram, brought a suit against one Ajudhia Prasad in the Civil Court in the Punjab and [481] obtained a decree against him on the 23rd July, 1878, for a sum of Rs. 30,545-12-0. That was a simple money-decree. In the year 1881 an application was made to the Punjab Court for a certificate to transfer the execution of that decree to Moradabad in

(1) 3 I.A. 241. (2) 3 C.L.R. 437.

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these Provinces, and the application was granted. But nothing further was done in the matter. Upon the 12th June, 1883, Ajudhia Prasad, the judgment-debtor, died. On the 30th April, 1884, very nearly six years after the decree had been originally passed, the defendants, in the name of Damodar Das, who was the original decree-holder and was then also dead, came into the Punjab Court and applied for a fresh certificate for the transfer of the execution of the case to Moradabad, and upon that date the certificate was granted. It is to be noticed, at least so I understand Mr. *Conlan*, that in that application to the Punjab Court, Ajudhia Prasad was treated as still being alive. However, whatever informality there may have been in that application, on the 20th August, 1885, a formal application was presented in the Court of the Judge at Moradabad and it was for the execution of this decree which had been transferred. It said:—"Application for execution against Ajudhia Prasad, and after his death against Angan Lal, the own brother, and Musammat Durga Kuar the widow, Luchman Prasad, the major son, and Brijbasi Lal, Makut Behari Lal, and Kunj Behari Lal, minors, under the guardianship of Musammat Durga Kuar, their own mother in their own capacity, as the legal representatives of Ajudhia Prasad, the original judgment-debtor, deceased, residents of Kundarkhi, pargana Bilari, in the district of Moradabad, and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors."

In that petition the following statement was made:—"Although in the decree the names of Narain Das and Chela Ram are included, yet a separation of the demand due to Narain Das has been separately made, and we the decree-holders are separate; and this certificate in respect of money due to us, as decree-holders, has alone been given. Inasmuch as the judgment-debtor has died and his heirs are living and in possession of his property, and Angan Lal himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and [482] has appropriated the same, therefore to that extent the person of the aforesaid Angan Lal is also responsible. The decree-holders pray that after issuing the usual orders, the decretal money may be recovered by means of the attachment and sale, and that for the purpose of execution the case might be transferred to the Subordinate Judge."

That petition as I have said, was filed in the Court of the Judge on the 20th August 1885, and under his order was transmitted to the Subordinate Judge for execution. Notifications of the petition were conveyed to the present plaintiff Angal Lal, as well as to the other persons mentioned therein, and upon the 7th October, 1885, Angan Lal filed objections, which I need not travel through at length. It is sufficient to call attention to the 3rd and 4th paragraphs, in which he says as follows:—"Although the objector is own brother of Ajudhia Prasad, deceased original judgment-debtor, yet he always lived separate, even during the life time of his parents, from the said judgment-debtor, and he followed his business separately. In the same way Ajudhia Prasad, the deceased judgment-debtor, used to live and work separate from the objector, who used to live upon what he earned from service, and the judgment-debtor himself was without any property—a thing which has been determined by this Court on several previous occasions. That there was no connection or partnership of the objector with Ajudhia Prasad deceased, neither any property belonging to Ajudhia Prasad is in possession of the objector. Inasmuch as Ajudhia Prasad has left issue, it is wrong on the part of decree-holders to call objector as heir to Ajudhia Prasad and to get

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execution process issued in his name in the presence of the deceased's male children."

Such was the way in which the plaintiff met the application of the decree-holders for execution against him, and it is quite clear upon the terms of these two paragraphs, that I have read, that the position taken up by him was that he was not the heir or legal representative of his deceased brother, and that it was erroneous on the part of the decree-holders-petitioners to ask the Subordinate Judge to bring him into the execution proceedings as the legal representative of the deceased judgment-debtor as provided for [483] in s. 234 of the Civil Procedure Code. To these objections of the plaintiff Angan Lal, answers were filed by the decree-holders-petitioners, and it is plain from the terms of their answer that they practically threw overboard the notion that Angan Lal was in any sense a person standing in the position of the leagal representative of their deceased judgment-debtor, but they treated him upon the footing of being a person, who was in possession of a sum of money belonging to the deceased judgment-debtor. Indeed, in the 4th paragraph of their answer they say in terms: "The plea of the objector that he was separate from Ajudhia Prasad does not strengthen his position. As the objector has realized and appropriated the money due to Ajudhia Prasad, is certainly liable to the extent of the money realized by him."

Such was the petition, such the objection of Angan Lal, and such the reply to the objection of Angan Lal on the part of the decree-holders, and upon those materials the Subordinate Judge proceeded to pass an order dated the 27th March, 1886. Now it is plain to my mind from the terms of that order, that the Subordinate Judge dealt with the proceedings before him, not upon the footing of determining a question under s. 234 of the Civil Procedure Code, as to the responsibility of a legal representative in respect of a decased judgment-debtor, but he disposed of it upon the single and simple ground, that so far as the materials before him enabled him to form an opinion, it was established that money had been received by Angan Lal, which he had not paid over to his deceased brother, and therefore he was responsible. Thus the Subordinate Judge was, by the summary method of an execution proceeding, trying a question as to whether money was or was not due to the estate of a deceased person by a third party, who was outside the decree and who was not brought in the character of a legal representative. In dealing with the matter in that way the Subordinate Judge acted without jurisdiction, and he had no right whatever to decide anything as to a person, who stood in the position of a stranger, or to hold that such stranger was liable to have the decree executed against him, as if he was the representative of the deceased judgment-debtor.

That order of the Subordinate Judge is the foundation of the present claim by the plaintiff, and as I understand the relief [484] sought in his plaint and the scope of his suit, the only object he had in view was to get rid of that order. It is not denied by Mr. *Conlan*, on the contrary it is conceded, that if the plaintiff Angan Lal was separated from his brother as there seems to be no doubt, and if the had received a sum of money his brother which he had not paid over, there was provision in the Civil Procedure Code under which the judgment-debtor might have realized that money from him. But he could not do so by a proceeding in which the plaintiff could not be a party, and the order made in regard to him was bad as being passed without jurisdiction.

The only way in which it is met by the respondent is, first, that this

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suit must be tried and disposed of on the ground that it is in effect nothing more or less than a suit under s. 283 of the Civil Procedure Code, brought by the plaintiff to get rid of the order of the 27th March, 1886, and as such, barred by one year's limitation. I dissent from that view. An essential condition precedent to the institution of a suit under that section is the making of an attachment of some immoveable property, of objection being taken to such attachment, of investigation being made into such objection in the manner provided in Chapter XIX of the Civil Procedure Code, and lastly, of its being allowed or disallowed, with the consequential right of the party damnified to bring a suit within a certain period of time. In the present case, there has been no attachment, there has been no investigation of any objections in the sense of the chapter to which I have referred, and there has been no disallowance of those objections. This seems to me to answer the first objection of the defendants respondents.

The second objection taken by the respondents is this:—These proceedings of the Subordinate Judge must be regarded as held under s. 244 of the Civil Procedure Code, and so no separate suit lies. But as I have already remarked, the Subordinate Judge never tried the action upon the footing of the present plaintiff being the legal representative of the deceased judgment-debtor within the meaning of s. 244. On the contrary, he dealt with him throughout in a totally different character. Mr. *Conlan* has called our attention to a ruling of their Lordships of the Privy Council in the case of *Mirza Mahomed Aga Ali Khan Bahadoor* v. *The widow of* [485] *Balmakund*, (1) and he has also referred us to a ruling in the case of *Syed Nadir Hossein* v. *Bissen Chund Bassarat* (2). Both these cases are very opposite to the matter before us. The ruling of the Privy Council seems to me directly in point, and if I understand it aright, it lays down the principle, which, if adopted, would have warranted the present respondent in attaching the alleged sum of money in the hands of the plaintiff as being due to the estate of the deceased Ajudhia Prasad in the ordinary manner provided by the law. That procedure might have resulted in objection being taken by the present plaintiff, and the ordinary machinery would then have been followed. But the respondents did not think proper to adopt that course. They sought through the machinery of the execution department, by a wholy erroneous proceeding, to enforce payment by the appellant of a sum due to the judgment-debtor, and as their proceeding was not only irregular but illegal, the order of the Subordinate Judge cannot possibly be sustained. Under these circumstances this appeal should be decreed, and the plaintiff should obtain a decree declaring that the Subordinate Judge's order of the 27th March, 1886, is of no effect so far as it professes to give execution of the decree of the 23rd July, 1878, against the plaintiff-appellant Angan Lal. The plaintiff will be entitled to his costs in all the Courts.

Mahmood, J.—I am of the same opinion.

Appeal decreed.

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(1) 3 I. A. 241. (2) 3 C.L.R. 437.

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Before Mr. Justice Straight and Mr. Justice Tyrrell.

GHANDHARAP SINGH AND OTHERS (*Plaintiffs*) v. LACHMAN SINGH AND OTHERS (*Defendants.*)* [4th May, 1888.]

Hindu widow—Adverse possession against widow—Reversioners—Act XV of 1877 (Limitation Act), sch. ii, *Nos.* 141, 144.

The plaintiffs sued for possession of certain zamindari property as reversioners to the estate of one *C*, their right to sue having accrued as alleged on the death of the widow of *C*, which took place on 14th October, 1884. The defendant, alleging himself to be the adopted son of *C*, and being in possession of the property in dispute since the death of *C*, which happened in 1869, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendants' adverse posses-[486]sion over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act and therefore not barred. *Held*, that as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. The *Shiva Ganga Case* (1) was referred to.

The following cases were cited in the course of the argument. *Raj Bahadoor Singh* v. *Achambit Lal* (2), *Jagadamba Chowdhrani* v. *Dakina Mohun* (3), *Rajendronath Holder* v. *Jogendro Nath Banerjee* (4).

[**F.**, 17 A. 167 (171) = 15 A.W.N. 36; 24 A. 195 (198) = 22 A.W N. 10; 26 A. 40 (48) = 23 A.W.N. 163; 11 C. P.L.R. 49 (53); **R.**, 19 B. 809 (816); 21 B. 159 (168); 24 B. 260 (282) = 1 Bom.L.R. 799; 34 A. 8 (10) = 8 A.L.J. 1101 = 11 Ind. Cas. 476; **D.**, 14 A. 156 (160) (**F.B.**).]

THIS was a suit for possession of shares in certain zamindari property. There were four brothers, Pertab Singh, Jawahir Singh, Adhar Singh, and Bhub Singh. Pertab Singh adopted Mannu Singh, a son of Jawahir Singh, and Bhup Singh adopted Chittar Singh a son of Adhar Singh. On the death of Bhup Singh, the names of his widow Paran Kuar and his adopted son Chittar Singh, were recorded, each in respect of one anna share in the zamindari property left by him.

Chittiar Singh died in 1869, leaving a widow, Dulari Kuar, and her name was entered in respect of the aforesaid one anna share of Chittar Singh and also of a two anna share in other zamindari purchased by Chittar Singh. Dulari Kuar died on 14th October, 1884, and the plaintiffs in the suit, who are some of the descendants of Mannu Singh and sons and grandsons of Jawahir Singh, applied to the Revenue Court for entry of their names in respect of the property that stood in her name; but on the objection of one Lachman Singh, son of Nokhi Singh and grandson of Adhar Singh, that he was the adopted son of Chittar Singh, they were referred to the Civil Court to establish their right to inherit the estate of Chittar Singh and hence the suit. Paran Kuar admitted that Lachman Singh had been adopted by Chittar Singh.

Lachman Singh contended that the claim for declaration that his adoption never took place was barred by the six years' rule of limitation;

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* Second Appeal No. 2200 of 1886, from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 6th September 1886, confirming a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 26th March, 1886.

(1) 9 M.I.A. 543. (2) 6 I.A. 110. (3) 13 I.A. 84. (4) 14 M.I.A. 67.

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that he had been in adverse possession for more than twelve years, and that he was duly adopted by Chittar Singh as his son.

The plaintiffs had stated in their plaint that the alleged adoption of Lachman Singh had become known to them prior to the [487] year 1873, when partition proceedings were pending in the Revenue Court for partition and division of the family zamindari villages to which Lachman Singh was a party, and which ended in the direction by the Revenue Court that the parties should first settle the question of their respective rights by an adjudication of the Civil Court.

The Subordinate Judge being of opinion that the suit was practically one for declaration that the adoption never took place, held that it was barred by six years' rule of limitation. He also found that Lachman Singh was the legal heir of Chittar Singh, and had been in adverse possession of the property in suit for more than twelve years since the death of Chittar Singh. The suit was accordingly dismissed.

In appeal the District Judge held that the suit being for recovery of possession of immoveable property, was governed by the longer period of limitation *viz.*, that of twelve years, and finding then, that Lachman Singh had been in adverse possession for more than twelve years dismissed the appeal. On second appeal it was contended that the suit being of the nature prescribed in art. 141 of the Limitation Act, was instituted within the time allowed by law.

Mr. *Colvin*, Hon. *T. Conlan*, and Munshi *Kashi Prasad*, for the appellants.

Mr. *G. E. Ross*, Hon. Pandit *Ajudhia Nath* and pandit *Moti Lal*, for the respondents.

JUDGMENT.

STRAIGHT, J.—The suit to which this appeal relates is one which on the face of it professes to be brought by the reversioners of the estate of one Chittar Singh, their right to maintain their present claim having, it is alleged, opened up to them upon the death of one Musammat Dulari, who departed this life upon the 14th October, 1884. The case for the defendant was that Chittar Singh, prior to his death in 1869, had adopted the defendant Lachman Singh as his son, and that upon his death Lachman Singh entered into possession and enjoyment of his property, to which the suit related, to the exclusion of his adoptive mother Dulari Kuar, who never held possession of it as an estate of the widow of a separated childless Hindu. In other words, what the [488] defendants asserted was that from the date of the death of Chittar Singh, his adopted son, the defendant Lachman Singh took and held possession of the property left by him adversely to Dulari Kuar. Supposing that Musammat Dulari had taken the estate of the widow of a deceased childless Hindu, and nothing had intervened to disturb her possession of that estate of the kind I shall presently refer to, the plaintiffs would, no doubt, have been entitled to come into Court with their suit, and it would have been governed by art. 141 of the Limitation Law. But it has been conceded by Mr. *Colvin*, and I think rightly, that if the defendant Lachman Singh had obtained and held adverse possession as against the widow for more than 12 years prior to the date of the institution of the suit, that adverse possession as against her is good as against the reversioners; and as authority for that position I have only to refer to the well-known declaration of their Lordships of the Privy Council in the *Shiva Gunga*

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Case. (1) Reference has been made in the course of the argument to three cases. One of those was the case of *Raj Bahadoor Singh* v. *Achumbit Lal* (2), another was the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3), and the last is the case of *Rajendro Nath Holder* v. *Jogendro Nath Bonerjee* (4).

Now as to the first of those cases, the remarks of their Lordships in the second of them, namely the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3), explain what the nature of that suit was, and they indicate in unmistakeable language what meaning is to be attached to a particular passage used in the judgment about which misconception had arisen. In that case all that their Lordships did decide was that under the old Limitation Act, IX of 1871, art. 129, upon a particular state of facts, that article applied, and they specifically say in the course of their judgment that they do not profess to decide whether "the articles of the new law, Act XV of 1877, namely, arts. 118 and 119, denote a change of policy or how much change of law it affects, because those questions were not before their Lordships."

In the third case relied upon by Mr. *Colvin*, their Lordships of the Privy Council, upholding the decision of a lower appellate **[489]** Court upon a peculiar and special state of facts, in reference to that case held that no limitation article applied to bar that suit.

It is not necessary for me to decide here whether even if there had not been such a finding as has been recorded by the learned Judge in this case, and there were no materials to show that adverse possession of the estate of Chittar Singh had been obtained by the defendant, Lachman Singh, but it appeared that an adoption had been asserted at the death of Chittar Singh, two remedies might not have been open to the plaintiffs, that is to say, one of a purely declaratory kind, such as is covered by art. 118 of the Limitation Act, when such alleged adoption became known to the plaintiffs, or a suit in the present form on the death of the widow. I think there is much force in what was said by my brother Oldfield on this subject in the case of *Basdeo* v. *Gopal* (5), but the state of the findings by the learned Judge in this case render it unnecessary to consider this question, and they are as follows:—

"Plaintiffs had full notice in 1869 A. D. that Dulari made no claim to the estate; that she never asserted that the estate had at any time vested in her; on the contrary, she alleged that on the death of Chittar Singh, the estate vested in a son adopted by him in his life-time, and that she was only managing during the minority of the adopted son and for his benefit, he being in full possession by right of inheritance from his adoptive father."

That is a most specific and clear finding to this effect, that upon the death of Chittar Singh, Lachman Singh was by the direct act of the widow notified to everybody, as a person who was the adopted son of her deceased husband, Chittar Singh himself; that he was in possession, not as the son adopted by her in pursuance of any authority conferred on her by her husband, whom she had put into possession, but by direct inheritance from Chittar Singh. It seems to me that the learned Judge having found those facts was distinctly right in saying that there was on the part of the minor Lachman Singh, now major defendant, clear evidence of adverse

(1) 9 M.I.A. 543. (2) 6 I.A. 110. (3) 13 I.A. 84=13 C. 308.
(4) 14 M.I.A. 67. (5) 8 A. 644.

possession to the widow and to any other person, who had any claim or interest, under or through her, in the property, which has continued down to the present time, and which was obviously for a much longer period than twelve years.

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[490] That being so, although Mr. *Colvin* has addressed us very ably in regard to the findings of fact of the learned Judge, I am of opinion that we cannot go behind those findings, and that upon them the learned Judge has properly held that the suit of the plaintiffs not having been brought within twelve years from the date when the defendant first obtained adverse possession, it must be dismissed, Lachman Singh having acquired a good prescriptive title thereby. I therefore dismiss the appeal with costs.

TYRRELL, J.—I concur. *Appeal dismissed.*

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10 A. 490 = 8 A.W.N. (1888) 203 = 13 Ind. Jur. 117.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

RAM LAL AND ANOTHER (*Defendants*) v. DEBI DAT AND ANOTHER (*Plaintiffs*).* [9th May, 1888.]

Hindu Law—Joint Hindu family—Evidence of separation—Definement of shares in ancestral property.

A four anna ancestral share in a zamindari village was owned by two brothers, in which the share of *H*, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs the descendants of the other brother. In the village records there has been a definement of shares followed by entries of separate interests in the revenue records, and since 1264 fasli the two plaintiffs have each been recorded as the owner of a one anna share and *H* of a two anna share thereof. The entire four anna share has been in the possession of mortgagees from the year 1844, excepting the sir lands of which *H* held separately his own share, *viz.*, 10 bighas. On the 7th July, 1883, *H* executed a deed of a gift of his two anna share in favor of the defendants, and caused mutation of names to be made in their favor surrendering to them at the same time possession of the *sir* land. *H* died on the 21st January, 1884, leaving neither son, widow nor daughter, and the plaintiffs were his heirs at law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and in appeal the District Judge affirmed the decree, holding that the four anna share was not joint and undivided property between the co-shares, and that *H* was in separate possession of the two anna share of which the defendants were the donees. On second appeal it was contended, that inasmuch as since 1844 there could have been no separate enjoyment of the four annas which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat* v. *Sukhmani Kuar* (1) was cited in support of the contention.

Held, that from evidence of definement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated.

[491] *Ambika Dat* v. *Sukhmani Kuar* (1), discussed.

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* Second Appeal, No. 2310 of 1886, from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 2nd August, 1886, confirming a decree of Maulvi Nasar-ulla Khan, Subordinate Judge of Jaunpur, dated the 11th August, 1884.

(1) 1 A. 437.

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THE following genealogical table explains the relationship of the plaintiffs in this case with Hazari Lal, deceased, whose estate was the subject-matter of dispute :—

Kashi Nath
- Sheo Dat
  - Bihari Lal
    - Ram Lal (*plaintiff*)
  - Kali Charan Lal
    - Ramghulam Lal (*plaintiff*)
- Girdhari Lal
  - *Hazari Lal*

Sheo Dat and Girdhari Lal owned a four anna share in a village called Takha. Hazari Lal's share in this four anna estate was one half, the remaining half being the share of the plaintiffs.

On the 7th July, 1883, Hazari Lal executed a deed of gift of his share in favour of the defendants in this case. At this time the four anna share but not the *sir* land belonging thereto, was in the possession of mortgagees, and had been so since 1844. Hazari Lal caused mutation of names to be recorded in favour of the defendants, surrendered possession of his *sir*-land, and died on the 21st January, 1884, leaving neither son, widow nor daughter. The plaintiffs were therefore his heirs under Hindu Law. They brought this suit to cancel the deed of gift mentioned above, and for possession of the *sir*-land, 9 bighas odd. They alleged, amongst other things, that the four anna share was joint undivided property ; that Hazari Lal lived in union with them ; and that therefore the alienation was void under Hindu Law. The defendants traversed all these allegations.

The Court of first instance dismissed the suit. The plaintiffs appealed to the District Judge. The District Judge dismissed the appeal. The first issue which he framed for determination was " whether Hazari Lal, at the time of the execution of the deed of gift, was in the separate possession of his share of the ancestral property." On this issue the Judge found as follows :—" In *Appovier* v. *Ramasubha Aiyan* (1), their Lordships of the Privy Council have ruled that when the members of an undivided family agree among themselves with regard to particular property that it [492] shall thenceforth be the subject of ownership in certain defind shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a certain and definite share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided, "division " having a twofold meaning, division of right, and division of property. In *Adi Deo Narain Singh* (2) it was held that the plain principle deducible from the above ruling is, that in order to show separation it is not necessary to establish a partition of the joint estate into separate shares or holding ; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severence and destruction of the joint tenancy so to speak, and to convert it into a tenancy in common.

(1) 11 M.I.A. 75. (2) 5 A. 532.

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"In this case it is clear from the copies of village-record filed that there has been a definement of shares followed by entries of separate interests in the revenue-records. Since 1264 fasli Kali Charan has been recorded as the owner of a one anna share, Ram Lal of a one anna share, and Hazari Lal of a two annas share, the *Jama* payable by each being separately recorded, Kali Charan being the lambardar of the four annas share.

"The fact that there was a definement of shares between Kali Charan, Ram Lal, and Hazari Lal, followed by entries of separate interest in the revenue-records of the village, goes far towards proving separation of title and interests, but does not necessarily amount to such separation. It must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect. (1 A. 437.) *

"The oral evidence is, as usual, conflicting; the statement of the plaintiffs' witnesses that Hazari Lal and his cousin Kali Charan and nephew Ram Lal lived in commensality, and were joint owners of the undivided four annas share, and *sir*-lands being contradicted by the defendadts' witnesses. It appears to me, however, to be [493] proved that Hazari Lal lived latterly in mouza Takha; that he died in the defendants' house in that village; that the funeral obsequies (*kirya karam*) were performed by the defendants: and that the plaintiffs lived in mouza Bhadi.

"The whole of the four annas share it seems has been for very many years in the possession of a mortgagee. The *sir*-lands, 20 bighas, were however, not mortgaged.

The witnesses for the plaintiffs say that the *sir*-lands were jointly cultivated, partly home cultivation, and partly through *shikmis*. On the other hand, the witnesses for the defendants say that the Hazari Lal held separately his own share of the *sir*-lands, the bighas 10 in suit. The Judge then referred to the oral and documentary evidence, and continued as follows:—

"It is urged on behalf of the plaintiffs that the four annas share was jointly mortgaged to Bhagwan Das, and that therefore the joint undivided nature of the property is thereby proved. The debt, however, which led to the mortgage was an old ancestral one, and as pointed out by the lower Court, the fact that the creditor took a joint mortgage of their property from the representatives of the original debtor or debtors does not *per se* prove that the property mortgaged was a joint and undivided one.

"Considering that the recorded definement of shares was accompanied by a separation and division of the *sir*-lands, as is proved by the revenue-records of 1264 and 1272 fasli; that Hazari Lal for some years before his death lived with defendants in Takha, and not with the plaintiffs in Bhadi; that as stated by one of the plaintiffs' own witnesses he had ceased communicating with the plaintiffs two years prior to his death; that he died in Takha apart from the plaintiffs and that the "*kirya karam*" or funeral obsequios were not performed by the plaintiffs, I must hold that the decision of the lower Courts correct, that the four annas share was not joint and undivided property, and that Hazari Lal was in separate possession of the two annas share which was given by him to the defendants. The plaintffs, his nephews, by Hindu law cannot therefore impeach the alienation, the property alienated being held in severalty."

* This reference is not to be found in the I.L.R.

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The plaintiffs appealed to the High Court.

[494] Hon'ble *T. Conlan*, Mr. *G. Gordan* and *Babu Bishnu Chandra Moitro*, for the appellants.

Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.— This was an appeal from the decree of the District Judge of Jaunpur, who held on appeal that there had been separation in fact in this Hindu family. The defendants were grantees from one Hazari Lal. If there had not been a separation, the plaintiffs would be entitled to a decree. If there had been separation the gift to the defendants was unimpeachable. The Judge of Jaunpur appears to me to have correctly apprehended the law as to separation and to the inferences which may be drawn as to separation. The property in dispute was a two annas share out of a four annas share in the village. The four annas share had been since 1844 in the hands of mortgagees, who had held it under a *zarpeshgi* lease, which had been renewed from time to time. The last lease was granted on the 23rd July, 1871. We are informed that in consideration of such renewals further sums were borrowed. It has been contended before us that inasmuch as there could have been since 1844 no separate enjoyment of the four annas share of the mortgaged property, the evidence afforded by the separate registration could not prove actual separation. I may mention that there was the evidence of Hazari Lal, who said he had separated; that evidence, if believed, would be sufficient.

The point which has been pressed on us was based on a judgment of this Court in the case of *Ambika Dat* v. *Sukhmani Kuar* (1). Mr. Justice Turner in delivering the judgment of the Court said:—"The fact that there was a definement of shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property." It has been assumed in the argument on behalf of the [495] appellants that the meaning of that judgment is that in no case can separation be found unless there is evidence of a separate enjoyment of profits. We do not think that is the meaning of the judgment. In fact, in the passage quoted, the learned Judges say: "a definement of the shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation." From evidence of that kind, in our judgment, if there is nothing to explain it, separation as to the estate in respect of which there has been a definement of shares followed by entries of separate interests in the revenue records may be inferred. If the case now before us had been before those learned Judges, they would probably have so worded their judgment that no one might infer that in all cases proof of separate enjoyment of profits was absolutely necessary. To hold that there could be no separation proved in the case of property in the hands of mortagees unless proof could be given of separate enjoyment, would be to hold that

(1) A. 437.

a joint family whose sole property was in the hands of mortgagees could not, during the currency of the mortgage, effect or prove separation. We think that the learned Judges in the case to which we have referred were only dealing with the case before them, and did not intend to lay down rules of universal and exclusive application. This is a second appeal. The Judge in our opinion has shown by his judgment that he perfectly understood the law. There was documentary and oral evidence before him to prove the separation, and we cannot in second appeal question the findings of fact: we dismiss the appeal with costs.

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Appeal dismissed.

10 A. 495 = 8 A.W.N. (1888) 181.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

KANHIA (*Plaintiff*) *v.* MAHIN LAL (*Defendant*).* [10th May, 1888.]

Hindu widow—Gift of immoveable property by husband—Life interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.

The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court, finding that *A* was separate in estate from plaintiff and the sold and exclusive [496] owner of the house, held the gift to the wife and the sale by her to defendant valid and dismissed the suit. On appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate.

Held, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed.

Held further that from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an heritable estate in and power of alienation over the property the subject of the gift and therefore the sale by the wife was valid.

Kunjbehari Dhar v. *Prem Chand Datt* (1) referred to.

[**Appl.**, 23 A. 309 (312) = 21 A.W.N. 84; **R.**, 9 C.P.L.R. 95 (100); **D.**, 30 C. 20 (32); 9 O.C. 119 (124).]

AMAN Singh, a Hindu, made an absolute gift of a house of which he was the owner to his wife Ramo. In the deed he said:—"I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false." Upon the death of Aman Singh, his widow, on the 24th December, 1885, sold the house to the defendant Mahin Lal. Plaintiff as grand-nephew of Aman Singh, alleging himself to be joint in estate with him, instituted the suit to set aside the gift made by him to his wife and also to eject the defendant purchaser from the widow from the house.

The Munsif, holding that Aman Singh was competent to make a valid gift of the house to his wife, observed that she had no larger power to alienate it than if she had inherited it from her husband, and decreed that the gift to the wife and the sale by her were only valid during her lifetime and would not affect the reversionary rights of the plaintiff.

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* Second Appeal, No. 42 of 1887, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 25th November, 1886, reversing a decree of Babu Baij Nath Munsif of Agra, dated the 8th April, 1886.

(1) 5 C. 684.

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On appeal the learned Subordinate Judge found that Aman Singh was separate in estate from plaintiff and the sole and exclusive owner of the house in dispute, and therefore had a perfect right to make an absolute gift to his wife, which he did, and that his wife was free to exercise her uncontrolled power of alienation over the property in dispute. He therefore dismissed the suit.

On second appeal it was contended that it has not been shown that the house in dispute was the wife's *stridhan*, and that even then she could not absolutely alienate it.

Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

[497] Mr. *Abdul Majid* and Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J.—In this case the plaintiff brought his action to set aside a deed of gift and a deed of sale. The deed of gift was made by the husband of Musammat Ramo in her favour. It was a gift of immoveable property. But the plaintiff alleged as the foundation of his case that the property was the joint family property of her husband and himself or his predecessors, and the claimed to have the deed of gift avoided on the ground that, under the circumstances, the donor could not give the property in question to his wife. He also asked to get possession of the property.

Now it has been found that the property in question was not joint family property, and that it was in fact separate property of the husband. Under the circumstances, the plaintiff failed to prove the case on which he came into Court. He, however, comes here in second appeal, alleging that he is the heir of the donee, and that she had, under the deed of gift, no right of alienation. It is needless to observe that this is a totally different case from the case that he originally made. It involves different considerations of facts and of law. In the case as now put forward questions would arise as to whether the plaintiff was in fact the heir of the donee or whether he was the heir of her husband. However, although I think that the appeal ought to be dismissed on the ground that it is a totally different case from the case which was put forward and tried, I think that even on the case as put before us the appeal ought to be dismissed.

I am of opinion that the donor intended to give and did give an heritable estate and power of alienation to the donee by the deed of gift. He says :—"I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false."

It appears to me that his intention was that he, the donor, should not, nor should any heirs of his, interfere with the enjoyment and disposal of the property the subject of the gift. Jackson, J., in delivering judgment in the case of *Kunjbehari Dhur* v. *Premchand Dutt* (1), said as follows :—

"We understand it to be a rule of law, well established in this Court, that a Hindu wife takes, by a will of her husband, no more [498] absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the lifetime of her husband ; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right, or power of alienation.

(1) 5 C. 684 at p. 687.

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The ruling recognises the conclusion that if the power of alienation is given, the power can be exercised, and it also is consistent with the rule of law laid down in paragraph 571 of Mayne's Hindu Law, 3rd ed., where the author says :—

"Immoveable property, when given by a husband to his wife, is never at her disposal, even after his death. It is her *stridhanum*, so far that it passes to her heirs, not to his heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male. Of course it is different if the gift is coupled with an express power of alienation."

I have said that if the power of alienation is given to the wife by the husband in any portion of his separate property, it follows that she has the power to alienate it.

Under the circumstances, I think that the appeal should be dismissed with costs.

TYRRELL, J.—I concur. *Appeal dismissed.*

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10 A. 498 = 8 A.W.N. (1888) 205.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMPHAL RAI AND OTHERS (*Defendants*) v. RAGHUNANDAN PRASAD (*Plaintiff*).* [14th May, 1888.]

Public thoroughfare—Obstruction—Right to sue — Special damage—Lease — Right lessee to sue—Trespass.

The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public have been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, has legally and justly a right to bring [499] the action. The findings of fact were, that by the terms of the lease plaintiff was entitled to maintain the action as representing the zemindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadways mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of have encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower appellate Court. *Held*, that in the absence of damage over and above that which in common with the rest of the public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case-law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant has built is included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease.

Satku v. *Ibrahim Aga* (1) and *Karim Baksh* v. *Budha* (2) referred to.

[D., 10 A. 553 (557) ; 7 O.C. 362 (363).]

THE facts of this case are stated in the judgment of the Court.

Mr. *Nieblett*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

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* Second Appeal, No. 1371 of 1886, from a decree of Munshi Matadin, Subordinate Judge of Ghazipur, dated the 28th February, 1886, confirming a decree of Maulvi Inamul Huq, Munsif of Ballia, dated the 24th December, 1885.

(1) 2 B. 457. (2) 1 A. 249.

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JUDGMENT.

MAHMOOD, J.—This case originally came on for hearing before me sitting as single Judge for the disposal of second appeals, and by my order of the 21st April, 1887, I referred the case, for the reasons stated in the order, to a Division Bench consisting of two Judges. The case was accordingly heard by my brother STRAIGHT and myself, and by his order of the 23rd December, 1887, in which I concurred, my learned brother remanded the case, under s. 566 of the Civil Procedure Code, for the trial of certain issues stated in that order. The order also sets forth the twofold aspects in which the case was presented to us by the argument for the parties on that occasion. The plaintiff is the holder of a ten years' lease from the Maharaja of Dumraon, who is a co-sharer of the village along with defendant No. 3. The lease is a *thika* lease of the zemindari rights of the Maharaja, and it was executed on the 24th January, 1885, conferring upon the plaintiff the right of possession and management of the zemindari share,subject to certain conditions and stipulations which need not be mentioned in detail for the purposes of this case. The cause of action for this suit is stated in the plaint to have arisen on the 6th June, 1883, when the defendant is alleged to have built certain constructions upon a plot of land, No. 788, which is included within the area of the village, **[500]** and is stated to be a thoroughfare used by the plaintiff as well as by the public.

The present suit was instituted on the 12th August, 1885, and the case of the plaintiff can best be set forth by quoting from the plaint itself. His case is:—"That by reason of building the house, placing a trough, manger, wood, &c., and tying cattle, the width of the passage, which was ten *lathas*, is now left only eight *lathas*: that the public are very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c.: that the plaintiff by reason of his own inconvenience, also as the lessee in possession of the whole right in the zamindari share of the Maharaja of Dumraon, has legally and justly a right to bring this action." And upon these grounds the plaintiff prayed for the following reliefs:—

"That the house in dispute, the trough, the manager, the wood, &c., built, erected, and placed by the defendants on 1 biswa 18 dhurs of land (bounded as below), part of the passage-site No. 788, valued at Rs.10, be demolished, pulled down, and removed, and the passage-site be levelled and restored to its original state and condition; that the defendants be prevented, in future, from making any appropriation for their own use or doing any act injurious to the convenience of the public;" and the plaint ended up by praying "that any other relief which may be just and proper be also granted."

It is clear from this, as was pointed out by my brother Straight in his remand order of the 23rd December, 1887, that the suit has a double aspect; one being that of an action for an injunction to remove a nuisance caused by the obstruction which the defendant's building upon the land has created, and the other aspect being that of an action in trespass founded upon the plaintiff's alleged right as lessee to possession of the land upon which the erections have been made. The suit was resisted in both its aspects.

So far as the first aspect is concerned, the defendant pleaded that the plot of land being a public thoroughfare and no special damage or injury having been alleged by the plaintiff in consequence of the alleged obstruction, the plaintiff could not maintain the suit, the alleged wrong,

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to a right possessed by the plaintiff in common with [501] the public not being available to him as a sufficient foundation for such an action. Then as to the second aspect of the plaintiff's case, the main defence was that the plaintiff, as a mere lessee, had no *locus standi* to maintain such an action, and that the defendant had been in possession of the land for more than the prescriptive period of twelve years, and the suit was therefore barred by limitation. Further, in respect of both the aspects of the case, the effect of the defence was that the land upon which the defendant had built did not form part of the thoroughfare; that the road had not been narrowed so as to put any one to inconvenience, and that the land on which the defendant had built had from ancient times been in his possession and he had a right to build thereon.

The first Court dismissed the suit, but that decree has been reversed by the lower appellate Court mainly upon the ground "that the constructions have not been in existence for more than twelve years;" "that the houses are new and have been built without the permission and consent of the zemindar;" that the plaintiff could maintain the action "as the representative of the zemindar;" that "it is proved by the evidence that the passage is narrower than before, since formerly three carts used to pass through it, now only one cart can pass, and therefore, if another cart comes from the other direction, inconvenience will surely occur."

In pursuance of my brother Straight's remand order of the 23rd December, 1887, the findings of the lower appellate Court in effect are that the terms of the *thika* lease of the 24th January, 1885, entitled the plaintiff to maintain such an action as representing the zemindari rights of his lessor; that the obstruction or constructions complained of by the plaintiff were erected antecedent to the lease and were in existence at the time when that lease was executed; that "the way referred to by the plaintiff in his plaint is a roadway used by the public in general on foot and with vehicles;" that the house and other buildings have encroached upon the road, and "for the reason the plaintiff complains in his petition of plaint that, besides the injury caused to the public who use this way, the plaintiff's passage along the road and that of his carts, cattle, &c., has been obstructed."

These findings have not been contested by either party under s. 567 of the Code of Civil Procedure, and taking all the findings [502] of fact upon which the lower appellate Court has proceeded, I shall deal with the case upon pure questions of law in the two aspects of the suit stated in my brother Straight's order of remand.

First, then, as to the question whether the plaintiff could, upon the allegations contained in the plaint, maintain this action for removal of an alleged obstruction erected upon land which has been found to form part of a public thoroughfare. For the purpose of deciding this part of the case it is not necessary to consider the plaintiff's right as lessee under the *thika* lease of the 24th January, 1885, for he to that extent comes into Court as one of the public entitled to use the thoroughfare. It is a settled proposition of the English law of torts that obstructions in a public thoroughfare are not actionable as creating a civil liability, unless some particular or special damage or injury is proved to have resulted to the individual person or the determinate body of persons maintaining the action. Such obstructions, being in a public thoroughfare, are classed as public nuisances falling under the same category as many other kinds of public nuisances which need not be referred to for the purposes of this case. But the principles

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upon which the English law of tort proceeds in respect of all the multifarious classes of public nuisances are identical, and those principles do not so much relate to the right as to the form of the remedy. In England and also in America the erection of obstructions in a public thoroughfare are indictable offences under the criminal law; and our own Indian Penal Code, in following the same principles, has virtually defined a public nuisance in s. 268, and has rendered the same punishable as a criminal offence. The Criminal Procedure Code also makes provision for summary proceedings by Magistrates to stop such nuisances. But upon the question whether such public nuisances are in themselves sufficient to sustain a civil action, the statute law so far as I am aware, is totally silent, and it therefore devolves upon Judges sitting in British India virtually to legislate, by judicial exposition, for the people of the country, under the authority of the somewhat indefinite rule of justice, equity and good conscience, which has to be administered, in the absence of any legislative directions, by the Courts of Justice in British India. Such is virtually the effect of the present state of the law of tort in British India, resulting as [503] might well be expected, in a vast conflict of decision on various questions of civil liability *ex delicto*. The practice of the Courts in British India, the highest of which have been presided over by English lawyers, has, however, been to fall back upon the analogies of the English law, and to take it in all cases to be a good guide for applying the rule of justice, equity and good conscience. This method has, in the absence of any definite rules of law governing actions *ex delicto* or other classes of litigation, been approved by the Lords of the Privy Council, and probably the latest *dictum* of their Lordships is contained in *Waghela Rajsanji* v. *Masludin* (1), where, however, their Lordships qualify their observations by indicating that the English law is not to be imported wholesale into India, regardless of the conditions of the people and the country.

Fortunately, upon the exact question now before me, the case-law of British India is decisive, and is the same as the rule of the English law of torts.

The principal authorities of the English law, in their application to Indian cases, were well considered by Westroop, C.J., in *Satku* v. *Ibrahim Aka* (2), and it was there laid down that the plaintiffs could not maintain a civil suit in respect of an obstruction in a public thoroughfare, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The rule so laid down followed many Indian cases upon which the learned Chief Justice relied, and although in that case the obstruction complained of was not of such a permanent character as a building, I hold that the same principle, so far as it requires proof of particular or special damage is applicable to this case: and in this view I am supported by the ruling of this Court in *Karim Baksh* v. *Budha* (3), where the obstruction complained of consisted of the erection of a *chabutra* which encroached upon a public thoroughfare, and the relief prayed for was the removal of a portion of the *chabutra*, the plaintiffs alleging that the encroachment was such that carts and other wheeled conveyances were unable to pass along the road.

Such being the state of the case-law, I do not think the exigencies of this case either require me to enter into the juristic reasons [504] upon which this rule is supposed to proceed, or in the face of the authorities of Indian cases, to open at the question how far those reasons are adopted to the

(1) 14 I.A. 96. (2) 2 B. 457. (3) 1 A. 249.

conditions of British India. I accept the authority of the case-law as it stands, and hold that no action of this kind is maintainable upon the ground that the defendant has erected obstructions in a public thoroughfare, thereby causing inconvenience to the plaintiff with the rest of the public, there being no allegation or proof of special or particular injury or damage having been sustained by the plaintiff in consequence of such obstructions.

As to the second aspect of the case, namely, so far as it can be regarded as an action for trespass, the contention of the parties raises two main questions :—

First, whether the plaintiff, as the lessee under the lease of the 24th January, 1885, is entitled to maintain the action for removal of constructions made upon the land antecedent to the lease and existing at the time when the plaintiff took the lease. *Secondly*, whether under the terms of the lease itself the plaintiff is entitled to maintain this action without joining his lessor, the Maharaja of Dumraon, and other co-sharers of the village as plaintiffs to the action.

Upon the first of these points, Mr. *Spankie*, in arguing the case on behalf of the plaintiff-respondent, has contended that the circumstances that the erections now complained of were constructed antecedent to the plaintiff's lease does not deprive him of the remedy prayed for by him, because, as the learned counsel argues the trespass complained of in this case is of a continuing nature, and as such the continuance of the buildings on the land subsequent to the lease would amount to a sufficient cause of action available to the plaintiff for this suit. In support of this contention the learned counsel relies upon *Holmes* v. *Wilson* (1) and *Bowyer* v. *Cook* (2) the effect of which, as represented in Addison's work on Torts (5th ed., p. 50 and pp. 331-2), seems to be that in the case of continuing trespasses, such as trespass by erecting buildings, as a continuing injury, fresh cause of action arise for recovery of damages, and the author exemplifies this by saying that "if a man throws a heap of stones or builds a wall, or plants posts or [505] rails on his neighbour's land and there leaves them, an action will lie against him for the trespass and the right to sue will continue from day to-day till the incumbrance is removed" (p. 331). This no doubt is a correct enunciation of the English law upon the subject; though speaking for myself as an Indian Judge, I can scarcely regard the rule either as reasonable in itself or fits to be applied to cases in India, because the rule renders multiplicity of actions unavoidable, as pointed out by Mr. Mayne in his work on Damages (3rd ed., p. 89), and I agree with him in the view that "the fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of verdict and would pay him for putting the land into its original state."

I need not, however, consider this rule in this case, for here there is no claim for damages in consequence of the alleged continuing trespass. The form of the action, so far as it can be gathered from the plaint no doubt alleges a trespass, and the substantial relief prayed for asks for an injunction to compel the plaintiff to demolish the erections which he has constructed, and to prohibit him from any future encroachment upon the land. The continuance of such erections may entitle the plaintiff to maintain a suit such as this for their removal, although such constructions were made antecedent to the lease. The right of the plaintiff, however, must be defined and circumscribed by the terms of the lease itself, which

(1) 10 Ad. & E. 503.

(2) 4 C.B. 236.

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fail to show either that the land upon which the defendant has built is included in the lease, or that that document intended to confer upon the plaintiff any power to question the legality of erections which existed at the time of the lease, and for aught that appears to the contrary, the lease itself was given subject to the occupation of the land by existing buildings. Further, the case is bare of proof of the plaintiff's lessor, the Maharaja of Dumraon, ever being in occupation of the land or any specific portion thereof on which the erections have been constructed, and it follows *a fortiori* that the plaintiff himself, whose rights originated with the *thika* lease of the 24th January, 1886, could not have been in occupation of the land when the wrongful entry thereon, by the constructions of the 6th June, 1883, is alleged to have taken place. There is thus no proof of the plaintiff's possession being disturbed, [506] and so far as the nature of the action may be regarded as one of trespass *quare clausum fregit* as understood in the English law of torts, the suit cannot be sustained. Under the circumstances, the fact that the plaintiff's lessor, the Maharaja of Dumraon, and the other co-sharers of the zemindari rights of the village have not joined the action, ceases to be a matter of significance for the decision of this case, especially as there is nothing in the form of the action or the allegations contained in the plaint to justify the suit being regarded as one of ejectment.

For these reasons, I am of opinion that the suit even in its second aspect fails, and that it was rightly dismissed by the first Court, though some of the reasons given for such dismissal may be unsound.

I would decree this appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs in all the Courts.

STRAIGHT, J.—I concur in the judgment and conclusions of my brother Mahmood. *Appeal decreed.*

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10 A. 506 = 8 A.W.N. (1888) 195.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAM CHAND (*Judgment-debtor*) *v.* PITAM MAL AND ANOTHER (*Decree-holders*).* [29th May, 1888.]

Attachment before Judgment—Termination of attachment—Execution of decree—Sale in execution—Material irregularity in publishing or conducting sale without attachment—Civil Procedure Code, ss. 311, 483.

The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is on the 8th of January, 1885, applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed ; but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February, 1887, and accordingly on the 21st December, 1886, a sale notification was issued. Judgment-debtor twice applied for postponement of sale but his applications were refused, and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale urging that the property sold was never attached in execution of the decree and the attachment previous to judgment was infructuous because afterwards the claim was dismissed

* First Appeal No. 131 of 1887, from an order of Maulvi Saiyid Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 16th September, 1887.

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by the Court of first instance; that there had been several other irregularities [507] in publishing and conducting the sale; and that owing to the irregularities property had been sold at a grossly inadequate price causing substantial injury. The Subordinate Judge overruling the objections confirmed the sale. On appeal by the judgment-debtor, *held*, following *Mahadeo Dubey* v. *Bholanath Dichit* (1), that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale.

The following cases were referred to in the course of argument.

Mahadeo Dubey v. *Bhola Nath Dichit* (1), *Chunni Kuar* v. *Dwarka Prasad* (2), *Mohee ooddeen* v. *Ahmed Hossain* (3), *Gangathara Pandita* v. *Rathaboi Ammal* (4), *Imamunissa Bibi* v. *Leakat Hoossain* (5), *Rameshwari Dassee* v. *Dorgadas Chatterjee* (6), *Bakhshi Nandkishore* v *Malikchund* (7), *Jasoda* v. *Mathura Das* (8), *Girdhari Singh* v. *Hardeo Narain Singh* (9), *Macnagten* v. *Mahabir Parshad Singh* (10).

[R., 12 A. 440 (445, 456) = 10 A.W.N. 103; 18 A. 469 = 16 A.W.N. 154; 21 A. 311 (313) = 19 A.W.N, 84; 5 C.L.J. 687 (690); 13 C.L.J. 243 (247); 10 Ind. Cas. 665 (666) = (1911) 2 M.W.N. 249.]

THE facts of this case real fully stated in the judgment of the Court.

Mr. *Colvin* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Hon'ble Pandit *Ajudhia Nath*, for the respondents.

JUDGMENT.

MAHMOOD, J.—The facts of this case are the following:—On the 18th June, 1884, a suit was instituted by the present respondent, Pitam Mal, against the appellant, Ram Chand, for recovery of money, and during the pendency of that suit on the 8th January, 1885, the aforesaid respondent applied, apparently within the meaning of s. 483 of the Code of Civil Procedure, for attachment of property belonging to the defendant. The application was granted on the same day, and attachment before judgment appears to have been made on the 11th January, 1885. It is not clear whether the requirements of s. 484 or s. 485 of the Code were duly observed. The suit, however, was dismissed by the first Court [508] on the 30th March, 1885; but there seems to have been no specific order made by that Court withdrawing the attachment.

The decree of the 30th March, 1885, was however appealed to this Court, and the appeal resulted in decretal of the plaintiff Pitam Mal's suit on the 2nd February, 1886.

It was in execution of this last decree that this litigation was commenced by an application of the decree-holder, Pitam Mal, to execute the decree. The application was made on the 13th November, 1886, and on the 18th December, 1886, the application was granted by an order which directed that the property of the judgment-debtor should be notified for sale on the 1st February, 1887. Accordingly, on the 21st December, 1886, a sale notification was issued; and the judgment-debtor, Ram Chand, by two applications, one made on the 25th January, 1887, and the other

(1) 5 A. 86. (2) A.W.N. (1887) 297. (3) 14 W.R. 334.
(4) 6 M. 237. (5) 3 A. 424. (6) 6 C. 103. (7) 7 A. 289.
(8) 9 A. 511. (9) 3 I.A. 230. (10) 9 C. 656.

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on the 31st January, 1887, prayed for postponement of the sale, apparently under the provisions of s. 305 of the Code of Civil Procedure. Both these applications were, however, disallowed, and the sale of the judgment-debtor's property took place on the 1st February, 1887, at which sale the properties were purchased as follows :—

1. One kothi with shops in Mathra, purchased by Pitam Mal, decree-holder, for Rs, 3,350.
2. One kutcha shop in Mathra, purchased by Pitam Mal, decree-holder, for Rs. 110.
3. One pucka, and stone-built stable in Mathra, purchased by Panna Lal, for Rs. 110.
4. One-fourth of a pucka and stone-built building in Mathra, purchased by Pitam Mal, for Rs. 135.

It will appear from the above specification that, with the exception of property No. 3 all the other properties were purchased by Pitam Mal (decree-holder) himself, and the connection of Panna Lal with this litigation seems to be due entirely to his purchase of the property No. 3 above mentioned.

On the 24th February, 1887, the judgment-debtor, Ram Chand, appellant, preferred objections to the auction-sale of the 1st February, 1887, upon various grounds mentioned in the judgment of the [509] Court below, and that application was resisted by Pitam Mal, the decree-holder, upon pleas which are also stated in the judgment of the lower Court, and need not be repeated here.

The judgment-debtor Ram Chand's objections appear to have been made with the object of setting aside the auction-sale of 1st February, 1887, upon grounds contemplated by s. 311 of the Civil Procedure Code; but those objections have been disallowed by the lower Court, which has held that the attachment before judgment was a sufficient attachment, because although the suit, during the pendency whereof the attachment was made ended in dismissal, the attachment itself had never been withdrawn; that the sale-notification having been affixed to the door of the Court-house, it was not shown that the sale had taken place within thity days of the issue of the sale-notification; that a proclamation by beat of drum was duly made and the "notifications were duly issued and affixed at the locality of the property;" that "the law does not require any proclamation to be made by beat of drum at the time of sale; and that there was actually made a proclamation at time of the sale of the property in suit such as is generally made at such times by amins conducting sales;" that when a time for sale is specified in a notification, "it is not thereby intended that the sale must begin exactly at the same time and on the same day as mentioned in the notification." Finally, the lower Court has held that "no irregularity having been made in the issue of notification and conducting the sale, no finding need be made as to the point whether or not the property in suit has been sold for an inadequate price;" but to this view of the law the learned Subordinate Judge adds the following observation :—"However, as regards the question of the inadequacy of price, I hold that the alleged rate is not proved by any oral or documentary, reliable or trustworthy evidence." The effect of the learned Subordinate Judge's judgment is to confirm the sale of the 1st February, 1887, and the order must be understood to have been passed under s. 312 of the Code of Civil Procedure, disallowing the objections raised by the judgment-debtor, Ram Chand, appellant, It has been argued by the learned Pandit, on behalf of the respondent,

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that the order of the lower Court, so far as it disallowed objections to the sale, is not appealable within the meaning [510] of cl. (16), of s. 588 of the Code of Civil Procedure; but this contention is opposed to the Full Bench ruling of this Court in *Tota Ram* v. *Khub Chand* (1) where I stated my reasons for holding that such orders are appealable. To the reasons I then stated I have nothing to add, beyond saying that in this case the order of the lower Court disallowing the objections of the judgment-debtor to the auction-sale of the 1st February, 1887, and confirming that sale is one and the same order, and, as such, appealable under cl. (16) of s. 588 of the Code of Civil Procedure. The rest of the argument addressed to us on behalf of the parties, however, raises the following questions for determination:—

(1) Whether an attachment before judgment, such as the attachment of the 11th January, 1885, was not good and valid attachment for purposes of the execution of the High Court's decree of the 2nd February 1886, notwithstanding the dismissal of the suit by the first Court on the 30th March, 1885?

(2) If not, whether the absence of a valid attachment at the time of sale of the 1st February, 1887, can be regarded as "a material irregularity in publishing or conducting" the sale so as to be questioned under s. 311 of the Code?

(3) If so, whether the action of the judgment-debtor in making the applications of the 25th January, 1887, and 31st January, 1887, praying for postponement of the sale, amounts to a waiver on his part of any irreguarities so as to preclude him from contesting the sale upon the ground that there was no valid attachment?

(4) If so, whether such irregularity would in itself be sufficient to vitiate the sale without proof of "substantial injury" within the meaning of that section?

(5) Whether in this case any such "substantial injury" is proved as is contemplated by s. 311 of the Code?

As to the first of these questions, it is necessary to premise that we cannot go behind the Full Bench judgment of this Court in *Mahdeo Dubey* v. *Bhola Nath Dichit* (2) where the whole Court unanimously adopted the view of my brother STRAIGHT that a regularly perfected attachment is an essential preliminary [511] to sales in execution of simple decrees for money; and where there had been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void.

This being so, we have been referred by the learned Pandit to the provisions of ss. 483, 485, 488, and 490 of the Code of Civil Procedure; and also to the form No. 163 in schedule IV, of the Code relating to attachment before judgment of immoveable property, in which form the words "*until the further order of this Court*" occur; and relying upon these provisions, the learned pleader argues that inasmuch as in the present case no further order withdrawing the order of attachment before judgment was passed the attachment must be taken to have subsisted for all purposes of execution, including the sale of the 1st February, 1887. On the other hand, Mr. *Colvin* relies upon the last part of s. 488 to show that an attachment before judgment comes to an end "when the suit is dismissed;" and the learned counsel also lays stress upon the provisions of s. 490, and argues that the words of that section contemplate that it is only when a decree is given *in favour* of the plaintiff that re-attachment in

(1) 7 A. 253.   (2) 5 A. 86.

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execution of such decree is dispensed with, implying that such attachment is necessary where the suit ended in dismissal of the plaintiff's claim. For this contention the learned counsel also relies upon the ruling of the learned Chief Justice in *Chunni Kuar* v. *Dwarka Prasad* (1) where it was held that a temporary injunction under s. 492, notwithstanding the use of the phrase " till further orders," comes to an end on the termination of the suit in which such injunction was passed, although no express order had been made by the Court withdrawing or setting aside such injunction.

I am of opinion that this contention is sound, and that the case last cited, though relating to temporary injunction, proceeds upon a principal analogous to attachments before judgment, both being *ad interim* proceedings which naturally cease to have any force as soon as the suit itself, in respect of which they were taken, comes to a close. In other words, an attachment before judgment under s. 488, like a temporary injunction under s. 492 becomes *functus officio* as soon as the suit terminates. It is true, as was argued by the learned Pandit, that s. 492 does not expressly mention an [512] order by the Court removing or setting aside the injunction, and in this respect the language of s. 488, as to the removal of attachment before judgment, is more express; but I do not think that this circumstance alters the principle applicable to *ad interim* proceedings, nor do I think that the last part of s. 488 requiring the Court to remove the attachment is intended to be more than directory, or in other words so imperative as to render an attachment before judgment a perpetual attachment in the absence of an order removing the same. For this view I rely upon the reasoning employed by the learned Chief Justice in connection with temporary injunctions in the case which I have already cited. If attachments before judgment, such as those contemplated by s. 485, were intended to continue operative notwithstanding the dismissal of the suit, I should say that s. 490 of the Code would have been a surplusage, for that section implies that, even where a suit is decreed, an attachment before judgment would come to an end with the decision of the suit but for the provision which that section has made. This view is in accord with the judgment of Sir Louis Jackson in *Mohee-ood-deen* v. *Ahmed Hossein* (2), and I hold that that ruling though passed under the Code of 1859, is applicable in principle to this case. Pandit *Ajudhia Nath* on behalf of the respondent, has indeed argued that the phrase *any decree which may be passed in the suit*," as it occurs in s. 485, of the Code, must be understood to mean that an attachment before judgment is to remain operative for the satisfaction of " any decree " which may be passed in any appeal made from any decree in such suit; and upon this ground the learned pleader contends that the High Court's decree of the 2nd February 1886, was a decree in the " suit. " I cannot accept this contention, because it would render s. 485 inconsistent with the last part of s. 488, which directs the Court passing the order of attachment before judgment to remove such attachment "*when the suit is dismissed.*" It could scarcely be contended that during the interval between the dismissal of the suit, on the 30th March, 1885, and the filing of the appeal to this Court which resulted in the decretal of the claim on the 2nd February, 1886, there was any litigation pending in any Court; and if I were to hold that the attachment of the 11th January, 1885, sub-[513]sisted during that interval, I thould be laying down the untenable rule that an *ad interim* order survives the pendency of the main litigation itself; and indeed if I were to

(1) A.W.N. (1887) 297. (2) 14 W.R. 284.

hold this, I should be driven to the logical conclusion that such *interim* order of attachment subsists for ever whether there is or is not an appeal, unless and until such order is expressly withdrawn. I hold therefore that inasmuch as the suit in which the attachment of the 11th January 1885, was made, terminated in dismissal on the 30th March, 1885, that attachment ceased to be operative after that date, and that, since no further proceedings are alleged to have been taken to attach the property in execution of the High Court's decree of the 2nd February, 1886, there was no valid attachment subsisting on the 1st February, 1887, when the judgment-debtor's properties were sold by auction.

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Upon the second question above enunciated by me, the learned Pandit has argued that absence of a valid attachment at the time of sale is not such "a material irregularity in *publishing or conducting*" the sale as s. 311 of the Code contemplates; and that even accepting the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (1), such questions cannot be agitated by the judgment-debtor after the sale has actually taken place. For this contention the learned pleader relies on *Gangathara Panditha* v. *Rathabai Ammal* (2), where it was held that after a sale of land in execution of a decree and before its confirmation, the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred by the provisions of s. 230 of the Code of Civil Procedure. On the other hand, Mr. *Colvin*, in resisting this contention, relies on *Imamunissa Bibi* v. *Liakat Husain* (3), and *Ramessuri Dassee* v. *Doorga Dass Chatterjee* (4), the effect of which cases is to lay down the rule that an omission to give the notice required by s. 248 of the Code to the judgment-debtor affects the regularity of the sale, and might be dealt with as a matter falling within the purview of s. 311 of the Code of Civil Procedure. The learned Counsel further relies on *Bakshi Nand Kishore* v. *Malak Chand* (5), where Oldfield, J., with my concurrence, held that an infringement of the rule contained [514] in s. 290 of the Civil Procedure Code, is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers. Again, the learned Counsel cites *Jasoda* v. *Mathura Das* (6), to which the learned Chief Justice and myself were parties, and we held that non-compliance with the provisions of ss. 287 and 290, which sections provide for the contents of the proclamation of sale and the period at which such sale should be held after the proclamation, is more than mere irregularity, and that it must be taken to have caused such substantial injury as would vitiate the sale within the meaning of s. 311 of the Code of Civil Procedure. In delivering my judgment in that case, I gave expression to a doubt as to whether "a material irregularity" within the meaning of the first paragraph of s. 311 would not in itself be sufficient to justify a Court in setting aside a sale without inquiring whether such irregularity had resulted in "substantial injury" within the meaning of the second paragraph. The view so expressed is contested by the learned Pandit on behalf of the respondent, and I shall presently consider it in deciding the third point in the case. But so far as the second point is concerned, I am of opinion that the authorities cited by Mr. *Colvin*, and already referred to by me, justify me, in holding that a broad and liberal construction must be placed upon the phrase "a material irregularity in publishing or conducting" a sale as that phrase is employed in the first paragraph of

(1) 5 A. 86. (2) 6 M. 237. (3) 3 A. 424. (4) 6 C. 103.
(5) 7 A. 289. (6) 9 A. 511.

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s. 311 of the Code. The words "publishing or conducting" are words of a very general import, and unless there is anything in the Code to restrict their ordinary meaning, the recognised rules of interpreting statutes require that such interpretation should be in the ordinary sense of the words. It is probably not easy to define exhaustively what matters would fall under the category of material irregularity in publishing or conducting a sale; but the point here is limited to the question whether absence of attachment at the time of the sale is any such material irregularity.

I must answer the question in the affirmative, consistently with the principle upon which the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhola Nah Dichit* (1) and the other cases cited by Mr. *Colvin* proceed. It seems to me that there is a distinction [515] between matters which relate to the capability of a decree for execution and matters which do not relate to such capability, but to the mode in which the decree is to be executed and satisfied. The Code of Civil Procedure has, indeed, placed both these classes in Chapter XIX under the general heading of rules relating to the execution of decrees. But that chapter is sub-divided into various headings mentioned in my brother Straight's judgment in the Full Bench case just referred to. Heading D, which consists of only one section (244), describes questions to be decided by the Court executing the decree, and it seems to me that even the general terms of clause (c) of that section cannot be understood to include such matters as are contemplated by s. 312 of the Code, because when a sale has taken place, auction-purchasers who, as such, are no parties to the decree become interested in such questions, and become necessary parties to applications for setting aside sale. The provisions of s. 244 being thus unavailable to the judgment-debtor in cases where a sale has actually taken place without any attachment, it can only be under s. 311 of the Code that he has his remedy for setting aside the sale, upon the ground that absence of attachment was "a material irregularity" within the meaning of that section. Nor do I think that it is extending the meaning of the phrase too far.

The general principle of law is that the only person who can sell property is the owner, and it is only by reason of statutory provisions arising from the exigencies of the administration of justice that the Courts possess authority to order compulsory sales, such as auction-sales in execution of decrees. But in conferring this power, the law has provided specific rules of procedure in order to guard against injustice. Among those safeguards attachment is perhaps the most important preliminary to bringing property to auction-sale. It is the first step which the Court in executing simple money-decrees has to take to assert its authority to bring property to compulsory sale, and I do not see why the omission to take such a step should not be regarded as a material irregularity within the meaning of s. 311 of the Code. Objections based upon the absence of attachment are not objections which attack the capability of a decree for execution, [516] as was the case in *Gangathara Panditha* v. *Rathabai Ammal* (2), where the objection upon which sale was sought to be set aside was that the decree itself was barred by limitation. The nature of such an objection is of course such as would fall under s, 244 of the Code ; and the learned Judges in that case accordingly held that the objection was too late when made after the sale had actually taken place, and the proper occasion for such objection was before the sale took

(1) 5 A. 86. (2) 6 M. 237.

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place. Now, in cases where no attachment has taken place, and property is proclaimed for sale under s. 287 of the Code, it could scarcely be expected that the judgment-debtor would take proceedings to secure a valid attachment of the interests of the opposite party, namely, the decree-holder. And if this is so, it seems that the only opportunity which the judgment-debtor could have for basing any objections as to the absence of a valid attachment would be after the sale has actually taken place.

The learned Pandit has, however, in arguing the third point, contended that in this case the action of the judgment-debtor in making the applications of 25th January, 1887, and 31st January, 1887, praying for postponement of the sale, amounted to waiver on his part of any such irregularity as would arise from the absence of attachment ; and for this contention the ruling of the Privy Council in *Girdhari Singh* v. *Hardeo Narain Singh* (1) and *Macnaghten* v. *Mahabir Pershad Singh* (2) are cited. In the former of these cases the judgment-debter obtained a postponement of sale upon an express stipulation of " the attachment and notification of sale being maintained", and the order of postponement having been made in those terms, the Lords of the Privy Council held that the judgment-debtor could not after the sale complain of any irregularity in such notification. The case, however, is distinguishable from the present, because here no such express specification, as to the validity of the notification, or its being allowed to be maintained, was made ; and in the next place, neither of the applications for postponement of sale was granted. In the latter case, all that the Lords of the Privy Council ruled was that an objection as to any particular irregularity could not be taken, for the first time in the Court of appeal. Such, however, is not the case here, for the objection [517] was taken in the Court of first instance. I am therefore of opinion that neither of these Privy Council rulings governs this case so as to preclude the judgment-debtor from contesting the validity of the auction-sale.

Dealing now with the fourth question in the case, I have already said that in delivering my judgment in *Jasoda* v. *Mathura Das* (1), I was inclined to hold that a "material" irregularity as distinguished from a simple irregularity, would vitiate a sale without proof of "substantial injury" within the meaning of the second paragraph of s. 311 of the Code. The learned Pandit has argued that this view is opposed to the *dicta* of the Lords of the Privy Council in *Girdhari Singh* v. *Hardeo Narain Singh* (2) and in *Macnaghten* v. *Mahabir Pershad Singh* (3), and I confess that there may be much force in this contention. But it is not necessary in this case to go further into the matter, because, as I have already shown, the effect of the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (4) requires that in this case the sale of the 1st February, 1887, must be held to be void for want of a valid attachment.

This view renders the decision of the fifth point in the case unnecessary, because the absence of attachment is in itself sufficient to set aside the sale without any inquiry as to substantial injury being sustained by the judgment-debtor. For these reasons I would decree this appeal, and, reversing the order of the lower appellate Court, set aside the auction-sale of the 1st February, 1887, with costs in both Courts.

BRODHURST, J. I concur.

Appeal decreed.

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(1) 3 I.A. 230. (2) 9 C. 656. (3) 9 A. 511. (4) 5 A. 86.

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JUNE 23.

APPELLATE CIVIL.

10 A. 517=
8 A.W.N.
(1888) 183.

10 A. 517=8 A.W.N. (1888) 183.

APPELLATE CIVIL.

Before Sir John Edge Kt., Chief Justice, and Mr. Justice Tyrrell.

SALONI AND ANOTHER (*Defendants*) *v.* HAR LAL (*Plaintiff*).*
[23rd June, 1888.]

Act XVII of 1886, *s.* 8—*Dercee made in British India—Suit on Judgment in Native territory—Cession of territory to British Government pending suit—Civil Procedure Code, s.* 13.

Prior to the cession of the town of Jhansi to the British Government, plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment [518] of the British Court in Jhansi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower appellate Court for trial on the merits.

Held, that the recital in part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhansi to the British Government should be continued in the Courts of the Jhansi district after the cession thereof; therefore the present suit, which, if it had been originally instituted in a Court of British India, could not have been maintained, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court where it was instituted, and it is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied.

King v. *Hoare*(1), referred to as illustrating the distinction between an original cause of action and cause of action founded upon a judgment recovered on the original cause of action.

PRIOR to the cession of the town and fort of Jhansi to the British Government in full sovereignty by His Highness the Maharaja, Scindia, the father of the plaintiff had obtained a decree for Rs. 2,959-12-6 with costs against the father of the defendant from the Court of the Assistant Commissioner of Jhansi presided over by Mr. McLean. After partial satisfaction of the decree within the Jhansi district, the plaintiff on the 11th of December, 1885, brought his suit for the unpaid balance of the decree in the Subah's Court in the Gwalior State, and the suit was pending in that Court when by Act XVII of 1886 the town of Jhansi came under the jurisdiction of the Courts in the Jhansi district.

On the 1st of February, 1887, the suit was made over by the Deputy Commissioner of Jhansi to the Court of the Assistant Commissioner of Jhansi and that officer dismissed the suit; remarking "the suit having already been decided by Mr. McLean, is evidently barred by s. 13, Act XIV of 1882."

On appeal to the Commissioner of Jhansi, that officer holding that the cause of action in the suit decided by Mr. McLean was not the same as that which led to the present suit, reversed the order of the lower Court, and remanded the cause for trial on the merits.

On appeal against this order of remand it was again contended that s. 13 of the Code of Civil Procedure barred the suit.

[519] Messrs. *Khushwakt Rai* and *Malcolmson*, for the appellants.

Mr. *Amir-ud-din*, for the respondent.

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* First Appeal, No. 72 of 1888, from an order of E. Ward, Esq., Commissioner of Jhansi, dated the 30th August, 1867.

(1) 13 M. & W. 504=14 L.J. Ex. 29.

JUDGMENT.

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APPELLATE CIVIL.

10 A.517 = 8 A.W.N. (1888) 183.

EDGE, C.J., and TYRRELL, J.—Prior to the cession of the town of Jhansi and the lands ceded therewith to the British Government, the plaintiff had obtained a judgment in the Assistant Commissioner's Court of Jhansi, that is, in one of the Courts in British India. That decree was for 3,000 odd rupees. After obtaining that decree and before the cession of the territory, he brought his action against the same defendants in the territory of Gwalior on the decree obtained in British India. *Prima facie* that was a perfectly good action. Whilst the suit in Gwalior was pending and undetermined, the territory, in which was the Gwalior Court before which that suit was pending, was ceded to the British Government. The question is whether the action which was pending in Gwalior can, under s. 8 of the Act XVII of 1886, be continued in what is now part of British India. The first Court thought that s. 13 of the Code of Civil Procedure applied. The Commissioner of Jhansi, sitting as a Court of appeal, correctly held that s. 13 did not apply. The cause of action was not the same. The action which is now pending in the Court was, so far as the Court in Gwalior was concerned, brought on the then foreign judgment or decree, and that action was the only course which was left open to the plaintiff to enforce in Gwalior the judgment which he had obtained in British India. The recital in Part II of the Act shows that it was intended that suits which were pending in the Courts of His Highness the Maharaja Scindia should be continued in the Courts of the Jhansi district. The only difficulty we have had was to ascertain what was the meaning of the words in s. 8, "but otherwise in accordance with the law and procedure of British Indian Courts." Although this action, if it had been originally brought in a Court in British India, could not have been maintained, being an action on a judgment of a Court in British India, still it was a good and maintainable action in the Court in which it was instituted and was pending at the time of the cession of the territory. We think it must be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied. [520] The distinction which the Commissioner of Jhansi has very properly drawn between the original cause of action in and the cause of action in this suit, is illustrated in the judgment in *King* v. *Hoare* (1).

The appeal is dismissed with costs. *Appeal dismissed.*

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10 A. 520 = 8 A.W.N. (1888) 210.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GAJADHAR AND OTHERS (*Defendants*) v. MUL CHAND AND OTHERS (*Plaintiffs*).* [4th May, 1888.]

Mortgage—Sale of equity of redemption—Suit by mortgage for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.

On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*

* Second Appeal, No. 1681 of 1886, from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 23rd June, 1886, confirming a decree of Muhammad Nasrullah Khan, Subordinate Judge of Jaunpur, dated the 1st December, 1884.

(1) 13 M. & W. 504 = 14 L.J Ex. 29.

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APPELLATE CIVIL.

10 A. 520 = 8 A.W.N. (1888) 210.

and in August, 1872, in execution of that decree, sold the said groves and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* has been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves.

Held, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interests of the mortgagee, and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of the mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act.

[521] *Muhamad Sami-ud-din* v. *Man Sing*. (1) followed.

The following cases were referred to and considered in the judgment:—

Abdulla Saiba v. *Abdulla* (2), *Mohan Manor* v. *Togu Uka* (3), *Khub Chand* v. *Kalian Das* (4), *Ali Hasan* v. *Dhirja* (5), *Sita Ram* v. *Amir Begam* (6), *Bhup Singh* v. *Gulab Rai* (7), *Ramanath Das* v. *Boloram Phookun* (8), *Naran Purshotam* v. *Dolatram Virchund* (9).

[F., 13 A. 315 (319) = 11 A.W.N. 90; R., 20 B. 390 (392); 9 Ind. Cas. 513 (519); 21 M.L.J. 213 = 9 M.L.T. 431 = (1911), 1 M.W.N. 165 (173); D., 9 A.W.N. 91.]

THIS was a suit for possession of certain groves and two sugar mills.

The plaintiffs in the suit had in the year 1872 obtained a decree for rent against one Durga, and in August, 1872, in execution of that decree, caused the groves and mills to be sold, and at the sale purchased them themselves. Prior to this, that is, on the 21st of December, 1871, the defendants, Durga Dubey and his brothers Ramessar, Jagessar and Purmessar, had mortgaged the four groves to one Maulvi Hyder Husain. Maulvi Hyder Husain had notice of the sale to plaintiffs, in fact, he opposed the sale. He then brought a suit against the mortgagors and obtained a decree on his mortgage, and under that decree brought the groves to sale in July, 1877, and purchased them himself. The plaintiffs were not made parties to this action, nor does it appear that they ever had objected to the sale by Maulvi Hyder Husain. In the month of May, 1880, Maulvi Hyder Husain sold the groves to the defendants Purmessar Dubey and Sundar Dubey, and in May, 1882, they were recorded by the Settlement Officer as the owners of the groves and the objections of the plaintiffs to this record being made, were disallowed.

The plaintiffs alleged that they were dispossessed of the groves by the defendants in the year 1882 and brought this suit.

The defendants in their answer contended, amongst other contentions, that as Maulvi Hyder Husain had purchased the groves at a sale under a decree enforcing a lien upon the groves which had existed prior to the plaintiffs' purchase in 1872, their title derived from Maulvi Hyder Husain ought to prevail over that of the plaintiffs.

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(1) 9 A. 125. (2) 5 B. 8. (3) 10 B. 224. (4) 1 A. 240.
(5) 4 A. 518. (6) 8 A. 324. (7) A.W.N. (1886), 70.
(8) 7 C. 677. (9) 6 B. 538.

[522] The learned Subordinate Judge of Jaunpur decided that the title of the plaintiffs was superior to that of the defendants, and decreed possession of the groves with a certain amount of damages in favour of the plaintiffs.

1888 MAY 4. — APPELLATE CIVIL. — 10 A. 520 = 8 A.W.N. (1888) 210.

In appeal to the learned Judge of the district, the defendants again contended that what was sold in the year 1872, at the instance of the plaintiffs, was subject to the lien upon the groves created in favour of Maulvi Hyder Husain in December, 1871, and therefore they, as representatives of Hyder Husain, had the better and superior title. The learned Judge held that inasmuch as the plaintiffs, who were owners of the groves at the time when Maulvi Hyder Husain brought his suit on his mortgage, were not made parties to the suit, the decree obtained by him did not bind them, and further as the property sold in 1877 did not then belong to the judgment-debtors of Maulvi Hyder Husain, he acquired no title to the groves by their sale at auction in this favour, and consequently the defendants acquried no title to the groves in suit by their purchase from Maulvi Hyder Husain. The appeal was accordingly dismissed.

In second appeal the defendants again urged the above contention.

Mr. *G. T. Spankie*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

EDGE, C. J.—This is an action for possession. The plaintiffs allege that they were ejected by the defendants. The defendants deny that the plaintiffs were ever in possession. There are no findings on this issue. The question under appeal have been brought before us on different lines. On the 21st December, 1871, three of the defendants mortgaged the four groves in suit to Maulvi Hyder Husain. In 1872 the plaintiffs obtained a money-decree against Durga, and in August, 1872, in execution of that decree, sold the groves in question, and at the sale purchased them, and also two mills. It has been found below that that decree had the same effect as if it had been against all the mortgagors. Of this sale Maulvi Hyder Husain had notice; in fact, he opposed the sale. At a later period Maulvi Hyder Husain the mortgagee, sued the mortgagors, on the mortgage, and obtained a decree on the [523] mortgage, and under that decree brought the groves to sale in 1877, and purchased them himself. In May, 1880, Maulvi Hyder Husain sold the groves to two of the defendants. It is quite clear that the plaintiffs are entitled to a decree for possession so far as the two mills are concerned. The title to them has not been disputed before us. What we have to consider is what is the position of the parties with regard to the property which was mortgaged on the 21st December, 1871. The plaintiffs were not made parties to the action which resulted in the decree under which Maulvi Hyder Husain sold the property in 1877.

A great number of cases have been cited to us in the argument in this case.

I think there can be no doubt that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors as they existed at the date of the mortgage of the 21st December, 1871, with which would go the rights and interests of the mortgagee. I think this proposition is established by the following authorities:—*Abdulla Saiba* v. *Abdulla* (1) and *Mohan Manor* v. *Togu Uka* (2). The same principle is enunciated by Mr. Justice Turner in

(1) 5 B. 8. (2) 10 B. 224.

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the case of *Khub Chand* v. *Kalian Das* (1). That, in my judgment, is subject to this, that although at a sale under a drcree for sale by a mortgagee, as in this case, the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title, and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree who was not a party to the action in which the mortgagee's decree was obtained, would have the right to redeem the property which the mortgagor would have had had it not been for the decree. I am aware that this view is at variance with the decisions of this Court in the following cases :—*Khub Chand* v. *Kalian Das* (2), *Ali Husain* v. *Dhirja* (3), *Sita Ram* v. *Amir Begam* (4). With regard to the latter case my brother Mahmood followed the ruling of Mr. Justice Turner in *Khub* [524] *Chand* v. *Kalian Das* (2). My brother Mahmood expressed his doubts in *Bhup Singh* v. *Gulab Rai* (5) as to the correctness of the rule laid down by Mr. Justice Turner. My view in regard to the conflict of authority when it is considered is that it is safer for us to follow the principle which my brothers Straight and Tyrrell laid down in the case of *Muhamad Sami-ud-din* v. *Man Singh* (6), particularly as that principle has been recognised and acted on by the High Court of Bombay, and is consistent, in my view, with the true principles of equity. It is also the principle which has been recognised in the Transfer of Property Act. Mr. *Amir-ud-din* contended for the respondents that nothing passed at the sale in 1877, and for that proposition he relied on the case of *Ramanath Dass* v. *Boloram Phookun* (7), and the case of *Naran Purshotam* v. *Dolatram Virchand* (8). The cases in I. L. R., 7 Calc., 677, apparently assumed that what could be sold was that mortgagor's right at the date of the sale. The case in I. L. R., 6 Bom., 538 does not appear to me to be in support of Mr. *Amir-ud-din's* contention. I am of opinion that this action must fail in so far as it claims possession of the four groves, and that it must succeed so far as the possession of the two mills are claimed. We make a decree that the plaintiffs may redeem if they commence proper proceedings to ascertain the amount within six months. The appellants will succeed as to the four groves and the Rs. 20 damages for the mango trees and will fail as to their claim for the two mills. Under these circumstances I think the appeal should be allowed in part and dismissed in part without costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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(1) 1 A. 245. (2) 1 A. 240. (3) 4 A. 518. (4) 8 A. 324.
(5) A.W.N. (1886) 70. (6) 9 A. 125. (7) 7 C. 677. (8) 6 B. 538.

10 A. 524=8 A.W.N. (1888) 218.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

JAG LAL (*Defendant*) v. HAR NARAIN SINGH (*Plaintiff*).*
[7th May, 1888.]

Act XV of (Limitation Act), ss. 5, 15—Admission of appeal beyound time—"Sufficient cause"—Appeal filed in wrong Court—Bona fide *proceedings—Jurisdiction—Valuation of suit.*

Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters, to be governed by the [525] statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigations.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.

To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court "*bona fide*," that is, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court.

[N.F., 184 P.R. 1889 ; **Appl.**, 13 A. 320 (323)=11 A.W.N. 107 ; **Appr.**, 9 Ind. Cas. 414 ; R., 12 A. 581 (586) ; 28 A. 545 (550)=3 A.L.J. 266=A.W.N. (1906) 99 ; 13 M. 269 (271) ; 21 B. 552 (554) ; 28 B. 235 (237)=5 Bom. L.R. 947 ; 12 C.W.N. 25 (272) ; 34 C. 216=5 C.L.J. 380 ; 118 P.R. 1908 ; (1912) M.W.N. 476 (486) ; 2 O.C. 103 (106) ; 3 O.C. 265 (267) ; 6 O.C. 255 (258) ; 6 C.P.L.R. 85 (86) ; 14 C.P.L.R. 154 (157).]

THIS was a suit for possession of shares in certain revenue-paying mahals.

The plaintiff in the suit, who owned the said shares, alleged in his plaint that the defendants had fraudulently caused him to execute a sale-deed of the same in their favour for the nominal consideration of Rs.3,000 and obtained possession thereof. The plaintiff valued his claim and the subject-matter of the suit at Rs. 10,000, and the suit was instituted in the Court of the Subordinate Judge of Azamgarh.

The defendants in their written statement did not contest the valuation of the suit, but resisted it on other grounds.

On the 11th June, 1886, the Subordinate Judge decreed the plaintiff's claim and from that decree Jag Lal, one of the defendants, appealed to the District Judge at Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal filed in his Court to the defendant, finding that the value of the subject-matter of appeal exceeded Rs. 5,000, the pecuniary limits of his appellate jurisdiction.

The defendant Jag Lal then on the 13th December, 1886, presented his appeal to the High Court, where it was admitted by order of a single Judge, subject to any objection that might be raised at the hearing on the ground that the appeal was not presented within the time allowed by law.

At the hearing of the appeal, Counsel for the respondent contended,

* First Appeal No. 207 of 1886, from a decree of Rai Manmohan Lal, Subordinate Judge of Azamgarh, dated the 11th June, 1886.

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that the appeal had been preferred much beyond the period [526] of limitation provided by law, and that no circumstances existed to justify the Court, as a Court of appeal, in admitting it after the period prescribed therefor had expired.

On behalf of the appellant it was urged in reply that under the peculiar circumstances of the case, the provisions of s. 5 of the Limitation Act were available to him and the Court in exercising its discretionary powers might resort to the analogy of the law contained in s. 14 of the Limitation Act. Appellant further urged that as he set up the plea that the value of the property was Rs. 3000, which he paid as the sale consideration, he was justified in preferring his appeal to the District Court. It was not stated on his behalf that by reason of any mistake of fact he had been led to prefer this appeal in the first instance, to the District Court.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

The Hon'ble *T. Conlan*, and Mr. *Simeon* for the respondent.

JUDGMENT.

MAHMOOD, J.—In this case a preliminary objection has been raised by Mr. *Conlan* on behalf of the plaintiff-respondent, to the effect that this appeal has been preferred to this Court and admitted beyond the period of limitation provided by law, without any such circumstances existing as would justify this Court, as a Court of appeal, in admitting the appeal beyond time, under the provisions of s. 5 of the Limitation Act. The plaint clearly shows that the plaintiff valued his claim and the subject-matter of the suit at a sum of Rs. 10,000, and in the litigation the defence set up by the defendant did not expressly dispute such valuation of the suit, but resisted the suit upon other grounds, which have no strict bearing upon the question of jusridiction. The Court of first instance decreed the claim holding that the property belonged to the plaintiff, and that the sale-deed set up by the defendant was fraudulent and fictitious.

This decree was passed on the 11th June, 1886, and from that decree the defendant preferred an appeal to the District Judge of Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal finding that the subject matter of litigation exceeded the sum of Rs. 5,000, which was the pecuniary [527] limit of his appellate jurisdiction. This having occurred, the present appeal was not presented to this Court before the 13th December, 1886, from the decree of the first Court dated the 11th June, 1886.

It is clear, and there is no contention that this appeal calculated by the ordinary rules of computing the period of limitation is barred, and the only ground upon which Mr. *Kashi Prasad* has asked us to hear this appeal and to dispose of it upon the merits is that under the peculiar circumstances of this case the provisions of s. 5 of the Limitation Act are available to his client, and in exercising the discretionary powers conferred upon us as a Court of appeal we might resort to the analogy of the law contained in s. 14 of the Limitation Act.

This appeal has been already admitted by the order of a single Judge, subject to any objection that may be raised at the hearing of the case, and even if no such qualification had been made, the Full Bench ruling in the case of *Dubey Sahai* v. *Ganeshi Lall* (1) has laid down that the

(1) 1. A. 34.

Bench which has to deal with the case finally is entitled to dispose of such questions. 1888 MAY 7.

The question then is,—Is this appeal within time, or rather has this appeal been preferred within such time as would entitle the appellant to the benefit of the discretionary power of s. 5 of the Limitation Act? I may say at once that s. 14 of the Limitation Act is not directly applicable to this case, because that section applies only to suits and applications, and has no reference to appeals such as the one now before us; because if it did apply to appeals, then s. 5 of the limitation law would, to that extent, amount to a surplusage, an interpretation which I am not willing to place upon the Limitation Act. APPELLATE CIVIL. 10 A. 524 = 8 A.W.N. (1888) 218.

It has been contended on behalf of the appellant that the action of the defendant-appellant in preferring the appeal to the Court of the District Judge of Azamgarh was a *bona fide* proceeding. Mr. *Kashi Prasad* does not say that such proceeding was the result of any error of fact, and his argument does not suggest that it was an error other than that of law. The learned pleader argued that where a plaintiff values his claim at a particular sum of [528] money, and the defendant raises a plea disputing such valuation, reducing it to a sum lower than that named by the plaintiff, an unsuccessful defendant in such a litigation has got a right, in appealing from the decree of the first Court, to go not to the Court which would have jurisdiction with reference to the pecuniary valuation of the suit, but to the Court which with reference to the defence set up by the defendant as to the valuation of the suit would ordinarily have jurisdiction. And upon this argument the learned pleader argues that because the defendants in this case had set up a plea that Rs. 3,000 was the value of the property in suit, therefore they were perfectly justified in not preferring their appeal to this Court, but preferring it to the Court of the District Judge of Azamgarh.

I am of opinion that this contention is entirely unsound. Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. A plaintiff may sue for a million pounds as damages either for a tort committed or as the value of certain moveable property which can no longer be recovered. The defendant may, in such an action, plead that the amount of damages claimed is excessive, and the value of the property is also exaggerated, and that in either case all that the plaintiff is entitled to is far less than the million pounds. The question is at which assessment the question of jurisdiction is to be settled? Is it the valuation of the claim as preferred by the plaintiff or the plea set up in defence? I have no hesitation in saying that it is the valuation of the plaint which would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. In support of this view I need only cite the Full Bench ruling of this Court in *Mahomed Hossein Khan* v. *Shib Dyal*(1) and the views expressed by my brother Straight in *Gobind Singh* v. *Kallu* (2). [see also *Chunder Koomar Mundul* v. *Bakur Ali Khan* (3)].

I hold that the present appellant in going to the Court of the District Judge of Azamgarh in appeal was acting in contravention of the law which law it was his duty to know. *Ignorantia legis* [529] *neminem excusat* is a very good maxim of law, as much applicable to this country as to any other; and I hold that in this case, there being no satisfactory explanation why

(1) N.W.P.H.C.R. 1873, 108. (2) 2 A. 778. (3) 9 W.R. 598.

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the present defendant-appellant went to the Court of the District Judge of Azamgarh in appeal instead of coming up to this Court, that the period which has elapsed has not been duly accounted for, so as to justify us in acting under the exceptional provisions of s. 5 of the limitation law.

I am all the more inclined in this particular case to adopt this view, because throughout the litigation the defendant-appellant never denied that the Rs. 10,000 alleged by the plaintiff to have been the amount of the sale-consideration was the amount agreed upon at the consideration of the sale of the 8th March, 1874, which, indeed, was the main contention in this litigation.

Then, again, there is a period between the 6th December 1886, the date upon which the memorandum of appeal was returned by the District Judge of Azamgarh, and the 13th December, 1886, the date upon which this appeal was presented to this Court. There has been no endeavour whatever to explain the reason why this delay took place. This appeal, indeed, so far as it has been presented beyond the period of limitation, is not supported either by affidavit or even by any explanation contained in the memorandum of appeal other than the facts which I have already stated.

It is perfectly conceivable that, in conditions of life such as they exist in India, an appellant in the condition of the present defendant-appellant might have felt himself entitled to try an experiment by going into the appellate Court of the District, and then taking his own time, after his memorandum has been returned, to come into this Court to file the same appeal. The statutes of limitation are intended to check such tendency of dilatoriness, and such statutes must have operation. These statutes have been called statutes of repose, but the moment they are allowed to be slackly dealt with, they cease to be statutes of repose, and frustrate the very object which they aim at. These views I expressed in *Husaini Begam* v. *The Collector of Muzaffarnagar* (1), in which I happened to differ with my honorable Colleague in that case, but my judgment was upheld by the learned Chief Justice and my [530] brothers Straight and Brodhurst on appeal under the Letters Patent (2). I hold therefore that this appeal was preferred to this Court beyond time and, as such, should be dismissed with costs. I order accordingly.

STRAIGHT, J.—I concur with my brother Mahmood and in the conclusion at which he has arrived with regard to the disposal of this appeal. It is not denied now by Mr. *Kashi Prasad* that the appeal has been properly preferred to this Court, and that being so, it must be conceded that it was improperly preferrred to the Court of the District Judge. That being so, it undoubtedly rests upon the appellant, who asks us to extend to him the indulgence of s. 5 of the Limitation Act, to satisfy us that he made his appeal to the Court of the District Judge "*bona fide*," that is to say, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court. Looking to the circumstance that in the plaint the property was alleged by the plaintiff to be of the value of Rs. 10,000, that upon the basis of that valuation he came into Court and sought to recover possession of it, and to the fact that the defendant never traversed that allegation, but allowed the suit to be tried by the Subordinate Judge upon that footing, I do not think it can be reasonably said on his behalf that he honestly believed the suit one in which the appeal lay to the District Judge. The appellant

(1) 9 A. 11.

(2) 9 A. 655.

has filed no affidavit, and we have no sworn assurance of his to the effect of what his learned pleader has now said as to an erroneous impression prevailing in his mind when he filed his appeal in the Court of the District Judge. There are no materials whatever to satisfy me that at the time he filed his appeal in the Court of the District Judge he was, acting under an honest though mistaken belief that the appeal lay to that Court. Even, therefore, if analogically I import the sort of indulgence into s. 5 of the Limitation Act which is mentioned in s. 14, the appellant has not shown me that he is entitled to it.

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Moreover, apart from the delay that took place in the Court of the District Judge, we have the additional circumstance that for the delay from the 6th December, 1886, when the memorandum of appeal was returned to the appellant by the Judge, to the 13th [531] December, 1886, when that memorandum was filed in this Court, no explanation is offered on behalf of the appellant. I say most emphatically that when the memorandum of appeal was returned, on the 6th December, 1886, to the appellant, it was his bounden duty to hasten with all alacrity to this Court for the purpose of presenting his appeal, and that not having done so, we have no right to exercise in his favour the discretion conferred upon us. I agree with my brother Mahmood that Mr. *Conlan's* objection must prevail, and this appeal must be and it is dismissed with costs.

Appeal dismissed.

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10 A. 531=8 A.W.N. (1888) 211.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GOPAL SINGH (*Defendant*) v. BHAWANI PRASAD (*Plaintiff*).*
[8th May, 1888.]

Lease—Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Act IX of 1872 (*Contract Act*), ss. 124, 125, *clause* (2), 126, 129, 131.

One *B* proposed to take a lease of zemindari property from *M* for the period of eight years at a rental of Rs. 3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: " And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured. " *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880, *B* failed to pay the rent due for the year 1883. *M* having died, his repesentatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G* and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

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* Second Appeal, No. 2282 of 1886, from the decree of T. R. Wyer, Esq., Officiating District Judge of Meerut, dated 21st September, 1886, confirming the decree of Babu Brij Pal Das, Officiating Subordinate Judge of Meerut, dated the 9th September, 1886.

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Held, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and [532] consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death.

Held further, that neither *G*, if he were alive nor on his death the defendant, as his representative, can be made liable for costs and expenses which, *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit.

Lloyds v. *Harper* (1) was referred to.

[R., 15 C.P.L.R. 136 (139).]

THE facts of this case are stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon. *T. Conlan* and Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J.—One Bahal Singh proposed to take a lease of zemindari property from the proprietor Rao Maharaj Singh, from the year 1877 to 1884, at a rental of Rs. 3,900 per annum. Rao Maharaj Singh declined to grant the lease until the payment of rent during the time was guaranteed by one Shiban Lal, who was the father of the plaintiff. Shiban Lal on his part required a guarantee or indemnity against any rent which might not be paid by Bahal Singh and which he might under his proposed guarantee become liable to pay. The defendant's father, Ganga Bakhsh, gave a guarantee to Shiban Lal, which, so far as is material, is as translated as follows:—"And for your satisfaction, I write that if any money remains due from Lala Balak Rai on account of the lease, for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." Lala Balak Rai was Bahal Singh, the proposed tenant. On his part Shiban Lal then gave his guarantee to Maharaj Singh. Rao Maharaj Singh granted the lease to Bahal Singh. Ganga Bakhsh died on the 22nd May, 1880. Bahal Singh failed to pay the rent which became due for 1883. The representatives of Rao Maharaj Singh, he having died, brought an action on the guarantee given by Shiban Lal to Rao Maharaj Singh, against Shiban Lal, and recovered the amount of the rent due and certain costs and expenses. Shiban Lal paid the amount of the decree. Shiban Lal died before this action was commenced. The plaintiff, who is the legal representative of Shiban [533] Lal, brought this action to recover the amount of the previous decree and costs which Shiban Lal had incurred in defending the previous action. This action was brought against the defendant who was the legal representative of Ganga Bakhsh. The Subordinate Judge of Meerut decreed the whole claim with costs to be recovered from the property of Ganga Bakhsh. The then District Judge dismissed with costs the appeal which was brought against the decree of the Subordinate Judge.

The question which we have got to determine is whether s. 131 of the Indian Contract Act applies to the case so as to make the death of

(1) 16 Ch. Div. 290.

Ganga Bakhsh an answer to the claim. That section says:—"The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions." A continuing guarantee is defined in s. 129 as follows:—" A guarantee which extends to a series of transactions is called a continuing guarantee." Assuming without deciding that this was a continuing guarantee within the meaning of s. 131, I am of opinion, having regard to the transaction which was being guarnteed, and to the fact that it must have been the intention of the parties in the one case that the guarantee given by Shiban Lal should continue during the whole currency of the lease which was granted on the faith of that guarantee, and that the guarantee given by Ganga Bakhsh should continue also during the currency of the lease; in other words, having regard to the object for which those two guarantees were given, that we must conclude that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that Shiban Lal should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay. It is obvious that the lessor would not have granted his lease on a guarantee which might have been determined the next day. It is equally obvious that Shiban Lal would not have executed his contract of guarantee without which the lease would not have been granted, if he were only to receive a guarantee in his turn which might have been determined the following day. Consequently I am of opinion, even if this was a continuing guarantee, that the liability continued notwithstanding the death of Ganga Bakhsh in 1880 The law in [534] England in cases of this kind and the principles on which that law is based are fully expressed by the judgments in the case of *Loyds Harper* (1). The reason why I do not think it necessary to decide whether this is a continuing guarantee or not within the meaning of ss. 129 and 131, is that I consider it evident that the respective parties clearly intended that the respective guarantees should continue and not be determinable during the currency of the lease, and that the payment of the whole of the rent which might become due under the lease should be guaranteed. Further, I much dobut whether the framers of the Code had before their minds a case like the present. Whether this contract of Ganga Bakhsh is to be called a contract of guarantee, or a contract of indemnity, appears to me, to be immaterial. Ganga Bakhsh in any event was a surety, if it was a contract of guarantee, and it is to be distinguished from a contract of indemnity.

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I fail to see how Ganga Baksh, if he were alive, could be, or how his representative can be, made liable for the costs of Shiban Lal incurred in defending the action brought against him, or for the costs or expenses which he was obliged to pay to the plaintiff in that action. There could have been no defence to that action. The payment of the rent was the only thing guaranteed. If it was a contract of indemnity as distinguished from a contract of guarantee, the plaintiff could not be entitled to the cost or expenses of the previous action unless he brought the case within clause (2) of s. 125 of the Indian Contract Act. In this case there is no evidence to show that Shiban Lal acted as a prudent man would have done in defending the action against him, nor did the defendant authorize Shiban Lal to defend that suit. I am consequently of opinion that the plaintiff

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was entitled to a decree only for the actual rent which Shiban Lal had to pay, and not for any interest, cost or expenses incurred by the lessor or Shiban Lal prior to the previous suit. The result will be that the decree below will be varied by a decree in favour of the plaintiff for Rs. 3,417 with costs of this litigation proportionate to that sum and with interest at 6 per cent. on that sum from the commencement of the suit to the date of the payment. Costs of this appeal according to the success of the parties.

TYRRELL, J.—I concur. *Decree modified.*

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10 A. 535 = 8 A.W.N. (1888) 221.

APPELLATE CIVIL.

[535] *Before Mr. Justice Straight and Mr Justice Brodhurst.*

SITAL PRASAD (*Defendant*) *v.* PARBHU LAL (*Plaintiff*).*
[18th May, 1888.]

Voluntary transfer—Undue influence—Act IX of 1872 (*Contract Act*), s. 16.

In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see, that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize.

Where a fiduciary or quasi-fiduciary relation had existed, Courts of equity have invariably placed the burden of sustaining the transaction upon the party benifited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

The plaintiff who on the death of the widow of his brother became entitled to the estate of the deceased found himself resisted in his claim by wealthy relatives. He was a man without means. The defendent took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favor of defendant's brother for the nominal consideration of Rs. 9,500 of half the property he claimed, and again, shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands.

Plaintiff sued for the cancellation of the deed of endowment on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree.

On appeal by the defendant it was held; that looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest and *bona fide* transaction and one that ought to be upheld.

[F., 12 A, 523 (529) = 10 A.W.N, 56; R., 11 O.C. 295 (297); D, 90 P.L.R. 1901 = 36 P.R. 1901.]

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* First Appeal, No. 92 of 1877, from a decree of Maulvi Sayyid Zain-ul-abdin Khan, Subordinate Judge of Moradabad, dated the 10th March, 1887.

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THIS was a suit for cancellation of a document, and the facts in connection with the case are as follow :—

One Khumani Ram had three sons, *viz.*, Sita Ram, Mukand Ram, and Kesho Das. Sita Ram's son is Shib Charan. Kesho Das [536] left a son Salig Ram, and Mukand Ram had two sons, Ram Ratan and Parbhu Lal, of whom Parbhu Lal is the plaintiff in the suit. Ram Ratan died, leaving a widow Gulab Kuar, who on his death inherited the zemindari property left by him. On 3rd March, 1885, Gulab Kuar died, and on her death, disputes arose between the plaintiff on one side and Shib Charan and Salig Ram on the other, regarding the property left by Ram Ratan. The plaintiff is a poor man without any means, while his relatives are wealthy people. The defendant by some means or other found out the plaintiff, took him to his own house, kept him there and found all the money to enable the plaintiff to establish his claim for mutation of names in his favour in respect of the property. In fact it was solely through the exertions of the defendant that plaintiff eventually succeeded in the revenue Court, and by an order dated the 5th of August, 1885, his name was entered in the revenue register in respect of the said property. While he was litigating in the revenue Court with his cousins, the plaintiff was living with the defendant and entirely guided by him. On the 5th April, 1885, while the petition of the plaintiff to have his name recorded in respect of the property of Ram Ratan was pending in the revenue Court, he executed a sale-deed in respect of half of the entire zemindari and landed property, forming the estate of Ram Ratan in favour of Sriram, brother of the defendant, for the nominal consideration of Rs. 9,500. On the 22nd December, 1885, when entirely under the control and influence of the defendant, the plaintiff executed the deed of endowment sought to be cancelled. This deed purports to be a gift of the remaining half of the zemindari estate left by Ram Ratan to the temple of "Lachmi Narain" situated in mouza Badwan Darwaza, pargana Sambhal, a temple built by the ancestor of the defendant and which he was then in possession and charge of. The motive for the gift is recited in the deeds to be charity for the benefit of the soul of the donor, and it goes on to say "I (the donor) have withdrawn my own proprietorship from it and have made it an endowment permanently, and having appointed Maharaja Sital Pershad, the aforesaid manager of the temple, as a manager of the property made a gift of, and have put him in possession thereof. The aforesaid manager shall use the income of the property made a gift of in charitable purposes, *i.e.*, in supporting Fakirs and Sadhus and in [537] the said temple, as per instructions I give below. The manager aforesaid shall be at liberty to appoint in his lifetime any one he chooses from the members of his family as manager of the property made a gift of. On the death of the manager, the most worthy of his heirs or he whom he nominates manager of the property made a gift of, shall be manager, Thus managers shall continue to be appointed, and except a member of the family of the manager, no one from another family shall be appointed a manager." The income of the property was directed to be spent in the manner following:—"Half the income in supplying food, &c., to Sadhus, one-fourth of the income in providing for the bhog of Sri Ram Chandarji, decorating the temple, &c., &c. The remaining one-fourth in paying the salaries of servants appointed to realize the income of the property made a gift of, servants attached to the temple and servants employed to look after its other management, and to prevent it from wasting and to look after the repairs, &c., of the temple.

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The gift was ultimately followed by mutation of names taking place in respect of the property comprised in the gift in favour of the defendant.

On the above facts, the plaintiff alleging that the deed of endowment had been obtained from him by the defendant by the exercise of undue influence and fraud, sought for its cancellation and prayed for recovery of possession of the property comprised in it.

The defendant denied that the plaintiff had been unduly influenced by him to make the gift, and he contended that the gift had been completed and acted upon, and that the plaintiff who has no wife nor children to provide for, made the gift to the temple for the benefit of his soul. He denied having derived any personal benefit from the gift.

The learned Subordinate Judge of Moradabad laid down the following issues for determination :—

1. Whether the plaintiff gets giddiness of head every second or third year, and by reason thereof he is entirely in a state of insanity for seven or eight months; or, as stated by the defendant, the plaintiff is always in his proper senses.

[538] 2. Whether the defendant took the plaintiff when he was insane to his own house and duped him by making him indulge largely in *bhang* and *charas* prevented him from seeing any one, made him execute a deed of endowment in respect of the property in dispute and got it registered by undue influence, when he was insane and in a state of intoxication, and the plaintiff being in the above state, did not understand the meaning thereof and had it completed; or, as stated by the defendant, all these allegations of the plaintiff are wrong, the plaintiff having voluntarily got the deed of endowment fully completed while in his proper senses.

3. Whether there remains any property with the plaintiff for his support, or the whole of his property has been taken away by the defendant during his insanity.

4. Does the condition in the deed of endowment as to the appointment of the munsarim and mutwalli of the property given, show any selfish motive on the part of the defendant? Is the plaintiff legally and justly competent to get the deed of endowment cancelled? Should the reliefs sought by the plaintiff in this case be in law and justice granted as against the defendant or not?

The learned Subordinate Judge then found on the first issue, that the plaintiff was not suffering from any disease causing insanity or loss of understanding, but that he was a man of weak understanding and insufficient intelligence, addicted to intoxication and with no forethought.

On the second issue, it was found that at the time of the execution of the deed of gift the plaintiff certainly received so much kindness and benefit at the hands of the defendant as to lead him to think that the defendant and members of his family were his only well-wishers. He had then been highly displeased with his own cousins and determined that they should not get the property after his death. He followed any advice that defendant gave him, and following defendant's advice he executed the deed of gift without knowing or considering its consequences. It was also found that the defendant took the precaution to keep the plaintiff out of the reach of any advice as regards the deed, and the deed of endowment was not obtained in good faith by the defendant nor [539] did the plaintiff execute it upon a proper and sufficient consideration of its consequences.

On the third issue it was found that in executing the deed of

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endowment plaintiff parted with every bit of property he had and he is now totally destitute of any means.

On the fourth issue the Court found that with reference to the conditions in the deed regarding the appointment of munsarim and mutwalli, it was quite clear that the defendant was actuated by motives of gain to himself in procuring the gift from the plaintiff, and accordingly the claim of the plaintiff was decreed.

On appeal it was chiefly contended by the defendant that he did not possess any influence over the plaintiff and had not unduly exercised the same for the purpose of obtaining the deed.

Mr. *G.E. Ross* and Babu *Jagindra Nath Chaudhri*, for the appellant.

Pandit *Sunder Lal*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit instituted by the plaintiff-respondent against the defendant-appellant upon the following state of facts as disclosed in the plaint. The plaintiff said that he was the absolute proprietor of a 10 biswas zemindari share, out of 20 biswas of mauza Bhartal Madapur, pargana Sambhal, and 118 bighas 1 biswas of resumed muafi land in mauza Isapur, and of 179 bighas 11 biswas of resumed muafi land also situate in pargana Sambhal, all of such lands being in the mahal of Narain Das, and their value Rs. 20,000. The plaint goes on to say: "that the plaintiff gets such giddiness of head that his mind is deranged and it lasts for 8 or 9 months at a time, whereby the plaintiff is disabled from distinguishing between good and bad, and gain and loss. When he recovers from the disease, he is restored to his proper senses and can well understand his own gain and loss, and is in as sound a state of mind as any other person.

In the 3rd paragraph of the plaint it was stated as follows:—

"In March, 1885, the plaintiff had his usual fit, and in consequence of the disease and derangement of mind, he fell out and [540] became annoyed with his relations. When the defendant and his brothers become aware of this, they took the plaintiff from mauza Bhartal, the place of his residence, to their own house at Sambhal and treated him very kindly and courteously, but they did not allow him to go out of their house, and they even appointed men to prevent him from going out and talking to any one. As the plaintiff is also in the habit of taking *bhang* and *charas*, the defendant cunningly made him indulge in those things very largely, so that his mental derangement increased, and he began to be always under the influence of intoxication and to regard the defendant and his family as his well-wishers. When the defendant and the members of his family were fully satisfied that the plaintiff was always under the effect of intoxication and also in a state of mental derangement, and that he was under their undue influence, they dishonestly and cunningly obtained from him a deed of sale for Rs. 9,500, dated the 5th April, 1885, in favour of Sri Ram, defendant's brother, in respect of half of the property mentioned in para. 1 of this plaint, without paying a single farthing as sale-consideration. The plaintiff, not being in his proper senses and being under the undue influence of the defendant, executed the sale-deed without knowing whether it was advantageous or prejudicial to him."

The 4th paragraph says:—"Not content with this, the defendant and the members of his family asked the plaintiff to execute a deed of endowment in respect of the remaining half of the property mentioned in para. 1 of this plaint. The plaintiff, being in the state of mental derangement

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and under the effect of intoxication and the undue influence of the defendant, executed, without consulting his own interest, a registered deed of endowment, on the 22nd December, 1885, as desired by the defendant, to the effect that he had permanently endowed the remaining half of the property for charitable expenses to the temple of Manokamna built by the ancestor of Sital Prasad, adopted son of Lachman Das, resident of Sambhal, appointing the said Sital Prasad, the *munsarim* (manager) of the temple, as the *munsarim* of the property; that the *munsarim* should apply the income of the endowed property to charitable expenses: that after the death of the *munsarim* one of his heirs who might be fit or who might be named by him [541] should be appointed to the post; and that none from another family than that of the *munsarim* should be appointed. This passage fully shows the fraud and artifice of the defendant in that he himself became the *munsarim* and obtained half the property under an illegal deed of endowment and half under an illegal deed of sale."

In the 5th paragraph it is stated :—"As the plaintiff was under the power of the defendant and his family, and owing to undue influence, insanity and the state of intoxcation, used to do whatever they required of him, he, without consulting his own interest, signed the deed of endowment as drawn up at the instance of, and made over to him by the defendant, and owing to the artifice of the defendant, the plaintiff got no opportunity of consulting any other person, as the defendant always took care to prevent the plaintiff from seeing any one, a fact known to all the people of the town of Sambhal. Under the above circumstances both the contracts, namely, the one contained in the deed of sale and that contained in the deed of endowment, are voidable at the will of the plaintiff. The defendant, moreover, got a general power of attorney executed on the part of the plaintiff in favour of Nihaluddin, son of his own general attorney Nazir-ud-din, whom he caused to make on the part of the plaintiff any statement that he thought to be favourable to himself."

In the 6th paragraph it is said:—"After the completion of all the proceedings by which the defendant illegally obtained the whole property of the plaintiff, he turned the plaintiff out of his house and the plaintiff went away to his own house. After a short period the plaintiff recovered from the disease of giddiness of head and was restored to his proper senses, when he was informed by his relations of all the fraudulent proceedings of the defendant and his family, and he became aware positively that all his property had already been illegally obtained by the defendant by fraud. The plaintiff, having then consulted other competent persons, learnt that the deed of endowment and sale-deed executed by him in a state of insanity were by all means liable to be cancelled. For the present plaintiff, for want of means, sues only for the cancelment of the deed of endowment, and for the cancelment of the sale-deed he will bring a suit afterwards."

[542] In the 7th paragraph it is stated:—"The plaintiff was paid not a single farthing as a consideration of the sale-deed, nor did he receive any benefit by executing the deed of endowment, nor was it executed voluntarily ; nay, it was executed while the plaintiff was insane and under the undue influence of the defendant. The defendant obtained half the property from the plaintiff by means of the illegal sale-deed and half by means of the illegal deed of endowment, and there remained no property with the plaintiff. All these proceedings were due to the cunningness and dishonesty of the defendant. The cause of action arose within the jurisdiction

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of this Court at Bhartal Madapur, pargana Sambhal, on the 15th February, 1886, when the plaintiff recovered his proper senses and was informed of the above fact."

Accordingly, upon these statements of the grounds upon which he came into Court, the plaintiff asked the following reliefs, namely :—

(a) That the deed of endowment, dated the 22nd December, 1885, which the defendant illegally obtained from the plaintiff by undue influence and fraud, while the plaintiff was insane, ill and under the effect of intoxication, may be cancelled and declared invalid and void.

"(b) That the defendant may be dispossessed and the plaintiff duly put in absolute possession of the 5 biswas zemindari and malguzari share of mauza Bhartal Madapur, pargana Sambhal, 59 bighas and 10 biswansis of resumed muafi land in mauza Isapur out of the plot of 118 bighas and 1 biswa numbered as below, in the mahal of Chandhri Tika Singh, and 89 bighas, 15 biswas and 10 biswansis of resumed muafi land out of the plot of 179 bighas and 11 biswas, numbered as below, in mauza Hazrat Nagar Garhi, pargana Sambhal.

"(c) That all proper directions for the security of the said reliefs may be given to protect the plaintiff from the fraud and artifices of the defendant, and to enable him to obtain peaceable possession of the property claimed.

No doubt the terms of the plaint were exceedingly prolix and discursive, and there is much repetition in it which was unnecessary for the purpose of presenting the case the plaintiff had to make [543] as the basis for the relief he sought. It has been subjected to very secure criticism at the hands of the learned Counsel for the defendant-appellant, and the learned pleader who is associated with him has boldly asserted that there is really nothing upon the face of it that the defendant was called upon to answer; the allegations were so vague and the charges in it so general, that the defendant had really no obligation cast upon him either to traverse those allegations in his written statement or to appear in the witness-box to contradict them. I disagree with the learned pleader in his contention. It is useless in this country for us to expect that conciseness or certainty in pleading which is required in the English Courts. I have no doubt that the person who framed the plaint in this particular case, from a not unnatural desire to put his client's story in the strongest aspect upon the face of the plaint, imagined the best way to do so was to draw it in the manner it has been drawn, and so introduced a good deal of matter which was not actually capable of proof, which was of no assistance to the Court below, and is certainly of no assistance to us in coming to a conclusion as to the propriety or otherwise of the judgment of the learned Subordinate Judge. I do not think however, that eliminating from this plaint a mass of matter which is wholly superfluous, it may be taken to represent this much, that the plaintiff was a person of weak intellect, that he was addicted to the practice of drinking *bhang* and smoking *ganja*; practices not calculated to improve his mental condition; that at the time of the decease of his sister-in-law, Gulab Kuar, he was threatened by his relatives with opposition to his obtaining the estate of his deceased brother, Ram Ratan, to which he was undoubtedly entitled; that they did oppose him in the mutation proceedings; and that the defendant, a rich Brahman and proprietor of a temple in Sambhal, took advantage of this and got him to his residence, keeping him there while the mutation proceedings were going on, treating him with kindness and pandering to his passion for drink and narcotic smoking, at the same time providing him

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with money to carry on the mutation proceedings in which he was being wrongfully resisted; that in the course of doing so he obtained from him in favour of his (the defendant's) brother a sale-deed of part of his property for Rs. 9,500, not a pice of which ever was paid; and subsequently obtained from [544] him the deed of endowment the subject-matter of the present suit as a gift and for no consideration in favour of his (the defendant's) temple, and having thus served all his ends, and having stripped the plaintiff of the whole of his property, turned him adrift. These are in effect the grounds on which the plaintiff comes into Court to avoid the deed of endowment of the 22nd December, 1885, by the execution of which, in conjunction with the earlier conveyance, he had effectually deprived himself of the whole of the property, which he had only succeeded in securing in the early part of the same year,

How then did the defendant, against whom these charges were formulated, meet them? For example, did he deny in terms in his written statement that the allegation in the plaint, which is repeated twice, namely, that the sale to the defendants, brother Sri Ram, ostensibly for Rs. 9,500, was a sale in respect of which no consideration had passed? Did he deny the assertions of the plaintiff that the defendant got him into his house and kept him there for a long consecutive period of time in 1885? Did he deny the statement that subsequently to the execution of the deed of endowment in 1885, he turned the plaintiff adrift and left him to shift for himself without a pice remaining to him of the property he had only obtained a short time before? There is no denial throughout the whole of the statement of defence of any one of these allegations, and it may be convenient for me here also to remark that the defendant has never presented himself as a witness in the cause to negative the assertions which were made by the plaintiff in his plaint, and which have more or less been proved by him upon his oath.

I do not conceal from myself, and my brother Brodhurst is equally agreed with me, that the case is one of very great difficulty. For it is of the most serious public importance that the free and voluntary contracts of persons in favour of others should, in no way, be interfered with or disturbed by the Courts of law, and it is not because a man chooses to make an ill-considered or foolish contract, that therefore the Courts of law are to step in and relieve him of the consequences of his act. Neither Courts of law nor Courts of equity have ever attempted, nor will they ever attempt to [545] set aside such transactions. But what the Courts in this country, will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and call upon him to give clear and cogent proof that the transaction complainted of was such a one as the law would support and recognise. No doubt there is one class of cases in which there being no fiduciary or *quasi* fiduciary relation between the parties, Courts of equity have interfered with contracts into which the persons claiming relief have entered upon various grounds. But in such cases they have required that the parties seeking that relief should themselves establish their title to relief. On the other hand, where a fiduciary or *quasi* fiduciary relation had existed, Courts of equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The matter before us is not that

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of a guardian and a ward, or of an attorney and client, or of a father and son, or of any of the more commonly recognized relations which involve such consequences. But these are not exhaustive and on this head I may conveniently refer to a passage from the notes to *Huguenin* v. *Baseley* (1) :—" In *Dent* v. *Bennett* (2), where a gift obtained by a medical attendant from his patient was set aside by Lord Cottenham, it was argued upon the authority of the civil law and some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. 'Undoubtedly', observed Lord Cottenham,' they are; but I will not narrow the rule, or run the risk of in any degree fettering the exercise of the benefiecial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most freely exercised." So at another place it is observed : " The principle upon which Courts of equity set aside such donations has been sc accurately stated by Sir Samuel Romilly in his argument, that Lord Cottenham, **[546]** in the case of *Dent* v. *Bennett* (2), fully adopted it. The relief, observes his Lordship, as Sir Samuel Romilly says in his celebrated reply in *Huguenin* v. *Baseley* (1), (from the hearing of which I received sc much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years), 'the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another'."

No useful purpose would be served by my travelling at length through the many authorities that are referred to in the notes to *Huguenin* v. *Baseley* (1), though I may in this connection conveniently refer to what is said in Story's Equity Jurisprudence on the same subject. In para. 234 of his " *Equity Jurisprudence*, " edited by Gregsby, it is observed :— " For it has been well remarked, that although there is no direct proof that a man is *non compos*, or delirious, yet, if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon." In paragraph 237 of the same book it is remarked, quoting from a judgment of Lord Wynford :—" 'But those who, from imbecility of mind, are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn, under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man.' And addressing himself to the case before him, he added, 'If this conveyance could be impeached on the ground of the imbecility of F only, a sufficient case has not been made out to render it invalid ; for the imbecility must be such as would justify a jury, under a commission of lunacy in putting his property and person under the protection of the Chancellor. But a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." Summing up the doctrine, Story remarks in para. 238 and says :—" The doc- **[547]** trine, therefore, may be laid down as generally true ' that the acts

(1) 2 White and Tudor's L. C., 4th ed. p. 592. (2) My. and Cr. 262.

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and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence.' (But the simple fact that the intellectual capacity of one party to contract is below that of the average of mankind, does not alone furnish sufficient ground for setting aside the contract). The rule of the common law seems to have gone further in cases of wills (for, it is said, that perhaps it can hardly be extended to deeds without circumstances of fraud or imposition); since the common law requires that a person, to dispose of his property by will, should be of sound and disposing memory, which imports that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, action and behaviour at the time, and not merely from his being able to give a plain answer to a common question. But, as fraud in regard to the making of wills of real estate belongs in a peculiar manner to Courts of law, and fraud in regard to personal estate to the ecclesiastical Courts, although sometimes relievable in equity, that part of the subject seems more proper to be discussed in a different treatise." And there is another passage in para. 239 in which it is said:—"On this account Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the Court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attendant upon it."

Now I might quote endless passages from the judgments of learned Judges upon this particular subject and from legal works which have been referred to, notably Pollock on Contracts, at pages 282 and 578, but it is unnecessary for me to do so, because I have shown, I think sufficiently, what a principle is and what [548] the rule by which, when the question arises, cases of this kind are to be governed. They have been recognized in India in the Contract Act, which provides that every person is capable of contracting, who is of the age to contract, and who contracts of his own free consent, which means when his consent has not been obtained or caused by (1) coercion, as defined in s. 15, or (2) undue influence as defined in s. 16, &c.

Now the expression "undue influence" is defined in s. 16 as follows:—

(1) " When a person in whom confidence is reposed, by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained."

(2) " When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion."

Now those two classes of what is decribed as undue infiuence in s. 16 seem thoroughly to cover the ground which is recognized by the

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principles enunciated in the notes to *Huguenin* v. *Baseley* (1), and to the doctrine promulgated in Story's Equity Jurisprudence, to which I have referred. It has not been denied, and, indeed Mr. *Ross* would not have contended for so unsustainable a proposition, that assuming there was a relationship such as that which is contemplated in clause (1), s. 16 of the Contract Act, or such a *quasi* relationship, once established, the *onus* would not rest upon the party who held that position towards the person who sought to avoid the deed to prove that the transaction it embodied was a fair and proper one. But by way of illustration it will not be out of place to refer to the well-known case of *Lyon* v. *Home* (2), as showing to what extent a Court of equity has pushed this principle. In passing, I need only say one word with regard to the case of *Selby* v. *Jackson* (3) quoted by Mr. *Ross*, Mr. *Ross* referred to it as an authority for the position that though a man may be subject [549] to temporary fits of insanity, that during his lucid intervals he is not incapable of making a legal and binding contract. No one doubts this and I did not require the authority of *Selby* v. *Jackson* to inform me of it. The only remark I have to make about that case, is that apart from the finding of fact that the plaintiff was of sound mind when he made the contract, both the Master of the Rolls and the Lord Chancellor in appeal were very clearly of opinion, that the person who was seeking to avoid the contract itself was very greatly benefited by it. Reverting to the case before us. I then have to see whether, looking to the repective positions of the plaintiff and the defendant and to the facts relating to the deed of gift as a whole, the transaction is one that should be allowed to stand. I shall not repeat at length the allegations that are made by the plaintiff in his plaint and the mode in which they were met by the defendant, but it does seem to me that, taking them in conjunction with the proof on the record, there was evidence to show that when Gulab Kuar died leaving this property behind her, it by some means or another became known to the defendant that the plaintiff was the person who was entitled to that property, but that he was opposed by his wealthy relative; that he was helpless to resist them, being entirely without means, having up to her death subsisted on his sister-in-law's charity; that he was a poor Brahman and therefore likely to be extremely susceptible to the influence of the defendant; that knowing all this the defendant got the plaintiff to his house and kept him there, and that during the time the quarrels were going on between him and his relatives, he did find him with money, how much does not appear, though it could not have been any very large sum, for the purpose of instructing pleaders to look after his interest in the mutation proceedings. That the defendant was not purely disinterested in his action is obvious from the admitted fact, that on the 5th April, 1885, a deed of sale was executed by the plaintiff in favour of the defendant's brother of half of the property to which he was entitled for Rs. 9,500. Whether the consideration was or was not paid is not clear, though, on the one hand, we have the plaintiff's assertion that it was not, while the defendant on the other has neither asserted nor proved that it was. I cannot help under such circumstances feeling that it was not; more particularly as it can hardly be suggested that so large a sum of [550] money was expended over the mutation proceedings, which commenced in March, 1885, and finally came to an end by the decision of the Collector on appeal on the 24th September, 1885. Proceedings of

(1) 2 Wn. and T. L. C. 592. (2) L. R. 6 Eq. 655. (3) L. J. 13 Eq. 249.

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that kind would at the outset only involve an expenditure of a few hundred rupees, and indeed, the defendant does not suggest that any large sum was advanced for the purpose. The matter therefore stands thus, that the defendant, a well-to-do Brahman with no special claim on him to do so, was entertaining the plaintiff in his house under the circumstances described, and that first in the month of April, 1885, a deed of sale of half of his property, and afterwads in December of the same year a deed of gift of the remaining half, is obtained from him, with the result that he is left as poor as he was when he first came into the defendant's hands.

Looking at all the facts, I am constrained to the conclusion that there was such a relation in the course of the year 1885 between the plaintiff and the defendant as casts upon the latter the obligation of satisfying us that the transaction of December, 1885, was an honest and *bona fide* transaction and one that we ought to sustain.

It is quite clear, as has been said in the authorities to which I have referred, that the more well-understood relations of guardian and ward, attorney and client, and so forth, are not exhaustive of the relations in respect of which an obligation rests on the party, who seeks to benefit by the transaction, of showing that it was a voluntary *bona fide* and honest one. Nor can it, in my opinion, be seriously suggested that, because the defendant was not the person in whose favour the gift was made, in the sense that the property was endowed to the temple and did not pass to him personally, therefore the case is to be regarded in a different light. That fact does not appear to me to alter the character of the transaction in the least. A priest, who takes advantage of his position and unduly uses his influence with another, whom he knows to be susceptible of such influence, for the purpose of inducing that other to make a gift or donation in favour of a religious society or institution, is bound,if that gift or donation is afterwards impeached, to show that it was a perfectly *bona fide* and proper transaction. Applying a like principle to the present case, and that a rich Brahman like the defendant would have great influence over a [551] poor Brahman in the position of the plaintiff is abundantly obvious, what has the defendant proved? I have already said that he has never ventured into the witness-box nor has his brother, the vendee, under the sale-deed of April, 1885. He has put forward evidence to show that in the mutation proceedings the plaintiff took an intelligent part. Is there anything very surprising in that. The man wanted to get his property, and it would have been an extraordinary thing had he not shown himself interested in those proceedings. Much stress was laid by Mr. Ross upon the fact that the cause of action was originally stated in the plaint as having arisen on the 15th February, 1886, but that the plaintiff came in afterwards, and applied to alter the day, because he knew he would be met with the circumstance that on the 17th February he went to the mutation department for the purpose of causing mutation of names in favour of the defendant. I confess I am at a loss to see what is the force of this. If a man under the influence of another enters into a transaction of this kind of course he will do all that is necessary to carry it out so long as the influence was upon him. It was never suggested that before the plaintiff was turned out of the defendant's house he sought to repudiate the deed of gift; on the contrary his case is this, that it was not until he realized the way in which the defendant had treated him, he came to understand how he had been stripped of his property. I can only say that upon a review of all the circumstances of this case my firm conviction is that the defendant did get hold

of the plaintiff, and did take undue advantage of him and his position of dependance to obtain from him the deed of gift. The transaction is, to say the least of it, a most suspicious one, and its supicious character is significantly enhanced by the circumstance that the defendant never dared to go into the witness-box to show how it was that the property was sold to his brother, how it was that the deed of endowment came about, and to explain all the other circumstances, the outcome of which was that the plaintiff was left absolutely without a pice worth of property or even the means of bare subsistence.

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The case is one that has caused me very anxious thought and serious consideration, and if I have come to an erroneous conclusion, it is not for want of having looked at it in all its aspects. [552] The learned Subordinate Judge who tried this case, though portions of his judgment are somewhat obscure, appears to me to have travelled along pretty much the same line of thought that I have in dealing with the matter, and I have read his judgment several times. Having seen the plaintiff in the box he says of him:—"I think that this man is not a man of ordinary intellect; he is a weak man, and can be easily induced; the defendant is a wealthy and well-to-do Brahman of a temple in the city; he got hold of this man, and he took him to his house. The man was much frightened at the attitude of his relatives with regard to the property of his brother, and that alarm was not lessened but rather stimulated by the defendant. The defendant supplied him with money for the purposes of mutation proceedings and he preserved control over him. He induced him to think that if he did not put his property out of the reach of his relatives, they would do him some harm, and the consequence was that half of it was sold and the other half of it went into the endowment." That is the finding of the Subordinate Judge upon it, and he has held that, looking to the respective positions of these two men, namely, the well-to-do Brahman and the temple owner on the one hand, and the impecunious Brahman the plaintiff on the other, there is no doubt that influence was brought to bear on him, and that under the influence he made the sale-deed and the deed of endowment. This appears to me to be the view of the learned Subordinate Judge, and I cannot lose sight of the fact that he had the opportunity of seeing the plaintiff in the witness-box, and he has told us what he thinks about him, and what effect his appearance and demeanour had upon his mind. I cannot but conclude, from what the Subordinate Judge (who is a Subordinate Judge of many long years of experience), and for whose opinion I entertain a very high respect) says, that this plaintiff was a man not up to the ordinary standard of intelligence and easily influenced by persons of stronger will. I think the transaction he seeks to avoid was in itself of so hopelessly improvident a character, that coupled with the other facts in the case it was on the defendant to satisfy us by his oath in the witness-box that it ought to be sustained. He has not done so, nor does the evidence of his witness Harchand improve the matter, for it only shows that the draft of this particular deed of gift had [553] been prepared by the defendant, and that during the whole time of its being written out the plaintiff was sitting at the elbow of the defendant. I am not prepared to say that the decision of the Subordinate Judge was an erroneous decision, and I therefore dismiss the appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

TOTA (*Defendant*) *v.* SARDUL SINGH (*Plaintiff.**) [1st June, 1888.]

Public way—Obstruction by building—Suit by zemindar for removal of building—Special damage—Right to sue.

The plaintiff who is the zemindar of the village brought an action claiming to have a chabutra or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public have a right of way and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the chabutra and the defendant appealed.

Held, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the pubic the road over his zemindari land. A zemindar in giving the public right of road or way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the zemindar has in common with the public the right to use the road as a road and, over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public but in respect of an interference with his own rights of property.

Baroda Prasad Mustafee v. *GorachandMustafee* (1) discussed.

Dovaston v. *Payne* (2) *R.* v. *Pratt* (3), *Rolls* v. *Vestry of St. George the Martyr, Southwork* (4), and *Goodson* v. *Richardson* (5) referred to.

[R., 7 O.C. 362 (363) ; 2 N.L.R. 110 (112) ; 5 M.L.T. 391=6 A.L.J. 539.]

IN this case the plaintiff, Maharaja Sardul Singh of Kishengarh, sued as zemindar and muafidar of the village Rilsown for the removal of a *chabutra* or building erected by the defendant, in one of the village roads.

[554] The Munsif of Muttra, holding that the building complained of was not a recent construction, dismissed the suit. In appeal, the learned Subordinate Judge of Agra differing from the Munsif in his view of the facts decreed the claim.

In second appeal the defendant for the first time contended, that the road being a public thoroughfare, the plaintiff who had not proved any special damage to him from the obstruction complained of, had no right of action. Upon this contention the following issues were remitted for trial to the lower appellate Court, *viz.* :—

1. Does the land whereon the building in dispute is erected belong to the plaintiff or is it a public thoroughfare ?

2. If the latter, has the building erected by the defendant caused any special damage to the plaintiff such as would entitle him to sue for demolition thereof ?

Upon these issues the lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, who is the zemindar and muafidar of the village, and it was used by the village, and over

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* Second Appeal, No. 2303 of 1886, from a decree of Babu Kashi Nath Biswas Subordinate Judge of Agra, dated the 15th December. 1886, reversing a decree of Pandit Alopi Prasad, Munsif of Muttra, dated the 6th August, 1886.

(1) 12 W.R. C. R. 160. (2) 2 Sm. L. C., 9th Ed., 154.
(3) 4 E. and B. 860. (4) 14 Ch. D. 785. (5) L.R. 9 Ch. 221.

it the public have a right-of-way; that it had been dedicated as a road for the use and convenience of the public, and the plaintiff has not suffered any greater damage than any one of the public.

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Munshi *Madho Parshad*, for the appellant.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Parshad*, for the respondent.

JUDGMENTS.

EDGE, C.J.—In this case the plaintiff brought an action claiming to have a *chabutra* or building which had been erected by the defendant on one of the village roads removed. The plaintiff is the zemindar. The road in question is a *katcha* road used by the village and over which the public have a right-of-way. The lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, zemindar, and that it had been dedicated as a road for the use and convenience of the general public. The lower appellate Court gave a decree for the removal of the *chabutra*, and the defendant has appealed.

Pecuniarily the plaintiff has not suffered any greater damage than any one of the public, as has been found. It is contended [555] here, on the authority of two cases decided in Calcutta and one case decided in this Court, that the action is not maintainable without proof of special damage. In the first case, *Baroda Pershad Mustafi* v. *Gora Chand Mustafi* (1), Sir Barnes Peacock held that the person who had dedicated the road could not, any more than any other member of the public, maintain an action for the obstruction of the highway without showing special damage. It is quite plain that according to the law of England and the law here, as laid down in these cases, a member of the public cannot maintain an action of the kind without proving a special injury to himself beyond that suffered by the public. I do not think that this rule of law applies to the case of a zemindar, who, or whose predecessor in title, had dedicated to the public the road over the zemindar's land. When a landholder in England or zemindar here gives the public a right of road or way over his land, he only dedicates or gives the public a right to use the road for the purposes of a road. He does not give the public or any one else a right to interfere with the soil of the road, as for instance, by building a house upon it or turning the road into a garden. In the case decided by Sir Barnes Peacock that learned Judge seemed to think that if the plaintiff in that case were allowed to maintain his action, all the public would have a general right to maintain an action against the defendant. I think that learned Judge overlooked the distinction between the rights of the public and the rights of the zemindar. The right of the public to go along the road and use the road as a road was a right which the zemindar also had. The zemindar beyond the public had a right to the soil in the road which he had never given to the public, so that, in an action of this kind, the zemindar is suing not as a guardian of the public as was suggested by Sir Barnes Peacock, but in respect of an interference of his own rights of property.

The other Calcutta case, *Bhugeeruth Dass Koyburto* v. *Chundee Churn Koypurto* (2) is merely an authority because it follows the rule laid down by Sir Barnes Peacock. In the case of *Karim Baksh* v. *Budha* (3) this Court merely applied the rule of English law, that is, that an ordinary member of the public could not maintain [556] an action for the obstruction

(1) 12 W.R.C.R. 160. (2) 22 W.R.C.R. 462. (3) 1 A. 249.

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of a highway unless he has sustained some damage peculiar to himself. The rule of English law is one founded on common sense. It is that when a road is dedicated to the public, the public have only got a right to use the road for the purposes for which it has been dedicated, let it be a cart road, or a road for riding on or a road for walking on.

I asked Mr. *Madho Prasad* who appears for the appellant whether, if in this case the defendant had built a row of houses on the site of the road, the zemindar could not maintain his action. He was compelled to say that he could not. I asked him whether if the defendant had ploughed up the road and converted it into a grove, or a market garden, the zemindar could not maintain the action, and he said that he could not. The authorities which would apply in England in a case of this kind are to be found in the notes to *Dovaston* v. *Payne* (1). One of those cases is the case of *R.* v. *Pratt* (2). There are also quite recent cases which show the principle of the English law on this point. I may refer to *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3). and *Goodson* v. *Richardson* (4). That the zemindar who dedicates a road to the public does not part with his property in the soil of the road and his right to use the site of the road for any purposes he pleases on the abandonment of the road, if shown very clearly by the judgment of Mr. Justice Oldfield and my brother Mahmood in *Nehal Chand* v. *Azmat Ali Khan* (5). It appears to me that a zemindar, like the plaintiff here, does, as a matter of fact, suffer an injury peculiar to himself when one of the public builds upon the site of the road dedicated by the zemindar to the public. I do not put it on this ground. I put it on the wider ground that he is entitled to maintain his action, not as one of the public, but as a zemindar for interference with his own rights of property.

I think that the appeal should be dismissed with costs.

MAHMOOD, J.—I am of the same opinion, but as it is a case which, by reason of my order of the 20th June, 1887, was remanded to the lower appellate Court, and again, by my order of the 22nd November, 1887, was referred to a Division Bench consisting [557] of two Judges, I wish to give an expression to my own views as to the reasons why I have arrived at the same conclusion as the learned Chief Justice.

In doing so, I dc not wish to travel upon the ground on which the learned Chief Justice has done, so far as English law has a bearing upon the case.

The land to which the litigation relates admittedly, as it has been found, forms a road site within the precincts of the village which is the property of the plaintiff, and such road is used by the public for purposes of transit. There can be no doubt, as was held by me with the approval of my brother Straight in a recent case, *Ramphal Rai* v. *Raghunandan Prashad* (6), that where the only right claimed is one in common with the public, in respect of the right-of-way through a public thoroughfare, the plaintiff could not maintain an action unless he proved special damage, or (to use a more modern phrase) injury particular to himself, that is to say, over and above such injury as is sustained by him in common with the public at large. In that case the plaintiff was not the zemindar of the village but a lessee from him, and the obstruction which he sought to remove was, as a matter of fact, found to have been antecedent to the time

(1) 2 Smith's Leading Cases, p. 154. (2) 4 E. and B. 860.
(3) L.R. 14 Ch. D. 785. (4) L.R. 9 C.D. 221 (5) 7 A. 362.
(6) 10 A. 498 (=A.W.N. (1888), 205.)

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when he obtained the lease, and my brother Straight and I held that whilst there was nothing to show that the plaintiff's lessor had any right to the land to which the litigation related, the lease itself was also silent in respect of giving any right to the plaintiff lessee, to maintain any action in respect of encroachments on the land. I refer to that case in order to guard myself against being understood as laying down any rule of law in this case which would be in conflict with what I laid down in the case to which I have just referred.

Now I confess that I have long entertained serious doubts whether the rule of the English law of torts which in cases of obstructions of a public way requires proof of special damage, as a condition precedent to the maintaining of an action such as this, is a rule of law in itself justifiable upon juristic grounds, or adapted to the conditions of life in British India, but in the course of my own judgment in the case to which I have referred, I have adopted [558] the rule of English law out of deference to the rulings which I cited in that case.

That case, however, is distinguishable from the present upon the point to which the learned Chief Justice has referred, namely, that here the *status* of the plaintiff is not merely that of an ordinary member of the public entitled to pass through the road, but the plaintiff is admittedly the zemindar of the village and, as such, the owner of the land whereon lies the road. I think that in a case of this kind the *status* of the plaintiff would be higher than that of an ordinary member of the public, provided he has a subsisting right of ownership pure and simple, or what I may analogically call, a right of reversion to the land used as a public road. That the land is within the four corners of the mahal is admitted on all hands, and that of the mahal the plaintiff is the owner is also admitted, and all that has been found against him is that the land is used for purposes of a public way. I think, as the learned Chief Justice has pointed out, the position of a person holding such a right is to be distinguished from that of an oridinary passer-by or traveller ; that even adopting the strict rule of English law as to proof of special damage being necessary in the case of an ordinary passer-by, such a rule would not apply to the case of a person such as the present plaintiff. The reasons for this distinction are, of course, clear, namely, that so long as the strip of land called the public road in this litigation forms part of the mahal, it may at some time or other cease to be a public way, or, by reason of such other changes as time or the administration of the revenue authorities might bring about, may be cultivated again, and, as such, it would no doubt come back to the zemindar, namely, the plaintiff. It is, therefore, scarcely possible to say that, with rights, such as the plaintiff has in the land, he did not suffer any particular injury by reason of the trespass of which he complained in the suit.

In this view the road, though available to the public for purposes of transit,forms part and parcel of the mahal, but this view is hampered by the *ratio decidendi* adopted in more than one case by this Court. These cases were referred to in my judgment in the Full Bench case of *Naimat Ali* v. *Asmat Bibi* (1). One of those [559] cases was the case of *Sahib Ram* v. *Kishen Singh*(2),where the majority of the Court held that the portion of the abadi or populated area of the village did not form part of the rights of a co-sharer, and the other case was that of *Hazari Lal* v. *Ugrah Rai* (3) in which it was held that *sir* land did not form an essential part of the zemindari share of a

(1) 7. A. 626. (2) A.W.N. 1882, p. 192. (3) A.W.N. (1884), p. 103.

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co-sharer. Both these rulings, however, proceed upon a *ratio decidendi* which as Pandit *Ajudhia Nath* has, I think, rightly pointed out, was practically overruled by the whole Court in *Niamat Ali* v. *Asmat Bibi* (1) to which I have referred, because there the Court held that grove-land does form part of the zemindari rights. Here the road formed part of the zemindari rights of the plaintiff, and his interest in such land was the right and possibility of making the land available to him for agricultural or other purposes, and his *status* is higher than that of an ordinary person maintaining an action with regard to what would otherwise be a public nuisance. So far as the plaintiff is concerned it is not merely a public nuisance, for he has suffered special injury.

For these reasons I concur in the order made by the learned Chief Justice.

Appeal dismissed.

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MATRIMONIAL JURISDICTION.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

CULLEY (*Plaintiff*) *v.* CULLEY AND OTHERS (*Defendants*).*
[16th June, 1888.]

Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of 1869 (*The Indian Divorce Act*), ss. 16, 17.

In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court, through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order [560] was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute.

Held, by Edge, C.J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh.

Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held, by Mahmood, J., that proceedings in a Divorce Court are quasi criminal and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties.

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire

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* Case for confirmation under s. 17 of the Indian Divorce Act (IV of 1869) of a decree *nisi* passed by the Judicial Commissioner of Oudh, dated 1st December, 1887.

(1) 7 A, 626.

of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis* v. *Lewis* (1) referred to.

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[F., 6 M.L.T. 96 (97) = 6 A.L.J. 793 = 31 A. 511 = 3 Ind. Cas. 969; R., (1911) 1 M.W.N. 107 (109) = 9 M.L.T. 125 = 8 Ind. Cas. 684 = 21 M.L.J. 528 = 34 M. 339 (340); 2 L.B.R. 67 (69).]

THE facts of this case are stated in the judgment of the Court.

Pandit *Sundur Lal*, for the petitioner and the respondent.

JUDGMENT.

EDGE, C.J.—In this case the petitioner Ernest Augustus Culley, brought this suit to the Court of the Judicial Commissioner of Oudh against his wife Elizabeth Anne Culley, who was the respondent, and two men as co-respondents: The petitioner, on the 1st December, 1887, obtained from the Judicial Commissioner a decree *nisi* and a decree for Rs. 100 damages against one of the co-respondents. The record was forwarded to this Court, this being the Court which has jurisdiction to make the decree absolute. The second of June of this year was the date fixed for the hearing of the application to make the decree absolute, that date being more than six months from the date of the decree *nisi*. The petitioner and the respondent forwarded through the Registrar of the Court of the Judicial Commissioner to this Court a joint petition in which they expressed their intention of living together again as man and wife and asked this Court not to make the decree absolute. The case came on before us on 2nd June, when we passed an order that the case should stand over for fourteen days to enable the petitioner [561] to appear in person or by pleader. A telegram had been received which purports to come from the petitioner which stated that he intended to appear by a pleader out of respect to the Court. This morning, on the case being called on Pandit *Sundar Lal* appeared for the petitioner and for the respondent, and on their behalf asked us not to make the decree *nisi* absolute. I would have had no difficulty as to the course to be pursued if it had not been for a doubt entertained by one of my brothers on the Bench. In my opinion, we should deal with this as with all other cases between private litigants, and this Court should not go out of its way and uninvited pass a decree without any motion being made to this Court. In fact, here the two parties who are the persons most interested in the matter, namely, the husband and wife, ask us, by holding our hand, not to dissolve the marriage which they are willing, should continue. I cannot understand why they should be in a worse position by appearing before us with such a request than they would have been if they had gone on and cohabited after the passing of the decree *nisi* and brought that fact to the notice of the Court. The decree *nisi* does not dissolve the marriage till the decree has been made absolute, and, indeed, not until the time has elapsed for an appeal to the Privy Council, or in the case of an appeal, until it has deen decided, and until then the parties contiuue to be for all purposes man and wife. For instance, if the petitioner or respondent in this case, before the marriage was actually dissolved, should marry another person, he or she would be liable to be convicted of bigamy. If they came together after the decree *nisi* and cohabited before the marriage was absolutely dissolved, the petitioner, by cohabiting with the respondent, would, in my opinion condone the adultery which was the basis of the decree *nisi*. It has been suggested that it is our duty to go on and

(1) 30 L.J.P. and M. 199.

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consider the case on the merits, that is, on the evidence on the record of the Court below, and if satisfied with that evidence, to make the decree *nisi* absolute. That is, that although the wife has repented, and although the husband is willing to condone the adulterous acts of his wife and to take her back to live with him, we, as a Court of Justice, are bound, contrary to the wishes of the parties, to pass a decree dissolving the marriage between the parties, who are willing that the marriage state should continue. Reference has been [562] made to capital cases in which the Court has to consider even in the absence of the parties whether the capital conviction should be confirmed and the capital sentence carried out. That provision as to the confirming by the Court of capital convictions is one which has been made by statute for the protection of the subject as against the Crown. I cannot see how the duties of the Court in criminal cases can throw any light on the duties of the Court in civil actions *inter partes*." References have been made to the Ajmere Act with which I am not familiar. I understand from what has passed here that it is an act which enables the judicial authorities in Ajmere to invoke the assistance of this Court on questions of law which may arise before it. Similar powers are given to the Judges of Small Cause Courts. In the Ajmere Act it is expressly provided that the parties need not appear. I assume the person who framed the Act thought there was a necessity for that provision. Even if these words were in the Act or not, I fail to see how the duties of the Court under the Ajmere Act references, Small Cause Court Act references, and references under the Stamp Act can apply. The object of those references is that this Court, as the highest judicial authority in these Provinces, should, when called on, assist those holding judicial offices in Ajmere or these Provinces by expressing the opinion of this Court when a difficulty arises. In looking at the Divorce Act, I find that by s. 16, in a case in which a High Court has itself passed a decree *nisi*, it provides that the High Court shall fix a time after the expiry of which the decree absolute may be made, and it is expressly provided that, if the petitioner does not apply within a reasonable time to make the decree absolute, the High Court may dismiss his suit. It would certainly be complimentary to the Courts of the District Judges, and hardly so to the High Court, to hold that in a case of a decree *nisi* having been passed by the High Court, the petitioner would have to make an application to make his decree absolute, whilst if he had gone to the District Court and got a decree *nisi*, he need take no further trouble, as the High Court, if merits appeared on the record, would be bound to make his decree absolute. I have no doubt but that we ought to accede to this application, and that it is an application, which in the interests of justice and morals we should accede to. Suppose we make the decree absolute, what would be the effect [563] after the time had expired for presenting an appeal to the Privy Council? The parties having ceased to be man and wife could go next day and be re-married. In the meantime by passing a decree absolute here, we would be keeping these parties in suspense, and effect in the end no possible object, except that for a short time these persons, who wish to continue as man and wife, would cease to be man and wife. In my opinion, the only order we should pass is that we do not make absolute the decree of the 1st December 1887.

BRODHURST, J.—I entirely concur.

MAHMOOD, J.—As the learned Chief Justice has referred in his judgment to certain difficulties which I suggested in the course of the argument of the learned Pandit, who appears on behalf of both the

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petitioner and the respondent, I must confess that, without concurring in all that has fallen from his Lordship, as to the nature of a decree *nisi* in a divorce case and the rules applicable thereto, I ma willing to adopt the conclusion at which he has arrived as to the order to be passed in this case. I am glad to be able to concur in that order, as it seems to me to be consistent with the general principles upon which the law of marriage should proceed. But since it was owing to my doubts that the learned Pandit had to be heard in support of the application of the 28th May, 1888, whereby the petitioner Ernest Augustus Culley and his wife Elizabeth Anne Culley, respondent, jointly pray that the decree *nisi* of the 1st December, 1887, be not confirmed, I am anxious to explain the difficulties of law which I have felt in the case, though I have out of deference to the learned Chief Justice and my brother Brodhurst concurred in the order which they have made.

This case is governed by the Indian Divorce Act (IV of 1869), and s. 7 of that enactment expressly lays down that so far as possible the Courts shall "in all suits and proceedings hereunder act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being, acts and gives relief." This being so, the principles of the English law of marriage and divorce cannot be lost sight of in such cases, and so far as I know those princi-[564]ples, I have no hesitation in saying that, because that law does not recognise marriage as a simple civil contract, as some other systems take it to be, therefore proceedings in the Divorce Court cannot be regarded as an ordinary civil litigation wherein private rights only are concerned, and wherein it rests with the parties to deal with their rights as they like by mutual consent or otherwise. For instance, a litigation such as this which aimed at dissolution of a valid marriage is not dependent for its results on the wishes of either the husband or the wife, nor can a decree for dissolution of marriage be passed even if the co-respondent agrees with the husband and the wife that such should be the case. The notions of the English Ecclesiastical law are the foundation of this rule, and not only has that rule been adhered to by the Court in England ever since dissolution of marriage (that is, divorce *a vinculo*) was made lawful in that country, but express provisions for the intervention of third parties, have been made by the English legislature, and the principles of that legislation have in the main been imported into this country by the Indian Divorce Act which governs this case. In England, not only any person may intervene in a divorce suit, but the Queen's Proctor, an especial officer appointed for the purpose, has especial duties assigned to him for intervention in such litigation in order to prevent the parties from securing by mutual consent or otherwise such results as would be opposed to the English law of marriage and divorce. That the same principles are recognised by the Indian Divorce Act seems to me to be apparent from the provisions of s. 12 and the second paragraph of s. 16 of the same enactment, and the rest of the Act is consistent with this interpretation.

Now it being an undoubted proposition of the English law of divorce and of the Indian Divorce Act that the mutual consent of the parties to a litigation which aims at obtaining a decree *nisi* cannot by dint of such mutual agreement or compromise secure such a decree, it occurred to me as a difficult question, whether in a converse case the mutual consent of the parties can undo the effects of a decree *nisi* which one of them has already obtained. In other words, I entertain serious doubts whether

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such a decree can be nullified by consent of the parties to such a decree.

[565] To this question no express answer is furnished by the Indian Divorce Act. S. 16 of the enactment provides that every decree for dissolution of marriage shall be in the first instance a decree *nisi*, not to be made absolute till after the expiration of six months or more, within which period any person may intervene in the cause, and the section goes on to provide *inter alia* that "whenever a decree *nisi* has been made, on the petitioner fails within a reasonable time to move to have such a decree made absolute, the High Court may dismiss the suit." This last provision no doubt supports the view that a petitioner who has obtained a decree *nisi* might by inaction prevent that decree from being made absolute, the result of which might be the dismissal of the suit. But it must in the first place be remembered that the provision of the law in this behalf is not imperative, and in the next place that it is easy to conceive cases in which the Court would in the exercise of its discretion be justified in making the decree absolute, notwithstanding the absence of any motion on behalf of the petitioner to obtain that result. There are, I believe, English cases support this view, but I consider it unnecessary to pursue the subject further, because under the Indian Divorce Act, the provision which I have quoted is limited to decrees *nisi* passed by the High Court.

That that provision is not applicable to decrees *nisi* passed by District Judges is clear from the terms of s. 17 of the Act, in which no such provision as that I have quoted finds place, and the distinction is all the more noticeable because the last part of the section contains provisions for intervention of third persons, "during the progress of the suit in the Court of the District Judge," whilst the provisions of the second paragraph of s. 16, applicable to decrees *nisi* passed by the High Court, prescribe the period of intervention to be the interval between the date of the decree *nisi* and the date of its being made absolute. What the exact reasons for this distinction may be it is unnecessary for me to contemplate, for I must take the law as it stands, and interpreting it by well recognised rules of construing statutes, I cannot but hold that the effect of the enactment is, that whilst in the case of decrees *nisi* passed by a High Court the power of intervention may be exercised after passing of the decree *nisi*, and the suit for dssolution of marriage itself possibly defeated by reason of the successful petitioner not moving to [566] have the decree made absolute, no such provisions exist in respect of decrees *nisi* passed by District Judge, and that in lieu thereof power is given by the last part of s. 17 to intervene "during the progress of the suit in the Court of the District Judge;" and that that power does not exist after the District Judge has passed a decree *nisi* for dissolution of marriage. I have therefore no doubt that our Indian Divorce Act confers no power of intervention in respect of decrees *nisi* passed by a District Judge *after* such decree has been passed; nor can such decree *nisi* be set aside or the suit dismissed merely because the holder of the decree does not move this Court to have the decree made absolute.

I have mentioned this in order to show why, during the course of the argument of the learned Pandit, I was unable to accept the contention that any provisions of s. 16 of the Act relating to decrees *nisi* passed by High Courts, are to be imported into s. 17 which relates to decrees *nisi* passed by District Judges; for if I could accept the contention, there is no reason why the provisions of s. 17 should not be imported into s. 16, and thus the two sections, being mixed up into one, present inconsistency of

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statutory provisions in one and the same statute. I am inclined to think that cases which come up to this Court under s. 17 of the Act for confirmation of decrees *nisi* are in the nature of references, which must be disposed of whether the parties appear before the Court or not, for whatever order the High Court may make in the case, there is no such provision as that contained in s. 16, enabling the Court to dismiss the petitioner's suit merely upon the ground that the party interested fails to appear when the case comes on for hearing for confirmation of a decree *nisi* passed by a District Judge. The distinction which exists in this respect lends support to this interpretation, and I cannot help holding that we should have been bound to dispose of the case even if the petitioner had never appeared before us. This view is consistent with the principle upon which many other provisions of the Indian statute-book, to some of which the learned Chief Justice has referred, proceed in respect of references made to the High Court, such references being often from remote districts.

In this case, however, no such question directly arises, because two of the parties to the District Judge's decree *nisi* have appeared, [567] though somewhat anomalously by one and the same pleader, and I have referred to the possible effects of the absence of the parties only because it was suggested in the course of the argument that it was entirely within the choice of the parties whether or not the decree *nisi* should be made absolute by our confirming it. I have already said enough to show that proceedings in a Divorce Court are *quasi*-criminal, that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties; and the distinction is fully recognised by the English law.—Browne on Divorce and Matrimonial Causes, 3rd *Ed.* p. 218.

Is there then any power in the Court to set aside a decree *nisi* by any procedure other than that of intervention by a third party? The English Divorce Court [*vide Stoate* v. *Stoate* (1)] and the Indian Court [*vide Willis* v. *Wills* (2)] are agreed that the right of intervention is limited to persons other than the parties to the decree, and I have already shown that under the Indian Divorce Act such right of intervention is limited to the period of "the progress of the suit in the Court of the District Judge," that is, before the decree *nisi* is passed, and does not exist thereafter. Is there then any other power in the parties to prevent a District Judge's decree *nisi* from being confirmed by this Court under s. 17 of the Divorce Act, either by compromise or otherwise?

This is the direct question in the case, and it is one which is far from being free from doubt and difficulty. Here the husband and wife in their joint application to this Court state "that your petitioners subsequent to the passing of the decree *nisi* in the above suit have come to terms, and have resolved that on the petitioner leaving the military service two years hence or thereabouts they will live together again as man and wife, and have arranged that meantime the respondent shall go to England, there to remain with the petitioner's father and mother," and it is upon this ground that they pray that the District Judge's decree *nisi* of the 1st December, 1887, be not confirmed.

It will be observed that in this statement there is no allegation that the parties had already resumed co-habitation, or that there [568] had been any kind of condonation by the petitioner who had obtained the

(1) 30 L.J.P. and M. 173. (2) 4 B.L.R.O.B. 52.

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decree *nisi* from the District Judge on the 1st December, 1887. The recital in the petition amounts to nothing more than the expression of a deliberate intention on the part of the husband and wife to co-habit after the lapse of two years if certain conditions were fulfilled.

Is such an application entertainable under the Indian Divorce Act, as a reason for not confirming the District Judge's decree *nisi* of the 1st December, 1887? Pandit *Sundar Lal*, has argued that under s. 45 of the Act all the rules of the Code of Civil Procedure are rendered applicable to proceedings of this nature, and that the provisions of s. 375 of that Code entitle the parties to enter into any compromise as to the final adjudication of this Court in respect of the District Judge's decree *nisi* of the 1st December, 1887.

I am of opinion that this contention is entirely unsound, because in the first place the terms of s. 45 of the Indian Divorce Act itself render the application of the Civil Procedure Code subject to the provisions of the Divorce Act, and in the next place the very nature of the provisions of s. 375 of the Code militates against the very nature of proceedings in the Divorce Court as I have already shown. That section therefore has no application to this case, for it furnishes no guide in respect of matrimonial causes. We have, therefore, to fall back upon the provisions of the Indian Divorce Act itself in deciding whether the application now made can be granted. But as I have already said that Act contains no express provisions upon the subject, beyond the general provisions of s. 7 of that enactment requiring us to act on principles of the practice of the English Divorce Court.

This being so, I think the case of *Lewis* v. *Lewis* (1) furnishes a state of things closely similar to the facts of this case, and I may quote from the judgment of Sir C. Cresswell in that case to indicate its application to this case. The learned Judge Ordinary, after stating that the petitioner being entitled to a dissolution of her marriage, a decree *nisi* was pronounced and when the motion to make it absolute came on, the husband interposed and stated that he and his wife had *made up their differences* and had *renewed matri-*[569]*monial co-habitation*, and therefore applied to have the petition dismissed, and it appeared from an affidavit of the clerk of the petitioner's attorney that she did not desire to take any further proceedings in the matter, went on to say :—" I doubt much whether after a decree *nisi* has been pronounced I can dismiss the petition at the instance of either of the parties to the suit ; but if the petitioner either by her attorney or in person applies to the Court, I will at the desire of both parties make an order that no further proceedings be taken in the cause. All proceedings in the case will then be stayed. I doubt whether the Court has power to dismiss a petition for dissolution of marriage after a decree *nisi* has been pronounced, except in the manner pointed out by the 23 and 24 Vic., C. 144, s. 7, namely, at the instance of the Queen's Proctor or of a third person."

This case is to my mind an authority for the proposition that even co-habitation of the husband and wife after one of them has obtained a decree *nisi* for dissolution of marriage will not *ipso facto* nullify such decree, and that, even where the husband and wife (that is, petitioner and respondent) agree, such decree cannot be set aside, and that all that their mutual agreement can achieve is that further proceedings in the cause would be stayed.

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(1) 30 L.J.P. and M. 199.

1888 JUNE 16. — MATRIMONIAL JURISDICTION. — 10 A. 559 = 8 A.W.N. (1888) 249.

The English law of marriage and divorce, as reproduced in the Indian Divorce Act, has placed the matrimonial contract upon a footing so vastly different to that upon which ordinary civil contracts are placed, that it would be wrong to say that only private rights of the parties concerned in a matrimonial dispute are involved in the litigation which arises out of those disputes, or that the law as it stands leaves it open to the parties to settle such disputes by mutual agreement or compromise. The Legislature itself has recognised the distinctions in passing the Indian Divorce Act, and it was because of those distinctions that I felt the difficulties which I have mentioned and which rendered it necessary for Pandit *Sundar Lal* to occupy the time of the Court in supporting the joint application of the husband and wife to prevent the decree *nisi* being confirmed by us.

But though these difficulties have occurred to me, the liberal interpretation which the learned Chief Justice has put upon the [570] Indian Divorce Act is so consistent with the general principles upon which the matrimonial law in civilized countries should proceed, that I have willingly adopted the order which he has made. That order, as I understand it, is that we should desist from confirming the decree *nisi* and prevent it from being made absolute under the peculiar circumstances of this case. I do not understand the order to set aside the decree *nisi*; and I may respectfully add that if I had not so understood it, I should probably have been unable to concur in it. As the order has been made, its practical effect is virtually the same as that indicated by Sir C. Cresswell in *Lewis* v. *Lewis*(1), that is to say, staying further proceedings relative to the confirmation of the District Judge's decree *nisi* of the 1st December, 1887, by our not confirming it.

NOTE.—As to whether or not application for a decree absolute according to the practice in the English Divorce Court, is a step in the cause, see Ousey and Ousey v. Atkinson L. R. I. P. Div. 56 and Brown, on the Law and Practice in Divorce and Matrimonial Causes, 4th Ed., p. 325.

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10 A. 570 = 8 A.W.N. (1888) 231 = 13 Ind. Jur. 275.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KUDHAI (*Defendant*) *v.* SHEO DAYAL AND OTHERS (*Plaintiffs*).* [21st June, 1888.]

Execution of decree—Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro tanto—*Validity of sale and extent of rights purchased to be determined by Court executing the decree—Civil Procedure Code, s.* 244 (c).

Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage-security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

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* Second Appeal No. 961 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 19th March, 1887, reversing a decree of Maulvi Jaffar Husain, Munsiff of Meerut, dated the 11th January, 1887.

(1) 30 L. J. P. and M. 199.

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JUNE 21.

APPELLATE
CIVIL.

10 A. 570 = 8 A.W.N. (1888) 231 = 13 Ind. Jur. 275.

Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase, are questions falling within the purview of clause [571] (c) of s. 244 of the Code of Civil Procedure and must be determined by order of the Court executing the decree.

Banarsi Das v. *Maharani Kuar* (1), *Wise* v. *Abdool Ali* (2) and *Pogose* v. *Fukuroodden Mahomed Ahsan* (3) referred to.

[D., 22 M. 209 (211, 212) = 8 M.L.J. 309 (311).]

THE facts of this case are stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Babu *Jogindro Nath Chawdhri*, for the respondents.

JUDGMENT.

MAHMOOD, J.—The facts of this case may be recapitulated here to indicate the questions of law which require decision in this appeal.

On the 13th June, 1882, six persons, *viz.*, (1) Musammat Premu, (2) Debi Sahai, (3) Girdhari, (4) Chand Lal, (5) Bihari, and (6) Kudhai (appellant), obtained a joint decree for possession of a house by redemption on payment of Rs. 1,043-2-3 against three persons (1) Sheo Dayal, (2) Sheo Singh, and (3) Johri Mal.

On the 5th June, 1885, Kudhai by himself applied for execution of the decree, praying for possession of only half of the house, which he claimed as his share therein. To this application objections were raised by the judgment-debtors, and during the pendency of that application the Court executing the decree allowed him to amend his application so as to seek possession of the entire house.

On the 28th August, 1885, the Court allowed Kudhai, appellant, to execute the decree in respect of the whole house on furnishing security for Rs. 869 2-8 (which represented five-sixths of the mortgage-money) to protect the interest of the other decree-holders who had not joined in the application for execution. The order was reversed in appeal by the lower appellate Court, but was restored by this Court on the 29th May, 1886 (4).

Having so far succeeded, Kudhai, appellant, having filed the requisite security applied again for execution of the decree in respect of the whole house, by an application dated 13th September, 1886, which must be taken to revive the execution-proceedings commenced by him with the application of the 5th June, 1885.

Meanwhile, on the 2nd August, 1882, Musammat Premu and others who were joint decree-holders with Kudhai, sold their rights [572] to one Sugan Chand, who on the 21st September, 1886, sold those rights to the judgment-debtors, that is to say, to the persons who were already in possession of the house. Relying upon their purchase the judgment-debtors raised objections to the execution, contending that the rights of the decree-holder Kudhai who sought execution in respect of the whole house, were limited to a one-fifth share, and that he could not, therefore, seek possession of more than that share. On the other hand, the appellant Kudhai, decree-holder, contended that the extent of his share was at least one-half of the whole house, and that he could execute the decree in respect of the whole house as the purchase made by the judgment-debtors was illegal, and the question had already been settled as to his right to execute the whole decree.

(1) 5 A. 27. (2) 7 W.R. 136. (3) 25 W.R. 343. (4) A.W.N. (1886) 125.

The Court of first instance held that the purchase made by the judgment-debtors having been made subsequent to the High Court's order of the 20th May, 1886, such purchase could not nullify the effect of that order; that the judgment-debtors are bound by that order, "and should give possession to Kudhai of the whole house"; that the question as to the extent of Kudhai's share in the house could not be determined in execution-proceedings; and that "the judgment-debtors may obtain their remedy as to the determination of their shares in the house and as to the possession thereof as representatives of Premu, &c., decree-holders, by a regular suit in the same manner as their predecessors-in-title would have done." Upon these grounds the first Court rejected the objections of the judgment-debtors, and allowed execution to proceed in respect of the whole house.

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From that order the judgment-debtors appealed to the lower appellate Court, and the learned Judge of that Court reversed the order of the first Court in a judgment which goes to show that he regarded the share of the decree-holder Kudhai to be only one-fifth in the house, though the order passed in appeal does not show that the learned Judge allowed execution of decree even to that extent.

From the order of the lower appellate Court, this second appeal has been preferred, and the arguments addressed to me by the [573] learned pleaders for the parties raise the following questions for determination:—

(1) Whether the purchase by the judgment-debtors of the shares of their decree-holders, Musammat Premu and others, renders the decree of the 13th June, 1882, incapable of execution in respect of the whole house, notwithstanding the order of this Court, dated the 20th May, 1886, which restored the first Court's order of the 28th August, 1885, allowing execution in respect of the whole house.

(2) Whether the question as to the legality of the purchase by the judgment-debtors and the extent of the share which they so acquired can form the subject of investigation in execution-proceedings such as this case.

I am of opinion that the questions so raised are not free from difficulty, principally, because the Code of Civil Procedure contains no express provision to meet cases such as this. The questions, however, are not dissimilar in principle from those which arose in the case of *Banarsi Das* v. *Maharani Kuar* (1), where my brother Straight and I concurred in holding that when by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them, but that when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. That was a case in which the decree was for money, but in arriving at the principle upon which that judgment proceeded, we relied upon the case of *Wise* v. *Abdool Ali* (2), were Loch and Macpherson, JJ. held that "even if it should appear that the principal defendant has (as one of the representatives of his son) an interest as one of the decree-holders, that fact will not bar execution being issued by other decree-holders according to *such rights as they may be able to prove.*" Similarly, reference was made to the case of *Pogose* v. *Fukuroodeen Mahomed Ahsan* (3), where Jackson and McDonell, JJ., observed:—"We

(1) 5 A. 27. (2) 7 W. 136. (3) 25 W. R. 343.

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[574] considered for a moment whether it was possible to make any distinction between the capacity in which Azim Chaudhri was the judgment-debtor and that in which he became one of the decree-holders as representing his deceased wife; but it appears to us that the consequence as regards that share in the decree is the same as it would have been if he *had purchased the whole or a part.* We think the effect of inheritance as to a part or as to the whole is the extinction of the decree *pro-tanto.*"

In both these cases, though the reports are not very clear, it would appear that the decrees were for immoveable property, and the rights of one of the decree-holders had during the pendency of execution-proceedings devolved upon the judgment-debtor; and in the latter case Sir Louis Jackson, in delivering the judgment of the Court, expressly stated that the effect of such devolution was similar to that of a purchase by the judgment-debtor of a portion of the property in respect of which the decree had been obtained.

I am of opinion that these two rulings are applicable in principle to this case, and are in accord with the juristic reasons upon which my judgment in the case of *Banarsi Das* v. *Maharani Kuar* (1) proceeded. The general effect of these rulings seems to me to be that where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor or is acquired by him under a valid transfer, the decree does not become incapable of execution but is extinguished only *pro-tanto.* The theory of law upon which this rule proceeds is in my opinion, sufficiently general to comprehend alike cases in which the decree is for money and cases in which the decree awards possession of immoveable property. For instance in a case where A and B jointly obtain a decree for money against C, and C, as judgment-debtor either pays off the share of A, or purchases his share in the decree, or inherits such share from A, the result would be the extinguishment of the decree *pro-tanto*, and the remaining decree-holder B could not execute for more than his own share. This is the effect of the ruling in *Banarsi Das* v. *Maharani Kuar* (1), and the cases to which the ruling refers. Similarly, and on the same principle, I hold that where A and B obtain a decree [575] for possession of a house or other immoveable property against C, and C purchases or inherits the rights and interests of A in such property, the decree is extinguished *pro-tanto*, though the remaining decree-holder B can, of course, execute the decree in respect of his own share. Both classes of cases rest upon the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman law be called *confusio* proceed.

Applying these principles to this case, I am of opinion that if the defendants-mortgagees judgment-debtors of the decree of the 13th June, 1882, have validly acquired by purchase the rights and interests of the mortgagors decree-holders Musammat Premu and others, the decree cannot to that extent, be executed against them, because it has been extinguished *pro-tanto*, and all that Kudhai, decree-holder, appellant, could seek to recover possession of by enforcement of the decree would be such share in the mortgaged house as has not been validly purchased by the mortgagees judgment-debtors. This view does not, in anyway, affect this Court's

(1) 5 A. 27.

order of the 20th May, 1886, because at that time the judgment-debtors-respondents had not acquired the rights of ownership in the house and were not in a position to raise the pleas which they have now set up. As already stated, Kudhai's joint decree-holders Musammat Premu and others sold their share in the mortgaged house to Sugan Chand on the 2nd August, 1882, but neither the vendors nor Sugan Chand were parties to the litigation which ended in this Court's order of the 20th May, 1886. The effect of that order no doubt is to allow Kudhai to execute the decree of the 13th June, 1882, in respect of the whole house, but at that time the judgment-debtors had not purchased a portion of the house from Sugan Chand, for the sale is dated the 21st September, 1886, and it is upon the grounds of that purchase that the plea they now raise is founded.

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For these reasons I hold that the decree-holder appellant Kudhai, is entitled to execute the decree only in respect of so much of the house as has not been validly purchased by the judgment-debtors-respondents under the sale of the 21st September, 1886. [576] These judgment-debtors or mortgagees in possession, and the decree of the 13th June, 1882, is a decree for redemption; and it seems to me obvious that it would be a most circuitous method to force these judgment-debtors mortgagors to receive in these execution proceedings the entire mortgage money including so much as is due by the shares which they themselves have purchased, and then to relegate them to another regular suit in which they would seek redemption of their shares from Kudhai on payment of the very money which Kudhai had paid to them in these execution proceedings. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at protection of the mortgagee, but that rule does not apply to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. This rule, which has always been recognised in India, has been formulated in the last part of s. 60 of the Transfer of Property Act (IV of 1882), and although it is a rule of substantive law, the principle upon which it proceeds is, in my opinion, applicable also to adjective law, that is, rules of procedure such as those, relating to execution of decrees of this character.

These observations dispose of the first question in this case as enunciated by me, and they render the decision of the second question an easy matter. The whole of that question comes to this, is the dispute as to the legality of the purchase by the judgment-debtors and the extent of the share which they so purchased a matter falling within the purview of clause (*c*) of s. 244 of the Code of Civil Procedure? That section, in enumerating the questions to be decided by the Court executing the decree, goes on to say in cl. (*c*), " any questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction on the decree." Here the decree-holder-appellant, Kudhai, as also the judgment-debtors-respondents were parties to the suit which ended in the decree of 13th June, 1882, and which decree is sought to be executed in these proceedings, and this being so, I hold that the terms of cl. (*c*) of s. 244 of the Code of Civil Procedure are sufficiently wide to include such questions as those raised in this case, relating to the validity and extent of the share purchased by the judgment-debtors in the mortgaged house to which the decree relates.

[577] But in this case neither of the Courts below has tried the case upon the merits, with reference to the question how far the decree sought to be executed has been extinguished by reason of the purchase made by the judgment-debtors-respondents on the 21st September, 1886, and till

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that question is decided upon the merits, it is not possible to determine to what extent the decree can be executed by Kudhai, and what amount he should pay in order to secure possession of so much of the house as has not been purchased by the mortgagees judgment-debtors-respondents. And in this connection I may state that the fifth ground of appeal before me, which proceeds upon the assumption that the decree-holder Kudhai appellant had already paid the mortgage-money as provided by the decree, is also a matter relating to the merits and cannot be dealt with by this Court as a Court of second appeal.

Under these circumstances, the proper course is to decree this appeal, setting aside the order of both the Courts below and to remand the case to the Court of first instance for disposal upon the merits, with reference to the observations which I have made. I order accordingly. Costs will abide the result.

Case remanded.

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10 A. 577 = 8 A.W N. (1888) 215.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DEBI PRASAD (*Plaintiff*) *v.* RUP RAM AND OTHERS (*Defendants*).*
[23rd June, 1888.]

Act XXII of 1881 (*Excise Act*), *ss.* 5, 12, 35, 42—*Licence—Sub lease—Breach of conditions of licence—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of* 1872 (*Contract Act*), *s.* 23.

The plaintiff obtained from the excise authorities a licence to manufacture and sell country liquor, such licence containing a condition against sub-letting the benefits of the licence. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a licence granted under the Act is made a punishable offence. The plaintiff sub-let the licence to defendants who, on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

[578] On second appeal the plaintiff contended on the authority of *Gauri Shankar* v. *Mumtaz Ali Khan* (1), that his suit had been wrongly dismissed.

Held, that the sub-letting of licence to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was, therefore, not enforceable in a Court of justice.

Gauri Shankar v. *Mumtaz Ali* (1) distinguished.

[F., 19 B. 626 (630); R., 31 C. 798 = 8 C.W.N. 635 (636); 14 C.P.L.R. 67; D., 21 B. 522 (527); 24 B. 622 (628) = 2 Bom. L R. 483; 11 C.P.L.R. 62 (63); 86 P.R. 1902 = 17 P.L.R. 1903.]

THE facts of this case are stated in the judgment of the Court.

The Hon. *T. Conlan*, Maulvi *Zahur Husain* and Munshi *Lalta Prasad*, for the appellant.

Mr. *J.E. Howard* and Pandit *Sundar Lal*, for the respondents.

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* Second Appeal No. 83 of 1887, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 6th November, 1886, reversing a decree of Maulvi Shah Ahmad-ul-la Khan, Subordinate Judge of Gorakhpur, dated the 15th March, 1886.

(1) 2 A. 411.

JUDGMENT.

1888 JUNE. 23.

APPELLATE CIVIL.

10 A. 557 = 8 A.W.N. (1888) 215.

BRODHURST and MAHMOOD, JJ.—This was a suit for recovery of Rs. 1,043-15-1½, principal and interest, due upon a *Sarkhat* (agreement) executed by the defendants on the 5th September, 1884. In that agreement is included a sum of Rs. 1,500, which the defendants promised to pay to the plaintiffs as the sub-lessees of a licence obtained by the plaintiff from the revenue authorities under the Excise Act for distillery. The suit was defended upon various grounds, but it was decreed by the Court of first instance.

Upon appeal the lower appellate Court reversed the decree of the first Court upon a question of law, which has to be considered by us here, as it is the main point upon which this second appeal has been preferred to us. The learned Judge of the lower appellate Court has held that the sum of Rs. 1,500 included in the *sarkhat* could not be lawfully taken into account, because it represented money due upon a contract of sub-leasing a licence, which contract was opposed to the Excise Act (XXII of 1881), by s. 5 of which enactment it is only persons to whom the licence has been granted who can take benefit of it, and by s. 12 of the same enactment such licence can take advantage of the licence subject to the terms of the licence itself and not in contravention thereof. Again, s. 35 and the following sections provide for regulations which bind the licence and subject the licence to certain conditions, and s. 42 in general terms says that any person who breaks any rule made under the Act, or any condition of a licence granted under the Act, for the breach of which rule no other penalty is herewith provided, shall be punished with a fine of Rs. 50.

[579] In this case the licence which had been obtained by the plaintiff in 1883, contained in para. 12 express prohibition against sub-letting the benefits of the licence, and there can be no doubt that the sub-letting of the licence by the plaintiff to the defendants was an action in contravention of the terms of the licence above-mentioned, and was so punishable under s. 42 of the Excise Act (XXII of 1881).

We therefore hold that the sub-letting of the licence was an action contrary to law within the meaning of s. 23 of the Contract Act (IX of 1872), and as such not enforceable by us as a Court of justice.

Mr. *Conlan* in arguing the case on behalf of the appellant has relied upon a Full Bench ruling of this Court in *Gauri Shankar* v. *Mumtaz Ali Khan* (1), and the learned counsel contends that that case is an authority to support the proposition that the restrictions upon sub-leasing a licence are intended only for the protection of the public revenue and do not vitiate the contract entered into by a licensee with a third party. So far as that case is concerned it is enough to say that Regulation VI of 1819, upon which the case proceeded, is in many respects different, both in point of nature and policy, from the Excise Act (XXII of 1881) with which this case is concerned, and that the ruling cited is one in which there was a case of partnership, and the licence did not contain any express prohibition against such partnership being entered into.

Pandit *Sundar Lal* in supporting the case for the respondents has called our attention to certain English cases—*Ritchie* v. *Smith* (2) ; *Cundell* v. *Dawson* (3) ; *Smith* v. *Mawhood* (4) ; *Taylor* v. *The Crowland Gas & Coke*

(1) 2 A. 411.
(2) 18 L.J.CP. 9.
(3) 17 L.J.C.P. 311.
(4) 15 L.J. Exch.149.

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Co. (1)—for supporting the contention that in connection with Excise Acts, the person to whom the licence is given is the only person who can avail himself of such licence, and that it would be defeating the policy of such enactments if such licensee is allowed to sublease the licence by any agreement. Again, the learned pleader relies upon a ruling of the Calcutta High Court in *Judoonath Shaha* v. *Nobin Chunder Shaha* (2), where Sir Richard Couch, in dealing with the Bengal Excise Act, held that "a contract by which a licensee lets the shop and the **[580]** use of the licence for a fixed term, receiving rent, is contrary to the policy of the law, and comes within the rule that a contract which is illegal, or is contrary to public policy, cannot be enforced."

We are of opinion that the general effect of those cases and especially the last-mentioned case is that no licensee under the excise laws can transfer the licence or sub-lease it to any person, and that it would be defeating the policy of the law if such contracts were to be allowed. This view is based not only upon the general principle that anything which defeats statutory provisions or is against the public morals should not be allowed, but upon the especial matters of the excise law that the capacity of the licensee is a matter to be taken into account. and that the consideration of the public morals also forms part of the granting of such licence with reference to the character of such licensee. We hold therefore that the lower appellate Court was right in holding that the suit, taking into account the sum of Rs. 1,500 as rent due under the licence which the plaintiff had taken from the revenue authorities and sub-leased to the defendants, was not maintainable. That Court has also found that once the item of Rs. 1,500 is kept out of account nothing of the account proffered by the plaintiff himself remains due to him. This being so, we dismiss the appeal with costs.

Appeal dismissed.

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10 A. 580=8 A.W.N. (1888) 217.

CRIMINAL REVISION.

Before Mr. Justice Straight.

EMPRESS *v.* NIADAR [7th July, 1888.]

Act XLV of 1860 (*Penal Code*), *s.* 498—*Detaining with criminal intent a married woman.*

The words "such woman" in s. 498 of the Indian Penal Code do not mean such a woman as has been so enticed as mentioned in that section but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section.

[F.—16 P.R. 1891 Cr.]

THIS was an application for revision on behalf of Niadar, convicted under s. 498 of the Indian Penal Code.

The evidence in the case proved that the wife of the complainant ran away from him and was eventually found residing with the petitioner. Complainant claimed back his wife, but petitioner persisted **[581]** in detaining her knowing that she was then the complainant's wife. On these facts the petitioner was convicted by a Magistrate under s. 498 of the Indian Penal Code and sentenced to rigorous imprisonment for four

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(1) 23, L.J. Exch. 254.

(2) 21 W.R. 289.

months. On appeal to the learned Sessions Judge, that officer observing that "it is fairly proved that the accused when complainant claimed his wife detained her, having then reason to believe she was complainant's wife," affirmed the conviction and sentence.

1888 JULY 7.

CRIMINAL REVISION.

10 A. 580 = 8 A.W.N. (1888) 217.

The second ground on which revision was sought was as follows:—"Because when enticing away a married woman is not established, no conviction can be had as against the prisoner under s. 498 of Indian Penal Code."

Mr. *Niblett*, for the petitioner.

The *Government Pleader* (*Ram Prasad*), for the Crown.

JUDGMENT.

STRAIGHT, J.—If I understand the judgment aright it has been found as a fact by the learned Judge that the petitioner, knowing or having reason to believe that the woman was the wife of the complainant, detained her in his home and kept her from her husband with the intent that she should continue to co-habit with him. It is admitted by the learned pleader for the petitioner, that his first plea as to the proof of the marriage cannot be sustained, but he contends that on the facts found by the Judge, and in the absence of proof of enticement, there can be no conviction under s. 498 of the Penal Code. In support of the view he refers to a ruling of Pearson and Oldfield, JJ. (1), which no doubt favours his contention, though whether the decision of those learned Judges is to be regarded as confined to the facts of that particular case is not altogether clear. At any rate, the point now raised does not seem to have been discussed. In my opinion, the words "such woman" in s. 498 do not mean "such woman so enticed as aforesaid," but do mean "such woman whom he knows or has reason to believe to be the wife of any other man," and that the detention of such a woman with the intent therein provided is one of the offences comprehended in the section. The petitioner therefore was, in my opinion, rightly convicted. But I think upon all the facts disclosed here a sentence of one month's simple imprisonment would have been ample, and I direct that the record be so amended.

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10 A. 582 = 8 A.W.N. (1888) 234.

REVISIONAL CRIMINAL.

[582] *Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Tyrrell.*

HARI PRASAD (*Petitioner*) v. DEBI DIAL (*Opposite party*). [10th July, 1888.]

Criminal Procedure Code, s. 195—Sanction for prosecution for giving false evidence in a suit under Act XII of 1881 tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.

A suit for arrears of rent under s. 93 cl. (*a*), Act XII of 1881, was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court

(1) 3 A. 251.

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being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer holding that he had no jurisdiction in the matter also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge:

Held, that the Court of a Collector when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the District, was still to be deemed subordinate to it, within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie.

[F.—9 A.W.N. 206; 19 A. 121 (123) = 17 A.W.N. 2].

THE facts of this case are stated in the judgment of the Court.

Pundit *Sundar Lal*, for the petitioner.

JUDGMENT.

EDGE, C. J.—This is a reference by my brother Straight to this Bench now composed of my brothers Straight, Tyrrell and myself. In a suit for arrears of rent under s. 93, clause (*a*), Act XII of 1881, which was heard by a Tahsildar having the powers of and acting as an Assistant Collector of the second class, application was made to him for an order sanctioning the prosecution of a witness in the suit for perjury. The Tahsildar, thinking he had no jurisdiction, referred the matter to the Magistrate of the District who was the Collector. The latter officer made an order sanctioning the prosecution. From that order the witness applied to the Sessions Judge to revoke the sanction. The Sessions Judge, being of opinion that the Collector was not sub-[583]ordinate to the Court of the Sessions Judge in this matter within the meaning of s. 195 of the Code of Criminal Procedure of 1882, declined to interfere. The witness then applied to the Commissioner of the Division. The Commissioner of the Division, being of opinion that he had no jurisdiction under s. 195 of the Code of Criminal Procedure of 1882, also declined to interfere. The witness then through counsel applied to this Court to revise the order of the Sessions Judge, the principal plea taken being that the Judge of Goakhpur had jurisdiction to hear the application to revoke the sanction. My brother Tyrrell and I are only asked to express our opinion in the matter. It will be for my brother Straight to pass orders in the case. The question on which we are asked for an opinion is whether the Judge's Court is the Court to which appeals from the Collector's Court ordinarily lie. I have great difficulty in answering that question in the light of the provisions of the N.W.P. Rent Act on the subject of appeals. Under that Act one set of appeals—from a Collector's *decrees* in suits—goes necessarily to the District Judge. Another class of appeals—from his *orders* made in applications—goes necessarily to the Commissioner of the Division. In either case the course of appeal may be described as ordinary; and it is difficult to say whether the Commissioner's Court or the Judge's Court is the Court to which appeals from the Collector's Court ordinarily lie. It would be inconvenient to hold that, in cases arising out of s. 195 of the Code of Criminal Procedure, the Court to which applications to set aside or to grant a sanction given or refused in the Court below should be made should have to be determined by a consideration of the question of the *forum* of appeal in the particular matter in which the perjury is alleged to have been committed. It has been suggested by my brother Tyrrell that

the framers of s. 195, as amended in 1882, had in mind the normal course of appeals in a district, as provided, for example, in Act VI of 1871, rather than the appellate provisions of peculiar local or special Acts, and that for the purposes of s. 195 the Court of the Judge of the District may be taken to be the Court to which appeals from the Collector's Court ordinarily lie. I think we may come to this conclusion, but I must say that I doubt whether the framers of s. 195 of Act X of 1882 had present to their minds the difficulty or ambiguity in this respect arising out [584] of the provisions of the Rent Act XII of 1881. The reference will be returned to our brother Straight with our opinion thereon.

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STRAIGHT, J.— I agree.

TYRRELL, J.—I agree. It was held by a Full Bench (1) of this Court that a Court of Revenue was a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872, which are replaced by s. 195 of the present Code. It is true that those sections did not contain the provision that "every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." But the reasons for holding that a Collector trying a suit under the Rent Act is a Civil Court for the purposes of Chapter XXXV of the former Code of Criminal Procedure seem to me to retain all their original force and to be unaffected by the alterations introduced in the corresponding Chapter XV of the present Code. And this being so, I think that the normal course of appeal applicable to civil cases was contemplated in the clause containing the words "the Court to which appeals from the former Court ordinarily lie." Moreover, as a very substantial part of a Collector's judicial work under our Rent Act is appealable only to the District Judge (s. 189, Act XII of 1881, and s. 191 *id.*, where the District Judge is indicated as the Court of "regular appeal" from a Collector's *decree* in "all suits mentioned in s. 93"), I do not discern a sufficient reason in the mere fact that the Collector's *orders* in certain cases (s. 196) are not appealable to the Judge but to the Commissioner, for departing from the rule and practice we laid down in *Q. E.* v. *Sabsukh* (1).

The arguments from convenience preponderate largely in favour of the local and more accessible jurisdiction. [Upon this expression of opinion Straight, J., set aside the order of the District Judge declining jurisdiction and directed him to restore the application for revision from the Collector's order to his file and dispose of it according to law.]

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10 A. 585 = 8 A.W.N. (1888) 242.

APPELLATE CIVIL.

[585] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

GURDAYAL MAL (*Defendants*) v. JHANDU MAL (*Plaintiff*).*
[30th June, 1888.]

Pre-emption—Town—Custom—Evidence—Decrees enforcing right.

In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible

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* Second Appeal No. 126 of 1887 from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 1st December, 1886, modifying a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Sharanpur, dated the 2nd September, 1886.

(1) *Queen-Empress* v. *Sabsukh*, 2 A. 539.

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evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.

Gujju Lal v. *Fateh Lal* (1) distinguished, *Koodcottoolah* v. *Mohinee Mohun haha* (2), *Sheo Churn* v. *Goodur* (3), and *Lachman Rai* v. *Akbar Khan* (4), referred to.

[R. 21 M.L.J. 57 (61).]

THIS was a suit to enforce the right of pre-emption in respect of the sale of a plot of land situated in muhalla Saragian, or of the Sarogis, in quasba Candhla, zilla Muzaffarnagar. The plaintiff based this claim on the custom of the town. Both the lower Courts gave the plaintiff a decree. The defendant vendee appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

The Hon. *T. Conlan* and Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This was a suit for pre-emption. The plaintiff alleges generally in the plaint that, by reason of his co sharership, he was entitled to a pre-emptive right with regard to the property, and that he had made the necessary demand. By the written statement the defendant denied that there was any custom. The custom has been found on the evidence, some of which was oral, namely, that of the inhabitants of the town. Other evidence which was put in consisted of sale-deeds relating to sales in which the right was enforced, but without the assistance of the Courts of law. Another class of evidence consisted of decrees in suits relating to property in the town, by which the right of pre-emption was recognised and enforced. For the defendants, witnesses were called who [586] gave a general denial of the existence of the custom. Those witnesses could not mention any instance in which a claim of pre-emption had been successfully resisted.

It is said that the decrees to which I referred were not admissible in evidence. It appears to me that they were the best evidence of instances in which the right was recognised. They are to my mind the most satisfactory evidence, because they are the result of decisions in cases in which one party alleged the custom and the other denied it. The Courts having heard the evidence decided in favour of the custom. As those decrees were not in suits between these parties, they were not conclusive, but they were excellent evidence to show that the right was asserted in the town by other persons and was recognised by the lawfully constituted legal tribunals. We have been referred to the Full Bench judgment of the Calcutta High Court in the case of *Gujju Lall* v. *Fateh Lall* (1). That case does not bear on the question here. There the question between the parties was as to the right to recover possession of particular property, and the judgment that was sought to be made use of was a judgment in a suit to which the plaintiff was not a party. That the judgments such as we have here are admissible in evidence of the local custom was established by the case of *Koodoottoollah* v. *Mohinee Mohun Shaha* (2). That was a pre-emption suit, and the custom there sought to be established was a custom of pre-emption. In the case of *Sheo Churn* v. *Goodur* (3) the learned Judges of this Court considered that instances of an enforcement of a custom were

(1) 6 C. 171.
(2) 5 Rev. Civ. and Cr. Rep. 290.
(3) N.W.P.H.C.R. 1868, p. 138.
(4) 1 A. 440.

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good evidence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. If we want further authority, it is to be found in the case of *Lachman Rai* v. *Akbar Khan* (1), in which case the learned Judges considered that proof afforded by judicial record was amongst the most cogent evidence of an existing custom and that it had been enforced. Judicial records in England not between the same parties have been admitted as evidence of the existence of local customs.

It appears to us that the learned District Judge was fully authorised in finding that the custom of pre-emption existed in [587] the town. It is said that there was no evidence of the custom having existed or of its having been enforced in this particular part of the town or *muhalla*, that in our judgment is immaterial. The custom applied to the whole town and the greater included the less. There was no evidence that the custom did not apply to this particular ward.

The remaining question is as to the price. The sale-deed stated the price at Rs. 2,500. The Judge found that the true price was Rs. 1,500. It was proved that Rs. 2,500 had been paid in the presence of the Registrar, but there was evidence that immediately afterwards Rs. 1,000 of that sum was returned to the vendee, and there was evidence that the vendor and vendee had said that Rs. 1,500 was the price. That was a question for the Judge, and we cannot interfere with his finding.

There is one point which we have omitted to mention, that is, it is contended that the plaint is bad because it does not specifically set out what the custom was. No doubt it would have been more regular if the custom had been specifically defined in the plaint, but the parties were put to no inconvenience. Each side called evidence, one to the custom and the other to rebut it.

We are of opinion that there is no sufficient reason to warrant us in disturbing the judgment of the Court below. The appeal is dismissed with costs. *Appeal dismissed.*

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10 A. 587 = 8 A.W.N. (1888) 238.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMJIWAN MAL AND OTHERS (*Plaintiffs*) *v.* CHAND MAL AND OTHERS (*Defendants*).* [8th & 9th May, 1888.]

Act XV of 1877 (Limitation Act), ss. 5, 14—Appeal preferred to wrong Court through mistake of law—Exclusion of time—Civil Procedure Code, ss 111, 216, 561—Suit for dissolution of partnership—Set off—Objections under s. 561—Dismissal of appeal as barred by limitation—Objections not entertainable.

A suit for dissolution of partnership in which the claim was valued at Rs. 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in [588] paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court.

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* First Appeal No. 213 of 1886, from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Azamgarh, dated the 31st March, 1886.

(1) 1 A. 440.

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S. 14 of the Limitation Act (XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent, but is limited to cases where from *bona fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase "other cause of a like nature" in the section is vague, and cannot be held to release a person from the obligation to know the law of the land.

The decree in this suit was passed by the Subordinate Judge as the Court of first instance on the 31st March, 1886. Against the decree the plaintiff preferred an appeal to the District Court on the 1st July, 1886, and on the 11th December, 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject-matter in dispute was above Rs. 5 000. The plaintiff then on the 20th December, 1886, presented the memorandum of appeal to the High Court, and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal, the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation.

Held, that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed.

Balwant Singh v. *Gumani Ram* (1) explained.

The entertainment of objections under s. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either.

[**Appl.**. 11 A. 408 (414)=8 A.W.N. 111; **R.**, 12 A. 461 (482) (**F.B.**)=10 A.W.N. 149; 21 B. 552 (554); 23 B. 692 (695)=1 Bom. L.R. 768; 28 B. 235 (237)=5 Bom. L.R. 947; 34 C. 216=5 C.L.J. 380; 21 M. 352 (353); 8 C.P.L.R 121 (123); 11 C.P.L.R. 49 (50); 2 O.C. 133 (134); 184 P.R. 1889; 24 P L.R. 1906; 118 P.R. 1908; 180 P.W.R. 1911=131 P.L.R. 1911=11 P.R. 1912=10 Ind. Cas. 207; **Cons.**, 19 A. 348 (352)=17 A.W.N. 86.]

THE plaintiffs and the defendants carried on a trading business under certain written articles of co-partnership, and according to which the plaintiffs were the proprietors of one-third of the business and the defendants of the remaining two-thirds. Disputes and differences arising between the partners, the plaintiffs requested the defendants to settle the partnership accounts and wind up the business, but the defendants not showing any readiness to do so, the plaintiffs instituted this suit. They prayed the Court to decree a dissolution of the partnership and that the accounts of the said partnership business might be taken by the Court and the assets thereof realised, and that each party might be ordered to pay into Court any balance due from him upon such partnership accounts being taken, and that the debts and liabilities of the partnership might be paid and discharged, and that the costs of the suit might be paid out of the partnership assets, and the balance might be [589] divided between the parties according to the terms of the agreement and in the event of the assets being found to be insufficient, the parties might be ordered to contribute in such proportion as should be just to a fund to be raised for the payment and discharge of debts, liabilities, and costs. The plaintiffs also prayed for such other reliefs as the Court might think fit to grant. The approximate value of the claim was laid at Rs. 2,000.

The defendants raised several pleas, the only one material for the purposes of this report being as follows;—An inspection of the account books of the firm would show and prove that Rs. 34,000 were due to the firm from the traders and many other respectable persons of Azamgarh, for

(1) 5 A. 591.

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which, under the provisions of the contract of partnership, the plaintiffs were and should be responsible, until the whole amount were received by the firm; and that Rs. 23,354-10-3 were due from the plaintiffs, who had appropriated the same. Moreover, the plaintiffs should settle the accounts of the profits.

The Court of first instance (Subordinate Judge of Azamgarh) laid down the following among other issues, *viz.*,—"with reference to the accounts entered in the books and papers of the joint firm and the articles contained in the agreement which is admitted, how much is due from one party to the other?" Finally on the 31st March, 1883, he decreed dissolution of partnership, appointed a receiver to collect all the partnership estates and effects, and ordered a sale of the stock in trade, and he further decreed and ordered that the plaintiffs should pay to the defendants the sum of Rs. 8,041-7-0 within one month of the date of the decree, with costs and interest.

Against this decree the plaintiffs on the 1st July, 1886, preferred an appeal to the Court of the District Judge, and on the 11th December, 1886, the memorandum of appeal was returned to them to be presented to the proper Court on the ground that the subject matter in dispute was above the value of Rs. 5,000.

On the 20th December, 1886, the plaintiffs presented the said memorandum of appeal to the High Court, and the appeal was admitted subject to the consideration of the Bench determining the appeal of any question as to the presentation of the appeal after the period prescribed therefor by law. The respondents to the appeal [590] filed objections to the decree appealed from, under s. 561 of the Code of Civil Procedure.

At the hearing of the appeal the respondents objected to the appeal being entertained on the ground that the same was not presented to the Court within the time prescribed by law for presentation of appeals to the High Court, and the appellants answered by urging that the time during which they were *bona fide* prosecuting their appeal in the Court of the District Judge should be excluded from the computation of the period of limitation, and that under those circumstances they were entitled to the indulgence allowed by s. 5 of the Limitation Act.

The Hon Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the appellants.

The Hon. *T. Conlan*, and Pandit *Sundar Lal*, for the respondents.

The facts of the case are further stated in the judgments of the Court.

JUDGMENTS OF THE COURT IN THE APPEAL.

STRAIGHT, J.—This appeal relates to a suit which was instituted by the plaintiffs-appellants before us in the Court of the Subordinate Judge of Azamgarh upon a plaint which, alleging a partnership as subsisting between the plaintiffs and the defendants, prayed for the following relief:—"That the plaintiffs pray the Court to decree a dissolution of the partnership, and that the accounts of the said partnership trading may be taken by the Court and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership assets, and that any balance remaining of such assets, after such payment and discharge and the payment of the said costs, may be divided between the plaintiffs and the defendants according to the terms

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of the agreement, or that if the said assets prove insufficient, the plaintiffs and the defendants may be ordered to contribute in such proportion as shall be just, to a fund to be raised for the payment and discharge of such debts, liabilities and costs, and to such other reliefs as the Court shall think fit. The approximate value of the claim is Rs, 2,000."

[591] Now that was a suit which undoubtedly was framed and presented to the Court in contemplation of the provisions of s. 215, Civil Procedure Code. But it is unnecessary for me in dealing with the matter to which I shall have presently to advert, to make any reference to these forms of suits and the shape in which they would be regarded by a Court in England. I have simply to see how far it is governed by any other provisions in the Civil Procedure Code, and if it is governed by those provisions, to apply them.

A variety of pleas were raised in the statement of defence to this plaint, the only material one of which here is what in substance amounted to this, that in the taking of any accounts as between the plaintiffs and the defendants, the defendants were to have the advantage of, and to be benefited to the extent of, the sum of Rs. 23,354-10-3, which they alleged had been received by the plaintiffs upon their account in the course of the partnership business, and in respect of which the plaintiffs were bound to pay them that sum.

The Subordinate Judge who tried the case, having declared the partnership dissolved and having caused the accounts to be taken, came to the conclusion, as declared by his decree, that the defendants were entitled to receive from the plaintiffs a sum of Rs. 8,041-7-0. Consequently, there was a decree in favour of the defendants given by the Subordinate Judge by which they were declared to be entitled to the sum which I have mentioned.

From that decision of the Subordinate Judge, which was passed upon the 31st March, 1886, the plaintiffs preferred an appeal to the Court of the Judge on the 1st July, 1886, and on the 11th December of the same year, the memorandum was returned to them upon the ground that the subject-matter in dispute was more than the sum of Rs. 5,000. The memorandum of appeal was then brought by the plaintiffs and presented to this Court upon the 20th December, 1886, and the appeal was admitted subject to the report, that is to say, subject to the consideration of the Bench determining the appeal of any question as to its admissibility by reason of being beyond the limitation period.

Mr. *Conlan* to-day, when the appeal was called on, objected to our entertaining it, upon the ground that the decree of the Sub-[592] ordinate Judge having been passed upon the 31st March, and the appeal only having been filed in this Court upon the 20th December, 1886, it was barred, and we were therefore bound to dismiss the appeal.

On the other hand, it has been contended by Pandit *Ajudhia Nath* for the appellants that his clients are entitled to the indulgence which is mentioned in s. 5 of the Limitation Act. He has claimed that indulgence upon the grounds that by applying the analogy of s. 14 of the Limitation Act, and following the ruling of this Court, to which I was a party, in *Balwant Singh* v. *Gumani Ram* (1), he should be allowed the period of time during which his client was *bona fide* prosecutiug his appeal, though erroneously, before the Court of the District Judge.

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(1) 5 A. 591.

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I have only to say with regard to that ruling that it was never ruled by my brother Tyrrell, who delivered the judgment in that case in which I concurred, that the provisions of s. 14 of the Limitation Act were to be bodily imported into s. 5 of the said Act. All that we did say was that such circumstances as are therein mentioned might supply good cause within the meaning of s. 5 of the Limitation Law. We did not say that the time during which an appeal has been preferred and pending in a wrong Court *shall* be excluded for the purposes of calculating time, but we did say that it *may* be excluded for the purposes of the indulgence as explaining the delay in bringing the appeal to the right Court.

Out of this contention of Pandit *Ajudhia Nath* has arisen a serious question, and one that presses my brother Mahmood very much, namely, the question of jurisdiction, that is to say, of whether, looking to the terms of this plaint and to the terms of the statement of defence, the decree which was given by this subordinate Judge was a decree which was necessarily appealable to this Court and not to the Court of the District Judge. We have heard a very long and learned argument upon this particular point, and I am free to confess that at one period of the argument I entertained a very strong view different to the view of my brother Mahmood, as to this suit falling within the terms of s. 111 of the Civil Procedure Code. My reason for that was that it appeared to [593] me, looking at it from the point of view of an ordinary suit for dissolution of partnership, that it was not a suit for the "recovery of money" in the ordinary sense of the term. But as has been pointed out by my brother Mahmood, this class of suits as mentioned in s. 111, Civil Procedure Code, as suits for the recovery of money, is a class of suits in contradistinction to suits for the recovery of immoveable property, restitution of conjugal rights and the like, and it contemplates a class of cases in which or out of which a money claim arises. He has gone so far with me that he admits that a mere suit for dissolution of partnership would not be a suit for money, nor possibly would a suit asking for a declaration that an account should be taken. But when the plaint goes on and says:—"Take the accounts and when you have made up the accounts of this partnership, if any thing is due upon those accounts, give me what is due to me,"—then that is in fact a claim for money and nothing else. I agree that that may be so. The suit upon the face of it in all its aspects is a suit for recovery of money, because the plaintiff says, "when you have taken the accounts, if any thing is due to me, be good enough to direct that it be paid to me."

What is then the nature of the paragraph of the statement of defence to which I have referred? That is not a general assertion on the part of the defendants in which they say to the Court taking this account that some balance will be found in their favour on the taking of accounts, but it says in specific terms that "in any event in taking that account you must give us credit for the sum of Rs. 23,354-10-3, because that actual sum has been received by our partners, which we ought to have received, and which has been misappropriated by them."

I cannot say that a sum claimed in that way is not a sum claimed in the nature of a set-off. That is to say, the defendants say:—"Whatever may be found due to the plaintiffs upon settlement of accounts, that must be reduced by Rs. 23,354-10-3 as the amount they owe to us, and if that is not sufficient they must pay the balance." I do not think that under these circumstances I am straining construction here to hold that this is a claim for money by the plaintiffs in which the defendants plead a set-off. If I am [594] correct in that view, then any further difficulty in the

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matter ceases, because it is specifically provided by s. 216 of the Civil Procedure Code that in matters of this kind, where a set-off has been claimed and a decree has been passed in favour of the defendant, the amount of that decree in the defendant's favour determines the form of appeal. The decree of the Subordinate Judge, being for a sum in excess of Rs. 8,000, in favour of the defendants, it is obvious therefore that the appeal of the plaintiffs did, according to the terms of s. 216 of the Civil Procedure Code, lie to this Court and not to the Court of the District Judge, and in going to that Court they made a mistake of law, for which, according to the ordinary rules, they are not entitled to be excused.

It has been argued on behalf of the appellants that looking to the difficulty of the question which has involved us in so much discussion here, this is another indication that their action in going to the District Court should be regarded as a not unreasonable mistake, and that they, though acting erroneously, acted with perfect *bona fides* in the matter. It does not appear to me that there is any adequate or sufficient explanation offered here to us to justify us in extending the indulgence mentioned in s. 5 of the Limitation Act. They are supposed, or those who advise them are supposed, to know the provisions of the statute, and to be aware that under its terms, if an appeal is preferred, it has to be preferred to a particular Court. It is no excuse merely to say that they preferred their appeal to a wrong Court by mistake. As regards the interval of time which elapsed between the 11th December, when the memorandun was returned, and the 20th December, when it was presented to this Court, the case is absolutely bare of any explanation at all as to that delay. Under all the circumstances I am of opinion that it has not been made out to my satisfaction that the appellants acted *bona fide* in this matter, or that they have shown any good cause for granting them the indulgence mentioned in s. 5 of the Limitation Act. That being so, I have come to the conclusion that the objection of Mr. *Conlan* to the hearing of this appeal is entitled to succeed, and the appeal must be and is dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusion as my learned brother. But because in the course of the argument upon [595] the preliminary point raised by Mr. *Conlan* in this case as to the hearing of the appeal, there was not full accord between the view which I was inclined to take of the case and that which my learned brother was inclined to take, I think it necessary to state the exact reasons why I have arrived at the same conclusion.

So far as the preliminary points is concerned, the arguments of Mr. *Conlan*, on the one hand, and that of Pandit *Ajudhia Nath*, on the other, raise two questions for consideration, both questions being only part and parcel of one and the same point, that is, whether this appeal has been presented within the time provided by art. 156, sch. ii, Limitation Act, and whether the provisions of s. 5 of the Limitation Act would justify us in extending the ordinary period of limitation. The decree from which this appeal has been preferred was a decree passed on the 31st March, 1886, and this appeal was not preferred to this Court till the 20th December, 1886, that is to say, long after the period of limitation provided by the article to which I have referred. It is clear that in administering the rule of limitation we are bound to administer it in two manners only, either as a lax system, the periods of limitation to be held *in terrorem* over the heads of the litigants and to be modified, varied or fluctuating according to the individual views or wishes of the Judges, or as definite rules of law, giving to the population for whom those laws have been framed a guarantee that

after a lapse of a certain period they may rest in peace and rely upon titles or other rights which they have acquired. This is a matter upon which many judgments have been delivered in England and other civilized countries. In India the question as to the exact manner in which such statutes should be administered was, no doubt, fully considered by the Legislature in framing s. 4 of the Limitation Act, which gave expression not to a modifiable, variable or fluctuating rule, but a very definite rule, namely, "every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, *shall be dismissed*, although limitation has not been set up as a defence." That rule, stringent as it is, is subject to the other provisions of the enactment, among which s. 5 is no doubt an important provision. It was in connection with the manner in which the statutes of limitation should be [596] interpreted that, in delivering my judgment in the case of *Mangu Lal* v. *Kandhai Lal* (1), I went out of my way to give as definite an expression as I could to the view, following the language of Mr. Justice Story, that statutes of limitation were statutes of repose and that they should be administered, not in a variable manner, but as strictly as possible, in order to strengthen the repose at which they aim. That same *ratio* was the reason why in the case of *Husaini Begam* v. *The Collector of Muzaffarnagar* (2) I applied the period of limitation as against a Muhammadan *pardahnashin* lady who had not chosen to come within the proper period. In that case I had the misfortune to differ with my learned colleague, but the judgment which I delivered was upheld in appeal (3).

To the views which I then expressed I still adhere; and in determining this case I shall base my judgment upon the solitary question whether or not the present appellants have preferred this appeal within time, even taking the indulgence of the provisions of s. 5 into account. Now it has been argued on behalf of the appellants by Pandit *Ajudhia Nath* upon the authority of the ruling to which my learned brother has referred in *Balwant Singh* v. *Gumani Ram* (4), that the provisions of s. 14 of the Limitation Act, are virtually imported into s. 5 of the Limitation Act, and that when there has been a *bona fide* prosecution of a case in a Court having no jurisdiction, such circumstance *ipso facto* amounts to a rule of protection with reference to such cases, so as to entitle the appellants to deduct from the period of limitation such period as has been spent in litigation in a wrong Court. My brother Straight has already stated that that is not the effect of that ruling, and I do not understand it to amount to any thing more than this, that the considerations mentioned in s. 14, Limitation Act, are or may be elements for consideration whether the delay is or is not to be excused within the meaning of s. 5 of the Limitation Act. Beyond that I am not prepared to go, because I hold that the provisions of s. 14 are not applicable to limitation for appeals, but to limitation for original suits and applications. If I were to hold otherwise, I should be crediting the Legislature with a surplusage, namely, the surplusage of framing s. 5 notwithstanding s. 14.

[597] The question then is, is this appeal barred by limitation or not; and for the purposes of determining this, there is no doubt that, even giving the appellants the benefit of such analogical principles as are contained in s. 14, we have to determine whether or not the action of the present plaintiffs-appellants in going to the Court of the District Judge of Azamgarh was or was not a *bona fide* one. The expression *bona fide*,

(1) 8 A. 475. (2) 9 A. 11. (3) 2 A. 655. (4) 5 A. 591.

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which is translated in English as "good faith," is not exhaustive, and is defined in the last part of s. 3 of the Limitation Act, where it is said "nothing shall be deemed to be done in good faith which is not done with due care and attention." Did the plaintiffs in this case act with due care and attention when they in this suit, notwithstanding the fact that the decree was for an amount exceeding Rs. 8,000, went up to the District Judge, instead of coming up in first appeal to this Court, from the decree of the 31st March, 1886? Indeed, Pandit *Ajudhia Nath* on behalf of the appellants conceded, and he could not well do otherwise, considering that the order whereby the appeal was returned by the District Judge to the appellants was never contested in any proceeding, and that this appeal has been finally preferred to this Court, that the appeal would lie to this Court, and that this Court was the proper Court to entertain such an appeal.

In connection with the question of *bona fide*, however, the learned pleader has argued that the provisions of s. 14 of the Limitation Act are so broad as to include within their scope, not only mistakes of fact, but also mistakes of law. The learned pleader has gone the length of contending that in the present case, although the appeal would lie here, it was an innocent mistake made by the appellants to go to the Court of the District Judge with their appeal.

I am of opinion that, so far as this contention concerns mistakes of law, the authority of the maxim, *Ignorantia leges neminem execusat*, has been so formally settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and, as such, furnish elements for extending the period of limitation which the statute law has provided.

In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from [598] simple ignorance of the law, the facts being fully apparent and clear, but is limited to cases where from *bona fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase "*other cause of a like nature*" which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to known the law of the land in which he lives.

But the learned Pandit went further in supporting the case of the appellants, and he contended that in the present case jurisdiction did properly lie in the Court of the Judge of Azamgarh. This is an argument which is inconsistent with the fact of this appeal having been finally filed here. But I have listened to it with care, because, as I hold, we are bound to see whether the learned Judge of Azamgarh was not the proper authority to hear the appeal and whether we as the Judges of the High Court have any jurisdiction to hear the appeal. The whole contention so far as this part of the argument is concerned rests entirely upon the interpretation of s. 111 of the Code of Civil Procedure read with the later s. 216 of the same Code. The plaintiffs came into Court assessing by estimate the value of their claim to be Rs. 2,000, and a further relief was also prayed that such balance as might be found due to the plaintiffs might be made over to them. The suit as brought was no doubt a suit for dissolution of partnership, a claim which neither in the Courts of equity nor in the Courts of law can be decided without the taking of accounts. As I understand, in such an action, both in England and in India, the ordinary relief prayed for and the ordinary decree made is that

upon such accounts being taken the balance should be made over to the parties to whom such sums might be due. I mention this, because unless this suit falls under the category of a suit for money within the meaning of s. 111 of the Civil Procedure Code, I should have had considerable difficulty in deciding whether or not we, as the High Court, are the proper Court of appeal in this case. The suit is, in my opinion, a suit for money, within the meaning of this section; because the illustrations which the Legislature has provided to that section show that, no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu*, so long as the relief sought is to recover money, it is a suit for money, and such [599] a plea of set-off may be raised within the meaning of that section. There are cases cited by Mr. *Conlan*: *Kishorchand Champalal* v. *Madhowji Visram* (1), *Bhagbat Panda* v. *Bambeb Panda* (2), *Kistnasamy Pillai* v. *The Municipal Commissioners of the Town of Madras* (3), in which Courts of justice in India have extended the rule, and have held that the provisions of that section are not exhaustive, and the Courts of justice have allowed set-off in those cases. Whether I am prepared to adopt and go the whole length of the rules therein laid down it is not necessary for me to say. But I am clearly of opinion that this present suit was a suit for money, and that it was a suit which would admit of a set-off.

In this case the defendants came into Court not denying the partnership, but setting up accounts of their own, and alleged that as the results of those accounts the defendants were entitled to a decree for a sum of Rs. 23,000. It was, indeed, in consequence of such a plea of set-off that the Court below in acting under that section took accounts, and as the result of that account gave the defendants a decree exceeding a sum of Rs. 8,000. It could not be understood to have been a decree which would ordinarily be appealable to the District Judge of Azamgarh, because the jurisdiction of the District Judge in appeal is limited to Rs. 5,000 (*vide* s. 22, Act VI of 1871). There seems therefore no reason to think that this decree was other than such as s. 216 of the Civil Procedure Code contemplates, and in respect of which the second paragraph of that section is fully applicable. That paragraph says:—"The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such had been claimed by the defendant in a separate suit against the plaintiff." Here the decree being beyond the jurisdiction of the Judge, clearly the appeal lay here.

There is no explanation supported by affidavit or otherwise why this appeal was not duly preferred in due and proper time directly from the judgment of the Subordinate Judge. But even if it be granted that the period during which the appeal was pending in the Court of the District Judge of Azamgrah be excluded, there is [600] no explanation why between the dates mentioned by my brother Straight sufficient diligence was not employed by the appellants to come to this Court with their appeal. I hold, therefore, that the decree now appealed from was a decree appealable only to this Court, and that the appeal should have been preferred within the period prescribed by art. 156, sch. ii, Limitation Act; and that not having been so preferred, the delay which has taken place is not duly explained, and that the appeal is therefore barred by limitation; and I agree with my brother Straight in dismissing the appeal with costs.

(1) 4 B. 407. (2) 11 C. 557. (3) 4 M.H.C.R. 120.

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JUDGMENT DISPOSING OF OBJECTIONS.

[The judgment of the Court disposing of the objections taken by the respondents was as follows :—]

MAHMOOD, J.—The question which has arisen to-day relates to certain objections taken by Pandit *Sundar Lal's* clients, the defendants-respondents in the suit, to the decree of the lower appellate Court, under s. 561, Civil Procedure Code. By reason of the judgment of my brother Straight and myself, the appeal in which these objections were raised was dismissed yesterday, not upon the merits, which were never heard, but upon the ground that the appeal should not have been admitted, because it was barred by limitation. Pandit *Sundar Lal* argues that notwithstanding this circumstance, and notwithstanding the fact that the dismissal of the appeal was due to the objections and contentions raised on behalf of those defendants-respondents, we, as a matter of law, are bound to proceed with those objections under s. 561 and to deal with them upon their merits both as to fact and law.

There is authority in the Indian cases to be found in the cases of *Baroda Kant Bhuttacharjee* v. *Pearee Mohun Mookerjee* (1) and *Coomar Poresh Narain Roy* v. *Watson and Co.* (2), where it was held that when an appeal is dismissed for default, the hearing of objections under s. 348 of Act VIII of 1859 cannot be allowed to proceed, and similarly it has been held that where an appeal is withdrawn the same is the effect upon the cross-objections. The same is the effect of the case of *Bahadoor Singh* v. *Bhugwan Dass* (3) and of the case of *Dhondi Jagannath* v. *The Collector of Salt* **[601]** *Revenue* (4), which case was followed with my concurrence by Oldfield, J., in *Maktab Beg* v. *Hasan Ali* (5).

I take the effect of these various cases to be that the entertainment of objections such as s. 561, Civil Procedure Code, contemplates, is contingent and dependent upon the hearing of the appeal in which such objections are raised, and that when the appeal itself fails, is rejected or dismissed without being disposed of upon the merits, the objections follow its fate, and cannot be entertained either.

Pandit *Sundar Lal* has argued that this exact point has never yet been ruled, because, as the learned pleader contends, here the appeal was heard, though it was dismissed upon the ground that it was barred by limitation. This contention may at first sight appear to be supported by the *ratio decidendi* of the ruling of the Madras High Court in *Venkataramanaiya* v. *Kuppi* (6), which was followed by the Bombay High Court in *Dhondi Jagannath* v. *The Collector of Salt Revenue* (4), but in my opinion those cases are inapplicable because there the object of withdrawing the appeal aimed at preventing the respondent, after the hearing of the appeal had commenced, from insisting upon his cross-objections. Under such circumstances, withdrawal of an appeal being a matter within the volition of the appellant, the Court was probably right in hearing the cross-objections notwithstanding the withdrawal. Here the plea of limitation is fatal to the hearing of the appeal upon the merits, and the plea has been taken by the respondents themselves, and being a plea *in limine* barring the hearing of the appeal upon the merits, we have given effect to it as we are bound to do under s. 4, Limitation Act, and have not heard the appeal upon the merits. Like the privilege of set-off in original actions, and I say this only analogically, the Legislature has thought fit to confer upon the parties respondents

(1) 23 W.R. 57. (2) 23 W.R. 229. (3) N.W.P. H.C.R. (1866), 23.
(4) 9 B. 28. (5) 8 A. 551. (6) 3 M.H.C.R. 302.

in appeal the right of being able to raise objections such as s. 561 contemplates. The practical effect of such objections is that they are in themselves appeals to be dealt with as such, but the privilege is qualified by very serious considerations. One consideration is that such objections are not subject to the same period of limitation as appeals. In the next place, [602] they may be argued as against the decree of the Court below itself, although from that decree no appeal has been preferred. These rights were not intended to be used in such a fashion as to be available to the respondent who apparently accepted the terms of the decree of the Court of first instance, and who never wanted to appeal therefrom, and it was only after the opposite party had appealed that he raised objections, We have already held that the original appeal of the plaintiffs in the suit could not be heard on the merits, as it was barred by limitation, and were we to allow these objections to be dealt with now separately and irrespective of that appeal, we should be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation, may confer upon the respondent the right of having an appeal of his own heard in the shape of objections under s. 561, Civil Procedure Code, although, if the original appeal was barred by limitation, *a fortiori* such objections ought to be barred also.

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I am of opinion that the *ratio decidendi* of the cases which I have cited applies as much to cases where an appeal is rejected or dismissed, as this appeal was dismissed by us yesterday, upon the ground that it could not be entertained because it was barred by limitation.

It is therefore not necessary for us to enter into those objections, and they are rejected with costs.

STRAIGHT, J.—I am of the same opinion.

Appeal and objections dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BHAGWAT DAS (*Plaintiff*) v. PARSHAD SINGH (*Defendant*).*
[25th May, 1888.]

Mortgage—Redemption before expiration of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage.

No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the [603] debt due by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point.

The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown.

[F., 137 P.W.R. 1908; R. 9 A.W.N. 135; 17 M.L.J. 83 (84); 16 C.P.L.R. 59 (63); 126 P.L.R. 1908; 203 P.L.R. 1912; 21 P.W.R. 1912.]

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* Second Appeal No. 2283 of 1886 from a decree of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 18th September, 1886, confirming a decree of Munshi Mata Prasad, Munsif of Etawah, dated the 8th July 1886.

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THIS was a suit for redemption of a usufructuary mortgage made on the 15th December, 1876, by two persons, Udit Singh and Musammat Maharaji, in favour of one Mohar Singh. On the 19th of August, 1878, the mortgagors conveyed their equity of redemption to Bhagwat Das, the plaintiff in the suit. Both the lower Courts dismissed the suit, and on appeal to the High Court, the point for contention was whether or not the plaintiff was entitled to redeem the mortgage before the expiry of the stipulated period for redemption mentioned in the instrument of mortgage.

The material clause in the instrument of mortgage, and the facts as well as the arguments of counsel are fully set forth in the judgment of the Court.

Mr. *G. T. Spankie*, for the appellant.

Mr. *S. Howell*, for the respondent.

JUDGMENT.

MAHMOOD, J,—In order to explain the question of law which arises in this case it is necessary to state the following facts :—

On the 15th December, 1876, two persons, Udit Singh and Musammat Maharaji, borrowed a sum of Rs. 100 from one Mohar Singh, deceased, (represented in this litigation by the defendants-respondents) and executed a mortgage-deed in his favour. The nature of the mortgage was usufructuary, and under its terms the mortgagee was to be placed in possession and to appropriate the profits of the mortgaged property in lieu of interest, the rate whereof is not specified in the mortgage-deed. The principal part of the deed, so far as the question in appeal is concerned, runs as follows :—

"We have now delivered the possession of the mortgaged zemindari share to the mortgagee. Neither shall we claim profits and mesne profits from the date of the mortgagee's possession, nor shall the mortgagee claim interest on the debt. We shall pay the principal mortgage money in 15 years (*asl zar-i-rahn arsa pandrah* **[604]** *baras men ada karengen*). If upon the stipulated promise we are unable to pay the mortgage-debt abovementioned, then whenever we repay the principal mortgage-money at the end of Jaith in any year, the mortgaged property shall be redeemed."

The mortgagee was accordingly placed in possession, and on the 19th August, 1878, the aforesaid mortgagors, Udit Singh and Musammat Maharaji, executed a sale-deed whereby they conveyed their rights and interests in the mortgaged property to the present plaintiff, Bhagwat Das.

Upon the title so derived, the plaintiff instituted the present suit on the 15th June, 1886, with the object of obtaining possession of the mortgaged property by redemption on payment of the sum of Rs. 100 mortgage-debt abovementioned.

The only ground upon which the suit was resisted is that it was premature inasmuch as it was instituted before the expiry of the term of 15 years specified in the mortgage-deed of the 15th December, 1876

Both the Courts below in interpreting that document have arrived at the conclusion that the term of 15 years was binding as much upon the mortgagor as upon the mortgagee, and upon this ground they held that the right to redeem could not accrue before the expiry of the stipulated term of 15 years, and that the action was therefore premature and should be dismissed.

From the decree of the lower appellate Court this second appeal has been preferred, and Mr. *Spankie* in arguing the case for the appellant has addressed a learned argument to me upon the contention, that, in the

first place, the Courts below have misconstrued the mortgage-deed, and in the next place, even if their construction be accepted to be correct, the plaintiff as representing the equity of redemption, is entitled to redeem the mortgage even before the expiry of the term of the mortgage; because, as the learned counsel contends, such terms must be understood to be stipulations for the protection of the mortgagor, and so long as the mortgagee receives all that is due upon the mortgage he cannot resist such a suit.

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This contention is opposed by Mr. *Howell* on behalf of the defendants-mortgagees, and the contention of the parties therefore [605] raises two points for determination; one relating to the interpretation of the mortgage deed, and the second as to the rule of law applicable to such suits.

Upon the first of these points, having consulted the terms of the mortgage-deed in the original Hindustani, I am of opinion that the parties intended that the mortgage should continue at least for a period of 15 years, after which it would become redeemable. The Hindustani words "*arsa pandrah baras men*" may no doubt be interpreted to mean "within a period of 15 years," but followed as those words are by the phrase *wadha par*, "at the promised time," they cannot have any meaning other than that 15 years was the term fixed for the mortgage. Mr. *Spankie's* contention would involve the conclusion that the term of 15 years need never have been mentioned at all, as the mortgage was redeemable at any time according to his contention. I cannot give the parties credit for any such surplusage, there being nothing in the document to justify such a construction. On the contrary, as I have already said, the phrase *wadha par*, "at the promised period," must refer to the expiry of 15 years, for otherwise the sentence which immediately follows, which provides that in subsequent years the mortgage would be redeemable at the end of any Jaith, would also become superfluous.

Then as to the latter part of Mr. *Spankie's* argument--I am not aware of any such general rule of law as would go the length of laying down that in all cases and in all circumstances the term for which a mortgage is executed is binding only upon the mortgagee and that the mortgagor can enforce redemption even before the expiry of the stipulated period. A mortgage is only a kind of contract whereby certain rights and obligations are created as between the mortgagor and the mortgagee. Such rights and obligations may be subjected to any terms and conditions not prohibited by law, and the fixation of any particular period as the term of the mortgage or as the time when redemption is to take place, is not such a stipulation as the law prohibits. Indeed, Mr. *Spankie* himself conceded that the term of 15 years mentioned in the mortgage-deed was binding upon the mortgagee, so as to preclude him from foreclosure or any other remedy which he may have for recovery of the mortgage-[606]debt before the lapse of that time. But the learned counsel argues that in the absence of any express covenant in the mortgage-deed to the effect that the same shall not be redeemable before the expiry of 15 years, the presumption of law is that the term was intended only for the protection of the debtor, *i.e.*, the mortgagor.

I think there might have been considerable force in this contention, if the nature of the mortgage and the terms of the deed did not preclude it. The relation between the mortgagor and the mortgagee is that of debtor and creditor, and redemption is the process by which the debt due on the mortgage is paid off. When in such a contract of mortgage a term

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of payment is fixed, the ordinary rule would be the same as in regard to a term of payment fixed in any other kind of obligations of debt. Upon this point Pothier in his treatise on *Obligations* (Vol. I, p. 132) has the following:—

"It remains to observe concerning the effect of a term, that being presumed to be inserted in favour of the debtor, the debtor may very well defend himself from payment before the expiration of the term, but the creditor cannot refuse receiving if the debtor is willing to pay, at least unless it appears from the circumstances that the term was appointed in favour of the creditor, who is the holder, as well as of the debtor."

This, then, being the general principle, I have to consider how it is applicable to mortgages. In *Vadju* v. *Vadju* (1) Westropp, C. J., following the authority of *Brown* v. *Cole* (2) and some Indian cases, held that the right of redemption and the right of foreclosure are co-extensive, in the absence of any stipulation, express or implied, to the contrary, and that in such cases when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period named. In that case the mortgage deed stipulated that the mortgagor would pay the mortgage-debt *within ten years* and redeem the mortgaged property, and the suit having been brought before the expiry of that term, the learned Chief Justice held that the suit was unsustainable because prematurely instituted, and that the mere use of the word "*within*" was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than the ten years mentioned in the mortgage-deed. The same ques-[607]tion was considered by Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur* (3), upon somewhat broader principles than the rule of the English law as to the right of redemption and the right of foreclosure being presumed to be co-extensive, with reference to the period mentioned in the mortgage-deed for payment of the mortgage-debt, and the *ratio decidendi* adopted in that case seems to me to be scarcely in full accord, upon minor points, with the views upon which the judgment of Westropp, C. J., in *Vadju* v. *Vadju* (4) proceeded. To put the matter briefly, the general effect of the Bombay case is to lay down that the mere fixation of a term for paying off the mortgage-debt is to be presumed to be binding as much upon the mortgagor as upon the mortgagee unless the contrary is clearly shown, whilst the effect of the Madras case is that where the mere fixation of the term occurs in a mortgage-deed, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period, unless the mortgagee could show that any such stipulations existed between him and the mortgagor as would debar the latter from redeeming the mortgage before the expiry of the term mentioned in the mortgage. In other words, whilst Westropp, C.J., would have the presumption as to the binding effect of the term of mortgage in favour of the mortgagee, Turner, C. J., would presume in favour of the mortgagor that the mortgage was redeemable at any time, unless the mortgagee could show from the nature of the mortgage or other circumstances that redemption should not be allowed before the expiry of the time mentioned in the mortgage-deed The two cases are, however, undistinguishable so far as the result is concerned, because in both cases the mortgage appears to have been of a usufructuary nature, in which the term of the enjoyment of the possession of the mortgaged property seems to have formed a substantial part of

(1) 5 B. 22. (2) 14 Sim. 427. (3) 2 M. 314.

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the terms of the mortgage itself, as was also the case in *Soorjun Chowdhry* v. *Imambundee Begum* (1). The same principle, however, appears to have been extended by a Division Bench of this Court in *Raghubar Dayal* v. *Budhu Lal* (2) to simple mortgages or hypothecation bonds in which a term of years is stated as the period of payment of the mortgage-debt, and in doing [608] so the learned Judges seem to have adopted in its integrity the rule laid down by Westropp, C.J., in *Vadju* v. *Vadju* (3), where, as I have already said, the nature of the mortgage being usufructuary, the period of enjoyment of possession by the mortgagee would form a substantial part of the contract, lending force to the contention that such possession and enjoyment could not be put an end to at the will of the mortgagor before the expriy of the term for which the mortgage was made.

Having so far referred to the principal rulings bearing upon the subject I have no hesitation in adopting the *ratio decidendi* upon which the judgment of Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur* (4) proceeded for, as I understand, that judgment enunciates no such rigid principle as that adopted by Westropp, C.J., in *Vadju* v. *Vadju* (3) that redemption and foreclosure are co-extensive in the absence of any stipulation to the contrary.

I have already said that the relation between a mortgagor and mortgagee is that of a debtor and creditor respectively, the main distinction between a simple debt and a mortgage-debt being that, whilst in the former case the obligation to pay the money is a simple personal obligation, in the latter a security of property is given as the means whereby such obligation is to be discharged. The difference rests, not in the essence of the contract but in the *modus operandi* agreed upon by the parties in respect of discharge of the obligation of the debt. In the case of a simple debt, the law provides a suit resulting in a simple money-decree to be executed or enforced in such manner as the rules of procedure for the time being prescribed. In the case of a mortgage-debt, the remedies of the mortgagee-creditor for realising his debt may lie either in foreclosure, or in obtaining possession of the mortgaged property, or in bringing such property to sale, according as the terms of the mortgage contract itself may be. But whether the debt is a simple money-debt or a debt secured by mortgage, one element is common to them all, namely, that before the obligation can be extinguished it must be discharged by payment or by such other methods as are appropriate to the nature of the obligation.

[609] This being the common element of the obligation to pay a debt, the fixation of any particular period for discharge of the obligation must necessarily be governed by the same principles. Parties to a contract of debt, as indeed parties to any other class of contracts, are at liberty to enter into any stipulations as to the time, place, and mode of discharging such obligations so long as such stipulations are consistent with the law of the land where they are made. The fixation of a period for discharge of a debt is nothing more or less than one kind of such stipulations, and I am not aware of any rule of law which would prohibit a debtor from stipulating that the debt should not be demandable from him before the expiry of particular period, nor of any rule which would prohibit a creditor from stipulating that the debt due to him will not be received by him till after the expiry of any particular period. Where such stipulations are already expressed no such difficulties arise as those in this case, for, if here the

(1) 12 W.R. 527. (2) 8 A. 95. (3) 5 B. 22. (4) 2 M. 314.

1888 MAY 25. — APPELLATE CIVIL. — 10 A. 602 = 8 A.W.N. (1888) 263.

mortgage-deed of 15th December, 1876, expressly stated that the mortgagor could not redeem the mortgage before the expiry of the 15 years term mentioned therein, this litigation would probably never have been commenced. But the mortgage-deed contains no such stipulation in express language, and the Courts have to decide whether any such stipulation was implied in the contract of mortgage.

In the present case I am of opinion that because the terms of the mortgage itself do not expressly state that the mortgage shall not be redeemable (that is, the mortgaged-debt shall not be paid off) before the expiry of the 15 years mentioned therein, it rested upon the mortgagee to show that he is entitled to decline to receive payment of the mortgage-debt before the expiry of that period. With all respect due to the ruling of Westropp, C.J., in *Vadju* v. *Vadju* (1) which was followed by a Division Bench of this Court in *Raghubar Dayal* v. *Budhu Lal* (2), I am of opinion that no such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless indeed the mortgagee succeeds in showing that by reason of the terms of the mortgagee itself the mortgagor is precluded from paying off the debt due by him to the mortgagee, and, to use the [610] language of Turner, C.J., in *Marana Ammanna* v. *Pendyala Peru-botulu* (3), "it requires a clear expression of intention to deprive a mortgagor of his right to redeem at any time on payment of the debt." I respectfully think that the rule that the right of redemption and the right of foreclosure are co-extensive and coincident, as to the time when these rights may be respectively exercised by the mortgagor and the mortgagee, is not a rule recognised by the law of mortgage, at least in this part of the country. As I take the law, both these rights rest upon the terms of the mortgage itself, and considering that the juristic reasoning as stated by Pothier requires that a term fixed for payment of a debt should be presumed to be a protection only for the debtor till the contrary is shown, I hold that in this case it rested upon the mortgagee to show why he is justified in declining to accept all that is due to him upon the mortgage, though the offer of such payment is made before the period of 15 years at the end of which the mortgagor, at the time of the mortgage, as interpreted by me, expected to be able to pay off the mortgage-debt.

But whilst holding these views upon the principles of law applicable to such payment of debts, I am of opinion that in the present case the mortgagee has succeeded in showing that, by reason of the very nature of the mortgage and the circumstances of the contract, he is entitled to resist redemption on the ground that the period of 15 years mentioned therein must be taken to form a material part of the contract itself, and to have been named not only for the protection of the mortgagor-debtor but also for that of the mortgagee-creditor. The mortgage was of a usufructuary character, in which no rate of interest on the mortgage-debt was specified, and the mortgagee, whilst entitled to possession and the appropriation of profits in lieu of interest, had to run the risk of appropriating only such profits as he could recover during the period of his possession of the mortgaged property, so that, to use the words of Turner, C.J., in the case already cited, "the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract," and "it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage;" and I

(1) 5 B. 22. (2) 8 A. 95. (3) 3 M. 230.

agree with [611] what was said by him in the same case that "where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term," though "the creation of a term is by no means conclusive on this point."

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In this view of the case I am of opinion that the lower Courts were right in interpreting the terms of the mortgage-deed of the 15th December, 1876, and that they were right in holding that this suit for redemption, which was brought before the expiry of the term of 15 years stipulated as the promised date of redeeming that mortgage, was premature and, as such, not sustainable.

I dismiss this appeal with costs. *Appeal dismissed.*

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10 A. 611 = 8 A.W.N. (1888) 238.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

GIRDHAR LAL AND OTHERS (*Plaintiffs*) v. BHOLA NATH AND OTHERS (*Defendants*).* [14th June, 1888.]

Mortgage—Usufructuary mortgage—Covenant by the mortgagor to pay the mortgagee arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to re-imbursement before redemption—Act IV of 1882 *(Transfer of Property Act), s.* 72 *(b).*

On the 27th August 1883, M and B jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants, was due to them, and decreed, redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed.

Held that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage-deeds; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realise it, thereby putting an end to all the rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed.

[612] *Held* further, that s. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted.

[App., 22 B. 440 (445); R., 13 A. 195 (199) = 10 A.W.N. 228; 28 A. 593 (597) = 3 A.L.J. 435 = A.W.N. (1906) 150.]

THE facts of this case are stated in the judgment of Mahoomd, J.

Mr. *D. Banerji* and Pandit *Mati Lal*, for the appellants.

Munshi *Newal Behari Bajpai*, for the respondents.

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* First Appeal, No. 101 of 1887, from a decree of Maulvi Saiyid Farid-ud-din Ahmad Khan, Subordinate Judge of Agra, dated the 28th March, 1887.

1888 JUNE 14. — APPELLATE CIVIL. — 10 A. 611 = 8 A.W.N. (1888) 238.

JUDGMENT.

MAHMOOD, J.—The facts of this case are simple, and may be briefly stated for the purpose of disposing of this appeal. On the 27th August, 1883, Musammat Bibi Makundi Dei and Bishambhar Nath executed a mortgage-deed, whereby they mortgaged the property now in suit to Dhani Ram and Chakkhan Lal for a sum of Rs. 3,000, and the mortgage was of a usufructuary character. Among the covenants contained in the mortgage-deed was the following: —

"At the time of redemption, we shall pay along with the mortgage-money whatever amount of arrears of rent may be found due from tenants at that time. The mortgagees shall, to the best of their abilities, take care of the fruitful and unfruitful trees."

On the same date the aforesaid Bibi Makundi Dei and Bishambhar Nath executed another usufructuary mortgage-deed in favour of the same defendants for a sum of Rs. 5,000, under exactly the same conditions, including the covenant as to payment for arrears of rent which I have already above mentioned."

On the 24th March, 1886, the aforesaid mortgagors, Bibi Makundi Dei and Bishambhar Nath, executed another usufructuary mortgage-deed in favour of the present plaintiffs, Lala Girdhar Lal, Shigopal and Radha Kishen, for a sum of Rs. 15,000, entitling the second mortgagees to possession of the property in suit.

These second mortgagees have come into Court in this case with the object of redeeming the two mortgages of the 27th August, 1883, and their claim as such is maintainable, because they are puisne incumbrancers seeking to redeem an earlier incumbrance.

The suit was resisted by the first mortgagees upon various grounds; but those which we have to consider in connection with this appeal are that over and above the principal sum of Rs. 8,000 which formed the consideration of the two mortgages of [613] even date, namely, the 27th August, 1883, a sum of about Rs. 4,000 was due to the mortgagees, and that without the payment of such sum no redemption could take place.

The Court of first instance in dealing with this ligation has decreed the claim for redemption, holding that besides the principal sum of mortgage-money of Rs. 8,000 which had already been deposited by the plaintiffs under the special provisions of the Transfer of Property Act, the sum of Rs. 498-15 9 was still due under the two mortgages of the 27th August, 1883. This sum consisted of four items, which were the following:—

		Rs.	a.	p.
1.	Arrears for 1292 and 1293 F. on account of mauza Ataus	165	3	6
2.	Arrears for 1292 and 1293 F. on account of mauza Khaki	122	2	0
3.	Arrears for 1293 F. on account of mauza Khutwari	68	1	9
4.	Government Revenue for the village ...	143	8	6
	Total Rs. ...	498	15	9

The lower Court upon this finding held that before the plaintiffs could sue for redemption as puisne mortgagees they were bound to pay up not only the principal sum of Rs. 8,000, but also this additional sum of

Rs. 498-15-9 which I have mentioned above; and that Court also directed that the expenses incurred by the plaintiffs should be recovered from the defendants.

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From this decree this first appeal has been preferred by the plaintiffs; and the main contention which has been pressed upon us by Mr. *Banerji* is that the decree of the lower Court is wrong in so far as it renders the decree for redemption subject to the payment of the aforesaid sum of Rs. 498-15-9. In supporting the appeal the learned counsel relies upon the terms of the mortgages of the 27th August, 1883, and he contends that inasmuch as those mortgages did not mention anything expressly as to the payment of any sum of money due over and above Rs. 8,000, which was the amount of the principal mortgage-money, therefore the payment **[614]** of this additional sum could not be made a condition precedent to a decree for redemption.

I am of opinion that this contention is unsound. In the first place, so far as the first three items above mentioned by me are concerned, there is a distinct clause in the mortgages of the 27th August, 1883, which entitles the mortgagees to claim the arrears of rent as a part and parcel of the mortgage-money, or, to say the least, such arrears of rent (to use the words of the deed itself), as would be found due from tenants at that time, became in fact part and parcel of the mortgage-money itself, and the decree of the Court below was sound.

As to the 4th item, the Government revenue amounting to Rs. 143-8-6, it is true that this sum was a sum paid by the mortgagees in respect of arrears of revenue antecedent to the 27th August, 1883, but the revenue fell due after this mortgage. It is clear that unless this revenue was duly paid not only would the mortgagees lose their rights but the mortgagors themselves would also cease to have any right in the property: because arrears of revenue may result in a sale such as would put an end to all the rights, not only of the first mortgagees, as well as of the second mortgagees, but also to the mortgagors' rights. Under these circumstances, though the terms of the mortgage-deed of the 27th August, 1883, are silent upon the point, yet the general law upon which the doctrine of salvage and subrogation proceeds, and the principles of which have been uniformly adopted by the Courts of India, lays down that persons in the position of the present defendants as mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue, could be redeemed. Such a right no doubt cannot be exercised by a person not interested in the property. But here there is no question that these two mortgages gave to the defendants in this action such interest in the property as would entitle them to spend the money to save that property.

It is not necessary to decide whether the particular case is governed by the specific rules contained in the Transfer of Property Act, because I am of opinion that the rules contained in s. 72 of that enactment only reproduce the doctrines which the Courts of **[615]** justice in India have uniformly adopted, and it reproduce the older law. Clause (*b*) of s. 72 read with the earlier part of the section enacts:—"When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—(*b*) for its preservation from destruction, forfeiture or sale; "and the antepenultimate paragraph of that section goes on to say he may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal and where no such rate is fixed.

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at the rate of 9 per cent. per annum." So far as the question of the rate of interest is concerned, it is not necessary to determine it; because no interest is claimed upon Rs. 143-8-6 paid as arrears of revenue. But I hold that the principle to which I have alluded entitles the defendants-mortgagees to make that a part and parcel of the mortgage-money, the payment whereof should be a condition precedent before they are ousted from the mortgaged property.

Under these circumstances I am of opinion that this appeal No. 101 of 1887 fails and should be dismissed.

(The learned Judge then proceeded to dispose of the connected appeal preferred by the defendants, and to dismiss the same, ordering that both appeals should be dismissed without costs of the High Court.)

STRAIGHT, J.—I entirely concur. *Appeals dismissed.*

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10 A. 615 = 8 A.W.N. (1888) 239.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

KAURI THAKURAI (*Defendant*) v. GANGA NARAIN LAL AND OTHERS (*Plaintiffs*).* [15th June, 1888.]

Landholder and tenant—Agreement by occupancy tenant to relinquish his holding—Agreement not enforceable—Suit for specific performance of agreement—Jurisdiction of Civil Courts.

The defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the [616] agreement, and obtained a decree from the lower appellate Court. On second appeal by the defendant,

Held that inasmuch as the plaintiffs sought to enforce the convenant contained in the *kabuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95 (*d*) and (*f*), but not in the manner sought by the plaintiff in this action.

THE plaintiffs in this case were the zamindars of mauza Kabkaba in the district of Gorakhpur. The defendant was a tenant with rights of occupancy in certain land situate in the mauza. It appeared that previous to the mutiny in 1857, the defendant was admittedly a person who owned the mauza, but owing to his misconduct during the disturbances of the mutiny, his rights and interests in the mauza were confiscated by Government; and the proprietary rights therein came to the plaintiffs by right of purchase.

On the 29th June, 1874, the defendant executed a *kabuliat* in respect of the land in suit in which he agreed to relinquish it at the end of five years, the wording of the clause being to the following effect: "On the expiry of the term he (defendant) shall have no claim or excuse for retaining possession of the cultivatory holding, but he shall give it up." This

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* Second Appeal, No. 62 of 1887, from a decree of Maulvi Shah Ahmad-ulla Khan Subordinate Judge of Gorakhpur, dated the 10th December, 1886, reversing a decree of Maulvi Ahmad Husain, Munsif of Bansgaon, dated the 21st August, 1886.

kabuliat appears to have been preceded by a decree of the Revenue Court passed in 1870 in favour of the plaintiffs ordering ejectment of the defendant from the land in suit, but there was no evidence to show that the defendant had ever been ejected; on the contrary he continued to pay rent to the plaintiffs and remained their tenant, till at the last settlement he got his name recorded as a tenant with rights of occupancy in respect of the land in suit. The plaintiffs then brought this suit in the Court of the Munsif of Bansgaon for possession of the land, basing their claim on the agreement contained in the aforesaid *kabuliat*.

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The defendant contended that the suit was not cognizable by the Civil Court; that he had been in continuous possession of the land for more than 12 years, and had thereby acquired rights of occupancy in the land in suit, and that the agreement in the *kabuliat* to surrender the land after five years was void in law.

[617] The Munsif, holding that the suit was cognizable in the Civil Courts, dismissed it on the ground that the agreement in effect was a transfer of the defendant's rights of occupancy, and that as such a transfer was prohibited by s. 9 of the Rent Act (XII of 1881), the agreement was not enforceable. On appeal by the plaintiffs the Subordinate Judge gave them a decree, holding that the agreement did not operate as a transfer of the right of occupancy, and was enforceable at law. He referred to *Lalji* v. *Nuran* (1).

The defendant appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

BRODHURST and MAHMOOD, JJ.—The plaintiffs in this case are admittedly the zamindars of the land in suit, and the defendant, Kauri Thakurai, is admittedly a person who formerly owned the village, and was in cultivation of certain lands, when, in consequence of his misconduct during the disturbances of the mutiny of 1857, his rights and interests in the village were confiscated by Government, and the proprietary rights came by purchase to the plaintiffs.

The plaintiffs came into Court alleging that a few years after the confiscation the defendant-appellant was ousted, and that, by an agreement of *kabuliat*, dated the 29th June, 1874, executed by the defendant, the latter agreed to cultivate those lands for a period of five years, and in executing that document entered into a covenant that after the lapse of five years he, the defendant, would vacate the land.

It appears from the judgment of the lower appellate Court that the agreement or *kabuliat* continued, and the defendant remained upon the land as a tenant paying rent to the plaintiffs. The *kabuliat* above mentioned appears from the same judgment to have been preceded by a Revenue Court's decree. passed in 1870, for ejectment of defendant; but, as Mr. *Ram Prasad* for the appellant states, there is not a particle of evidence to show that the decree for ejectment was executed, or that the defendant was ousted from the land in suit. On the other hand, it is conceded that he [618] continued to pay rent to the plaintiffs, and, for all purposes, to occupy the *status* of a tenant towards the landlord.

(1) 5 A. 103.

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APPELLATE CIVIL.

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The plaintiffs appear to have made an application to the Revenue Court in respect of the mutation of the names, with the object of having it recorded that the *status* of the defendant was not that of an occupancy-tenant, but only that of a tenant at will. On the 24th December, 1885, it was decided by the settlement officer that the defendant's position was that of a tenant with a right of occupancy, inasmuch as he had cultivated the land continuously for a period exceeding twelve years, and that decision was upheld by Mr. LaTouche, as the Court of appeal, on the 14th April, 1886. In that judgment it was found that "the parties admitted the *status* of the defendant to be that of an occupancy-tenant, he having cultivated the land for more than twelve years."

The present suit was begun on the 16th June, 1886, in the Civil Court by the plaintiffs zemindars, with the object of enforcing the covenant contained in the *kabuliat* of the 29th June, 1874, whereby the defendant had covenanted, in taking the lease, that he would vacate the land at the end of five years. Some argument has been addressed to us as to whether or not such a suit was one cognizable by a Court of civil jurisdiction as distinguished from a Rent Court, within the meaning of s. 95 of the Rent Act (XII of 1881). Mr. *Ram Prasad* argued that the nature of the suit was such as was contemplated by clauses (*d*) and (*f*) of s. 95 of Act XII of 1881, but we are of opinion that this contention is unsound, because here the nature of the prayer in the plaint was not that of ejectment, but it was a prayer which required consideration whether the covenant contained in the *kabuliat* of the 29th June, 1874, could be regarded as valid. The suit was therefore a civil nature, and in this view we are supported by the ruling in *Lalji* v. *Nuran* (1), to which the lower appellate Court has also referred.

The same ruling has however, been understood by the lower appellate Court as justifying the conclusion that because the present defendant in executing the *kabuliat* of the 29th June, 1874, promised to vacate the land at the end of five years from that date, therefore he should be so ejected. One of us was a party to that **[619]** judgment, and, reading the ruling as we do, we are of opinion that the case is no authority for maintaining that where a person already possessing a right of occupancy promises to vacate the land at some future period (in this case it was five years), such action is to be regarded as a contract of relinquishment. All that the case laid down was that an occupancy-tenant, or indeed any kind of tenant, could, if he pleased, leave the land alone and relinquish it so as to render the right of the landlord available to him for the purpose of securing the cultivation of the land.

Here it was admitted before the settlement officer by the respondents in the case to which reference has already been made, that the defendant was an occupancy-tenant at the time when the *kabuliat* of the 29th June, 1874, was executed. Such right no doubt depends on continuous cultivation extending beyond twelve years, and in giving rise to the right the provisions of s. 6 of the old Rent Act (X of 1859), were no doubt applicable. But at the time when the *kabuliat* was executed, namely, the 29th June, 1874, there existed the Rent Act (XIII of 1873), the policy of which enactment was to prevent the extinction of occupancy-tenure, so much so that s. 9 of the enactment, reproduced in Act XII of 1881, prohibited transfer of such tenures; or, in other words, continued the right of occupancy to one who would hold on to the land and continue to cultivate it.

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(1) 5 A. 103.

This is not therefore a case in which there has been any actual relinquishment of the tenure by the defendant, because, as a matter of fact he has not relinquished the tenure. This is not a case in which the relation of landlord and tenant between the parties is denied by either of the parties to the litigation. This is a case in which the right of landlord and tenant being admitted, the plaintiffs seek to enforce the covenant contained in the *kabuliat* of the 29th June, 1874, in such a manner as to extinguish the rights of occupancy which are found, upon the facts of the case, to belong to the defendant.

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In our opinion such a suit cannot prevail. The policy of the law was to make occupancy tenures firm, to give fixity of tenure to those who had cultivated the land for a period exceeding twelve years, and there are provisions in the Rent Act of 1859, as also [620] in the Rent Act of 1873 and again in the present Rent Act of 1881, which go to show that such tenures are regarded with care by the Legislature, and that the ouster of persons having rights of occupancy is not to be allowed even where persons having such rights promise to relinquish the land under an agreement such as that of the 29th June, 1874. The Court therefore could not have enforced the ejectment of the defendant. The Court of first instance was therefore right in dismissing the claim as to the enforcement of the forfeiture clause of the *kabuliat* of the 29th June, 1874.

Mr. *Madho Prasad*, in defending the appeal, has asked us to remand the case for trial of the specific question as to whether or not the decree of 1870 was ever executed, and as to the various questions arising from it, with reference to the rights which the plaintiffs as zamindars may have in connection with the land and against the defendant-appellant. We are of opinion that the relation of landlord and tenant being admitted, proved, and shown in the case, and also the *kabuliat* of the 29th June, 1874, upon the ground of which alone such a suit could be maintained in the Civil Court, the remaining questions as to whether the defendant could be ousted is a matter, not for the Civil Court to determine, but for the Rent Court to deal with. There may be such remedies as clauses (*d*) and (*f*) of s. 95 of Act XII of 1881 contemplate, and those remedies may still be open to the plaintiffs-respondents. They may, having admitted the defendant to be their tenant, either seek to enhance the rent, or seek to recover payment of such rent, or upon failure of such payment to enforce a decree for ejectment. These are questions for the Rent Court and not for the Civil Court, and we are not concerned with them. The result of this view is to decree the appeal, and reversing the decree of the lower appellate Court to restore that of the Court of first instance with costs in all the Courts. We order accordingly.

Appeal allowed.

1888
JUNE 18.

APPELLATE CIVIL.

10 A. 621 = 8 A.W.N. (1888) 243.

10 A. 621 = 8 A.W.N. (1888) 243.

APPELLATE CIVIL.

[621] *Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

UPMANI KUAR (*Plaintiff*) *v.* RAM DIN AND OTHERS (*Defendants*).*
[18th June, 1888.]

Pre emption—Wajib-ul-arz.—*Clause fixing price in case of sale to a co-sharer—Agreement running with the land—Pre-emptor entitled to take property on payment of price fixing in* wajib-ul-arz.

The pre-emptive clause in the *wajib ul-arz* of a village contained the provision that the right of pre-emption could be enforced on payment of such sum as would represent the "*kimat-i-muravvajah*," that is, according to current rates. A suit for pre-emption was brought against the vendor and vendee of a certain fractional share in the village, and the plaintiff claiming the benefit of the above provision disputed the price entered in the sale deed as the proper price for the share according to current rates.

Held, following *Karim Baksh Khan* v. *Phula Bibi* (1), that a co-sharer was entitled to purchase the share sold at a price to be ascertained according to the rule in that behalf contained in the *wajib-ul-arz* and the condition in the *wajib-ul arz* regarding the price to be paid for the share sold was binding on the land and therefore binding on the stranger vendee.

[R., A.W.N. (1908) 98.]

THE plaintiff in this case, Musammat Upmani Kuar, and the defendant, Khurshed Jahan, were co-sharers of the village Makhapur in the district of Azamgarh. The defendant, Khurshed Jahan, by a sale-deed dated the 21st May, 1885, sold a nine pies share in the village to the other defendants Ram Din and two others for the sum of Rs. 825, which was entered in the sale-deed as the price. The covenant of the village *wajib-ul-arz* relating to enforcement of the right of pre-emption contained the following provision for assessment of the price, *viz.*, that the right of pre-emption could be enforced on payment of such a sum of money as would represent the "*kimat-i-muravvajah*," that is, price according to current rates. The plaintiff instituted this suit to enforce his right of pre-emption in respect of the share sold by the defendant, Khurshed Jahan, and contended that the price entered in the deed of sale, *viz.*, Rs. 825, was fictitious and that the same should be calculated with reference to the rule for ascertaining the price as laid down in the pre-emptive clause in the *wajib-ul-arz*, and he maintained that Rs. 350 would be the real price.

The Munsif of Azamgarh, finding that the plaintiff had failed to prove either that the market value of the property was only [622] Rs. 350 or less than Rs. 825, accepted the latter sum as the "correct amount of the consideration money," and accordingly decreed the claim for pre-emption in favour of the plaintiff, subject to payment of Rs. 825.

The plaintiff appealed to the District Judge of Azamgarh, who dismissed the appeal. The main part of his judgment was as follows:—

"The lower Court did not hold the wording of the *wajib-ul-arz* as binding upon the parties; and I agree in this view of the lower Court; besides this, there is no reliable evidence that only Rs. 350 were paid, so if plaintiff wishes to buy the property, she must do so for Rs 825."

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* Second Appeal, No. 252 of 1887, from a decree of J.M.C. Steinbelt, Esq., District Judge of Azamgarh, dated the 30th November, 1886, confirming a decree of Munshi Nehal Chand, Munsif of Azamgarh, dated the 16th July, 1886.

(1) 8 A. 102.

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The plaintiff appealed to the High Court, and contended that the lower Court had erred in law in not adopting the rule laid down in the *wajib-ul-arz* for ascertaining the price.

The facts of the case are further stated in the judgment of the Court.

Mr. *Abdul Majid* and Munshi *Madho Prasad*, for the appellant.

Pandit *Moti Lal* (for Munshi *Juala Prasad*), for the respondents.

ORDER OF REMAND.

MAHMOOD, J.—The property to which this litigation relates is a nine pies share in mauza Makhapur, of which the plaintiff and the defendant, Khurshed Jahan, were co-sharers. On the 21st May, 1885, Khurshed Jahan executed a sale-deed in favour of Ram Din and other defendants, whereby he sold the abovementioned nine pies share for a price which is stated in the sale-deed to be Rs. 825.

The plaintiff thereupon instituted this suit to enforce her right of pre-emption in respect of the abovementioned sale, and in her claim she alleged that the sum of Rs. 825 had fraudulently and collusively been entered in the sale-deed to defeat her right of pre-emption; that the price actually paid was only Rs. 350; that according to the pre-emptive clause of the *wajib-ul-arz* of the village the right of pre-emption could be enforced on payment of such sum of money as would represent "*kimat-i-muravvajah*," that is, price according to current rates; that such current rate was to calculate the price at 8 annas per cent. profit; and to support her [623] contention she produced a *bujharat* of 1292 Fasli, showing that the annual profits of the nine pies share amounted to Rs. 21-1-8.

The suit was resisted by the vendor, Khurshed Jahan, defendant, on the allegation that he sold the property for Rs. 825 after the plaintiff had refused to purchase the share. Ram Din and others, vendees-defendants, took the same plea, and they further pleaded that the market value of the property in suit was Rs. 825, which they had paid as the consideration of the sale.

The Court of first instance held that refusal by the plaintiff to purchase the property was not proved; that the plaintiff had failed to prove either that the market-value of the property was only Rs. 350 or less than Rs. 825; that this last sum must, therefore, be taken as the "correct amount of the consideration-money and the same should be paid by the plaintiff." The Court accordingly decreed the claim for pre-emption subject to payment of Rs. 825.

From this decree the plaintiff appealed to the lower appellate Court upon grounds which impugned the judgment of the first Court as to the amount of purchase-money and the principle upon which it should be calculated. The learned Judge of the lower appellate Court dismissed the appeal and the main part of his judgment is thus worded :—

"The lower Court did not hold the wording of the *wajib-ul-arz* as binding upon the parties; and I agree in this view of the lower Court; besides this, there is no reliable evidence that only Rs. 350 were paid, so if plaintiff wishes to buy the property, she must do so for Rs. 825."

The plaintiff has preferred this second appeal, contending that in determining the price of the property in suit the lower appellate Court has erred in not following the terms of the *wajib-ul-arz* as to the "*kimat-i-muravvajah*" or the current rate; and that that Court has omitted to decide the exact amount of the price actually paid for the property in suit.

Mr. *Abdul Majid*, in supporting the appeal, has confined his argument to these two points, and contends that the decision of the lower appellate

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Court must be taken to proceed upon the preliminary point that the terms of the *wajib-ul-arz* as to the assessment of the price were not binding upon the parties, and that [624] therefore that Court has not tried the case upon the merits. On the other hand, Mr. *Moti Lal*, who appears for Mr. *Juala Prasad*, on behalf of the respondents, argues that the judgment of the lower appellate Court must be read so as to incorporate the findings and conclusions of the first Court, and so read, the case must be treated as having been tried upon the merits, leaving no room for second appeal.

I am of opinion that the appeal has force and that the case has not been tried upon the merits by the lower appellate Court, as that Court's judgment proceeds upon the view that the terms of the *wajib-ul-arz* as to the assessment of the price for pre-emptive purposes were not binding upon the parties. The question is no doubt one not altogether free from difficulty, when regarded as a general question of law, whether such covenants run with the land so as to bind purchasers who may or may not have notice of such covenants. The covenant may amount only to an obligation annexed to the ownership of immoveable property, but not amounting to an interest therein, and in this light the covenant would fall under the class of obligations which have been well described in the second paragraph of s. 42 of the Transfer of Property Act (IV of 1882), or, to use the language of jurisprudence, the right created by such a covenant would fall under the category of *jus ad rem* as distinguished from *jus in rem*: and if it be so, then the equitable doctrine of notice would come into play in dealing with such questions where *bona fide* transferees for value are concerned.

I am, however, relieved from entering into this somewhat difficult question by a long course of decisions in respect of such covenants when found in the pre-emptive clause of the *Wajib-ul-arzes* in these Provinces. In *Chotey* v. *Bulla* (1), *Hakeem Maher Ali* v. *Premsookh* (2) and *Balesur Aheer* v. *Pudarut Singh* (3), the late Sadar Diwani Adalat of these Provinces laid down the rule that a condition in the *wajib-ul-arz* securing to co-sharers a right of pre-emption at a fixed sum per bigha, without reference to the actual price paid by a stranger, however, unusual and inexpedient, must be enforced, when its enforcement is claimed by a co-sharer. In laying down this rule the learned Judges do not seem to have [625] considered how far the doctrine of notice would affect the question when raised against *bona fide* transferees for value, and I can well imagine why in *Akbar Singh* v. *Juala Singh* (4), in dealing with a similar covenant, my brothers Straight and Tyrrell confined the effect of such covenants only to disputes as to price between the pre-emptor and the vendor, and would not extend the effect of such covenants to *bona fide* purchasers for value.

The case-law stood thus when a Full Bench of this Court in *Karim Bakhsh* v. *Phula Bibi* (5) had to consider the same question, and they unanimously arrived at the conclusion that covenants in the *wajib-ul-arz* as to the assessment of price for purposes of pre-emption run with the land so as to bind purchasers, that a pre-emptor co-sharer could enforce such a covenant both against the vendor and the vendee, and that if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover the surplus from the vendor. In

(1) N.W.P., S. D.A. R., 1865, part i, p. 163.
(2) N.W.P., S. D.A. R., 1865. part i, p. 365.
(3) N.W.P., S. D.A., 1865, part ii, p. 101. (4) A.W.N. (1865), 216. (5) 8 A. 102

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delivering his judgment in that case my brother Tyrrell distinguished the ruling in *Akbar Singh* v. *Juala Singh* (1) to which I have already referred, and he adopted the Full Bench ruling in *Hasrat Khan* v. *Jeobadh Upadhia*(2) which is, so far I am aware, the latest ruling on the subject.

In none of the cases to which I have referred (and I am not aware of any other ruling) does the exact nature of the right created by covenants in the *wajib-ul-arz* as to the assessment of price for pre-emptive purposes appear to have been either argued or considered, with reference to the applicability of the equitable doctrine of notice to *bona fide* transferees for value, nor does it appear that the question how far such covenants are enforceable in law as opposed to public policy in consequence of derogating from the value of immoveable property was considered or decided; and I confess that if the matter was *res integra* I should have considered it my duty to have considered these points before giving such unqualified effect to covenants as to price contained in the *wajib-ul-arz* as against transferees for value, the more so as I cannot help feeling that such covenants are opposed to the very nature of the right of pre-emption.

[626] The matter, however, as I have shown is not *integra* and the balance of authority of the case law which culminated in the Full Bench ruling of this Court in *Karim Bukhsh Khan* v. *Phala Bibi* (3) is entirely in favour of the appellant's case, for it goes the length of holding that irrespective of notice such covenants in the *wajib-ul-arz* run with the land and are enforceable against *bona fide* purchasers for value, whose only remedy is to recover the surplus, from the vendor, that is, such money as may have been paid by the vendee over and above the price assessed according to the *wajib-ul-arz*. The ruling is binding upon us, and in accordance therewith I hold that the learned Judge of the lower appellate Court was wrong in law in holding that the terms of the *wajib-ul-arz* as to the enforcement of pre-emptive right on payment of price at the current rate was not binding upon the parties, and that he should have tried the case upon the merits with reference to the terms of the *wajib-ul-arz* abovementioned. In other words, he should have gone fully into the merits of the whole case in order to ascertain the exact current rate at which such property is sold. The circumstance that the defendants vendees paid any particular sum as the price of the property may no doubt form an element of consideration as to the exact market-value of the property with reference to the current rate at which such property is sold. But according to the Full Bench ruling abovementioned, the circumstance that the defendants-vendees actually paid Rs. 825 or even a lesser sum, as the price of the property, would not *per se* render the decree for pre-emption subject to payment of the price actually paid.

The lower appellate Court has not tried the case upon the merits with reference to these considerations, and under the circumstances I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court for trial upon the merits. Costs to abide the result.

BRODHURST, J.—For the reasons stated by my brother Mahmood, I concur with him in allowing the appeal, in setting aside the decree of the lower appellate Court, and in remanding the case to that Court for trial upon the merits.

Cause remanded.

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(1) A.W.N. (1885), 210. (2) A.W.N. (1887), 76 (3) 8 A. 102.

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10 A.627=8 A.W.N. (1888) 242.

APPELLATE CIVIL.

[627] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

WALI-UL-LAH KHAN AND ANOTHER (*Defendants*) *v.* MUHAMMAD ISRAR-UL-LAH KHAN AND OTHERS (*Plaintiffs*).* [29th June, 1888.]

Practice—Issue raised by Court which was not raised by parties.

The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On Second appeal to the High Court.

Held that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause.

[D., 12 A. 556 (558).]

SALAMAT-ULLAH Khan, Wali-ullah Khan, and Sakhawat-ullah Khan were three brothers owning jointly several zamindari villages and other lands and houses. By a partition and division between the brothers by means of an arbitration award, all their joint property was divided between them, and each brother became separate and undivided owner of the zamindari village land and houses allotted to him, and the award further provided that in case of sale or transfer by any of the parties of the property so acquired by him in severalty, the other parties should have a right of pre-emption. By this partition mauza Bahori, tahsil Pawayan, was allotted to Wali-ullah Khan, the defendant, and his name was recorded in the revenue papers as proprietor of the said mauza.

By a sale-deed dated the 6th March, 1885, Wali-ullah Khan conveyed 5 biswas out of the entire 20 biswas of the said mauza and another plot of land which he also held in severalty, to Muhammad Iftikhar-ullah Khan in the sum of Rs. 2,000, and the plaintiffs, who each the sons of Salamat-ullah Khan, signed the deed as witnesses.

The plaintiffs then brought this action to enforce their right of pre-emption in respect of the aforesaid sale, alleging also at the same time that they were not among the witnesses to the sale-deed and that the signatures purporting to be theirs on the deed were not genuine.

The defendants contested the suit on various grounds, and maintained that the signatures on the sale-deed purporting to be those of the plaintiffs as witnesses thereto were genuine.

[628] The Subordinate Judge of Shahjahanpur, who tried the suit in the first instance, fixed several issues for determination arising out of the material allegations of the parties, and one of them was, "Were the signatures to the sale-deed affixed by the plaintiffs themselves, or had the defendants forged them without the knowledge of the plaintiffs, and how will these signatures affect them?" Finding in favour of the defendants upon this issue as well as on the several other issues in the case, he dismissed the suit. On appeal by the plaintiffs to the District Judge, that officer upon this particular issue found as follows:—" I also agree

* Second Appeal, No. 1643 of 1886, from a decree of H. P. Mulock, Esq., District Judge of Shahjahanpur, dated the 26th July, 1886, reversing a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 11th March, 1886.

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with the Subordinate Judge that the plaintiffs did really sign the deed of sale or gift, or whatever it may be considered to be. It has been held—*Rajlakhi Debi* v. *Gokul Chandra Chowdhry* (1) that the mere attestation of a deed of sale by a relative does not necessarily import his concurrence. In this case the defendant, uncle of the plaintiffs, no doubt used his family influence to obtain the signature of the plaintiffs to his deed of sale, and I see every reason to believe that such signatures were obtained under compulsion and with no real intention or concurrence in the transaction or of waiver of any right. The plaintiffs did not intend to surrender any right when they signed the deed, and it was simply, to my mind, to relieve themselves from the importunities of their uncle that they affixed their signatures to the deed." On the other issues in the case he found in favour of the plaintiffs and decreed their claim, but without costs.

On second appeal to the High Court by the defendants, it was contended, among other things, that the finding of the District Judge, that the plaintiffs signed the sale-deed as witnesses under compulsion, was opposed to their own statement in their plaint wherein they denounced their signature as forgeries.

Mr. *G. E. A. Ross*, the Hon. Pandit *Ajudhia Nath*, and Mr. *Zahur Husain*, for the appellants.

The Hon. *T. Conlan* and Mr. *W. M. Colvin*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This is a pre-emption suit. The plaintiffs, who claim a right of pre-emption, had signed the sale-**[629]** deed as witnesses. As to that part of the case their allegation in the plaint was that they had not signed the sale-deed, and that their signatures were forgeries. The Subordinate Judge and the District Judge found that the signatures of the plaintiffs to the sale-deed were their genuine signatures. The Subordinate Judge found that the plaintiffs knew to what the sale-deed related, and he dismissed the suit. The District Judge allowed the appeal on the finding that the plaintiffs had witnessed the deed in question under pressure. There was no such issue raised on the pleadings in the case, and no such issue was before the District Judge. The simple issue on this point was—were those signatures the genuine signatures or not of the plaintiffs? The plaintiffs did not allege in their plaint that they had signed the sale-deed under pressure or that they did not know what the contents of the sale-deed were. The issue which the District Judge found in their favour was a very serious issue, and of that class of issues, which, in our opinion, the Privy Council has more than once pointed out, should not be raised by the Judge for the parties when they had not raised it themselves. In the Privy Council case referred to by the District Judge—*Rajlakhi Debi* v. *Gokul Chandra Chowdhry* (1), the mere proof of the signature of a witness to the document was, we think properly, if we may say so, held to be no evidence that he knew what the contents of the document were. On the findings on the issue raised by the parties by their pleadings, to which we have referred, the plaintiffs had no cause of action. The appeal is allowed, and the suit is dismissed with costs.

Appeal allowed.

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(1) 3 B.L.R.P.C. 57=12 W.R P.C. 47=13 M.I.A. 209.

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APPELLATE CIVIL.

Before Mr. Justice Straight, and Mr. Justice Tyrrell.

ZALIM GIR (*Defendant*) *v.* RAM CHARAN SINGH (*Plaintiff*).*
[16th July, 1888.]

Mortgage—Payment by mortgagee by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagee for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.

B made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zemindari property in favour of *P*. On 27th January, 1874, *B* [630] mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zemindari for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his zemindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August, 1878, *B* made another mortgage to the defendant for Rs. 200 of the same 117 bighas, 7 biswas and 10 dhurs. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10 August, 1878, and on his application for execution of the decree the property mortgaged to him was advertised for sale of the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale property mortgaged to him.

Held that by the conditional sale, which became absolute upon the 19th March 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances.

Held further the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January 1874, for he had no right under the instrument in his favour of the 10th August 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January, 1874, when he had satisfied and discharged the two mortgage bonds held by the plaintiff of the 10th October, 1871, and 10th October, 1872.

[F., 17 M. 309 (315) ; R., 13 A. 432 (438); 1 O.C. 107]

THE facts of this case are stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Mr. *C. H. Hill* and *Munshi Juala Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—It is impossible that I can allow this litigation to linger longer in the Court. The suit was instituted as far back as November, 1883, and we are now dealing with it, after second trial in the lower appellate Court, in the month of July, 1888. The controversy between the parties was not of a specially complicated character, and if certain unnecessary elements had not been introduced into it by lower Court, it might have been very readily and easily disposed of. Stripped

* Second Appeal, No. 339 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 31st January, 1887, reversing a decree of Munshi Kulwant Singh, Subordinate Judge of Ghazipur, dated the 1st April, 1884.

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of the complication that have been introduced into it, the case simply comes to this :—

On the 10th October, 1871, and the 10th October, 1872, one Bhairo Singh made two mortgages for money advanced to him in favour of one Panna Lal, and as security for those advances he [631] hypothecated his zamindari property. On the 27th January, 1874, Bhairo Singh mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zamindari for a sum of Rs. 700 to Zalim Gir, the defendant-appellant before us. On the 10th September, 1877, Bhairo Singh made a conditional sale in favour of Ram Charan Singh, the plaintiff respondent before us, for a sum of Rs. 4,500. The necessity for the taking of that loan, as recited in the deed of conditional sale, was a pressing obligation upon Bhairo Singh, the borrower, to pay off the two charges created in favour of Panna Lal on the 10th October, 1871, and the 10th October, 1872. On the 10th August, 1878, Bhairo Singh made another mortgage for Rs. 300 of the same 117 bighas 7 biswas and 10 dhursa to Zalim Gir, the defendant-appellant before us.

Subsequently Zalim Gir brought a suit upon his two bonds of the 27th January, 1874, and the 10th August, 1878, against his mortgagor, and on the 9th November, 1881, he obtained a decree for Rs.2,064-14-0. Zalim Gir applied for execution of his decree and the mortgaged property was advertised for sale, the 20th November, 1883, being fixed for the sale. Meanwhile Ram Charan Singh, the plaintiff-respondent, had taken the necessary proceedings to foreclose his deed of conditional sale : and upon the 19th March, 1883, the sale was foreclosed and he became the absolute proprietor of the mortgaged property, which included within it the 117 bighas 7 biswas and 10 dhurs which had been charged in favour of the defendant-appellant. The defendant-appellant having, as I have already said, notified the mortgaged property for sale, and the 20th November, 1883, having been fixed for such sale, the present suit was instituted on the 19th November, 1883, the day before the sale, with the object, to put it shortly, to have it declared that Zalim Gir was not entitled to bring the property to sale.

It is unnecessary for me to travel through the judgments delivered, first by the Court of first instance, and next by the appellate Court when it had the case first before it, and on the last occasion when it had to re-try the appeal under our order of remand. It is enough to say that, in my opinion, we must now take it as found that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff-respondent acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, [632] and 10th October, 1872, and he therefore is also in my opinion entitled to pay those securities in his aid as prior incumbrances to that of the defendant-appellant, for the purpose of stopping him bringing the property to sale in execution of his decree, unless he recoups the plaintiff for the amount which he (the plaintiff) found to satisfy and discharge those incumbrances.

It is clear that the only right, supposing he gets those incumbrances out of the way by satisfying and discharging them, which the defendant-appellant has is upon the strength of the decree obtained in reference to his bond of the 27th January, 1874, to bring the property to sale, because he can have no right whatever under the instrument which was made in his favour on the 10th August, 1878. It therefore seems to me that the proper course for us to pursue in this case is, while allowing this appeal, to modify the decree of the Court below by declaring that the defendant shall only

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be permitted to bring the property to sale under his decree in respect of his mortgage of the 27th January, 1874, when he has satisfied and discharged the two mortgage-bonds held by the plaintiff-respondent of the 10th October, 1871, and the 10th October, 1872. The order of the learned Judge will stand as to the costs of the lower Courts. In this Court each party will pay his own costs.

TYRRELL, J.—I entirely concur. *Appeal allowed.*

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10 A. 632 = 8 A.W.N. (1888) 254.

APPELLATE CIVIL

Before Mr. Justice Straight.

GOPAL DAS (*Decree-Holder*) v. ALI MUHAMMAD AND OTHERS (*Judgment-Debtors*).* [26th July, 1888.]

Mortgage—Decree for sale—Decree not to be treated as a money decree—Act IV of 1882 (*Transfer of Property Act*), *ss.* 88, 89, 90.

A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89 and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance, be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance.

[R., 9 A.W.N. 149 ; 12 Ind. Cas. 70 (72) = 14 C.L.J. 659 = 16 C.W.N. 132 (135).]

THE appellant in this case, a mortgagee who had obtained a decree against the mortgagors for the mortgage-money, costs, and [633] interest, and for the sale of the mortgaged property, attached certain immoveable property of the mortgagors, respondents, other than the mortgaged property. The mortgaged property had not been sold at the time. The respondents objected that the decree-holder was not entitled to proceed against the property attached until the mortgaged property had been sold. This objection the Court of first instance allowed so far as to stay any further proceedings in respect of the attached property, and to direct the decree-holder to bring the mortgaged property to sale, but it maintained the order of attachment. On appeal by the judgment-debtors the lower appellate Court ordered that the attachment should be removed. The decree-holder appealed to the High Court.

Pandit *Moti Lal Nehru*, for the appellant.

Mr. *Amiruddin* for the respondents.

JUDGMENT.

STRAIGHT, J.—I think the learned Judge was right. The appellant decree-holder had obtained a decree on his mortage-security for sale of the mortgaged property, and it was the business of the Court executing it to proceed in the manner directed by ss. 88, 89 and 90 of the Transfer of Property Act. In my opinion, the presumption should be that immoveable property which a mortgagee has accepted as adequate security for his loan to the mortgagor will, if sold, realize enough to satisfy his charge, and this view seems to me to be borne out by the section of the Act referred to

* Second Appeal No. 1606 from an order of T. R. Wyer, Esq., District Judge of Shahjahanpur, dated the 23rd June, 1887, reversing an order of Munshi Chandi Prasad, Munsiff of East Budaun, dated the 5th February, 1867.

above, more particularly by the provisions contained in s. 90. I do not think under the law as it now stands, that a mortgagee with a decree for sale of the mortgaged property, the execution of which is now specially provided for in the Transfer of Property Act, can treat such decree as one for money, which entitles him to ask for attachment of the other property of his mortgagor, judgment-debtor; on the contrary, what I think the statute means and says, is, that he must first sell the mortgaged property, and if it does not fetch enough to pay his charge, interest and costs, then he may ask the Court for a decree for the money balance, if it is recoverable personally from the defendant and his other property, and execute that in the ordinary manner as a money-decree is executed. I dismiss the appeal with costs.

Appeal dismissed.

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10 A. 634 = 8 A.W.N. (1888) 257.

APPELLATE CIVIL.

[634] *Before Mr. Justice Straight.*

MUSHARF ALI AND ANOTHER (*Defendants*) *v.* IFTKHAR HUSAIN AND ANOTHER (*Plaintiff*). [6th August, 1888.]

Suit for removal of trees—Limitation—Act XV of 1877, *Limitation Act, sch. ii, Nos.* 32, 120.

A suit by a zemindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, schedule ii of the Limitation Act, and not by art. 32, schedule ii of the Act.

Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, schedule ii of the Limitation Act.

Gangadhar v. *Zahurriya* (1) distinguished.

[D.,—20 A. 519 (520) = 18 A.W.N. 135; 23 A. 486 (492) = 21 A.W.N. 164; 11 O.C. 379.]

THE defendants had planted some trees on the waste land of the village of which the plaintiffs were the zemindars, and this suit was brought to have the trees removed. The defendant contended *inter alia* that the trees were planted with the consent or acquiescence of the zemindars, and that the claim for their removal was barred by limitation.

The lower appellate Court found that the trees in suit were not twelve years old; that the suit was not for recovery of land, and overruling the contention of the defendant that article 32, schedule ii of the Limitation Act governed the suit, gave the plaintiffs a decree for the removal of the trees.

The defendant appealed to the High Court, and contended upon the authority of *Gangadhar v. Zahurriya* (1), that the suit was governed by article 32, schedule ii of the Limitation Act.

Munshi *Ram Prasad*, for the appellants.
Mr. *D. Banerji*, for the respondents.

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* Second Appeal No. 1438 of 1887, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th April, 1887, modifying a decree of Pandit Indar Narain, Munsiff of Allahabad, dated the 15th April, 1886.

(1) 8 A. 446.

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JUDGMENT.

STRAIGHT, J.--It is admitted by the learned pleader, for the defendants appellants that the learned Judge has found in specific terms that the land upon which the trees have been planted by the defendants, of which act or acts the plaintiffs complain, is the waste land of the zemindars, and accordingly the defendants had no rights in that land, which would justify them in so planting the [635] trees. Mr. *Ram Prasad* has contended for the appellants that art. 32 of the Limitation Law applies to the present case, and in support of that view he has quoted the ruling of my brothers Tyrrell and Mahmood in *Gangadhra Zahurriya* (1).

It would be out of place for me to criticise that ruling if I disagreed with it, which I do not. But the facts of that case are totally distinct from the facts diclosed here. There, there was an undoubted right in the defendants, who were occupancy-tenants of the plaintiff's land, to use that land for certain specific purposes, and what the plaintiff complained of was that instead of using it as arable land, for which it had been let to them, they had converted it into a *bagh* or grove; consequently art. 32 was held to be applicable. Here the case is a totally different one. Upon the admission of the learned pleader for the appellants, the defendants had no right in this waste-land of the zemindars-plaintiffs under colour of which they could plant trees in the zamindars' waste; and except that they could have asserted any title by adverse possession for more than 12 years to the land, they could have acquired no right to plant trees therein. They have proved no such adverse proprietary title in the land, and all that they have sought to do, is to show that what they did, of which the plaintiffs complain, was done either with their direct leave or licence or with acquiescence upon their part. Dealing with the point of limitation, I think that the learned Judge was right in applying art. 120 of the Limitation Law. The only question further that I have to determine is, when did the right to bring the suit accrue to the plaintiffs? Mr. *Ram Prasad* has not satisfied me that the plaintiffs' right to sue accrued more then six years prior to the date of the institution of the suit, and this view seems to have been held by the learned Judge in the Court below. That being so, I dismiss the appeal with costs.

Appeal dismissed.

(1) 8 A. 446 (A.W.N. 1886, p. 210.)

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[1] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAHIM BAKHSH (*Defendant*) v. MUHAMMAD HASAN (*Plaintiff*).*
[5th July, 1888.]

Muhammadan Law—Gift—Hiba-bil-iwaz—Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee—Gift invalid.

The fundamental conception of *hiba-bil iwaz*, or a gift for an exchange, as understood in the Muhammadan Law, is that it is a transaction made up of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwaz* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan law provides.

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Muhammadan Law. *Kasim Hossein* v. *Sharif-unnissa* (1), *Sahib-un-nissa Bibi* v. *Hafiza Bibi* (2), and *Shaikh Ibhram* v. *Shaikh Suleman* (3), distinguished. *Mohin-ud-din* v. *Manchershah* (4), *Mullick Abdool Guffoor* v. *Muleka* (5), and *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (6), referred to.

[F., 188 P.R. 1889; R., 21 A. 165 (170, 171)=19 A.W.N. 8; 29 B. 468 (478)=7 Bom. L.R. 443 (445); 91 P.R. 1894; 23 P.R. 1906=107 P.L.R. 1906; 12 O.C. 185 (188).]

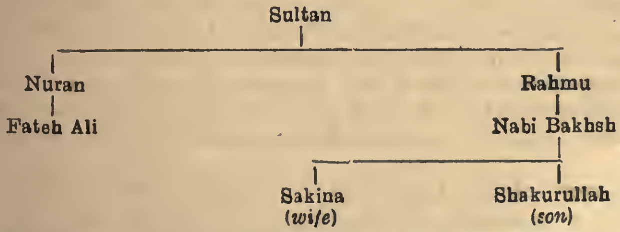
THE facts of this case are stated in the judgment of the Court.

The Hon *T. Conlan*, Lala *Lalta Prasad*, and Maulvi *Mehdi Hasan*, for the appellant.

[2] Mr. *G. E. A. Ross*, Mir *Zahur Husain*, and Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts of this case are very simple, and the decision of the appeal rests upon the principles of the Muhammadan Law of gift, which admittedly governs this case. The relative position of the persons to whom reference will be necessary is indicated by the following table :—



* First Appeal No. 151 of 1887, from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 20th June, 1887.

(1) 5 A. 285. (2) 9 A. 213. (3) 9 B. 146. (4) 6 B. 650.
(5) 10 C. 1112. (6) 12 W.R. 498.

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It is admitted that the property to which this suit relates was originally owned by Nabi Bakhsh, who died in the year 1876, leaving a widow, Mussammat Sakina, and a son, Shakurullah, as his heirs under the Muhammadan Law.

Shakurullah died on the 12th July, 1881, leaving his mother Musammat Sakina and Fateh Ali, who (as the pedigree shows) was his father's paternal uncle's son, and as such entitled to inherit a share in the estate of the aforesaid Shakurullah.

It appears that upon the death of Shakurullah, his mother Musammat Sakina, having a right of inheritance partly by inheritance from her husband Nabi Bakhsh and partly by inheritance from her son Shakurullah, remained in possession of the entire property up to the time of her death, which occurred on the 25th March, 1883.

Subsequently, that is, on the 4th May, 1883, the aforesaid Fateh Ali (whose name appears in the pedigree) executed a deed of gift, whereby he purported to convey all such rights of inheritance as he might have in the property to Muhammad Hasan, plaintiff-respondent.

In consequence of this deed of gift a certain quarrel arose between the plaintiff and the defendant as to the mutation of names [3] in respect of the zemindari portion of the property, but the plaintiff's claims were rejected by the revenue authorities on the 22nd November, 1883, and the defendant appears to have maintained his possession of the entire property, which, as before said, had come into the possession of Musammat Sakina, widow of Nabi Bakhsh and mother of Shakurullah. Fateh Ali died on the 29th August, 1884.

The present suit was instituted on the 25th September, 1886, by Muhammad Hasan, plaintiff—respondent; and in order to clear the case of possible confusion it is necessary to state that the suit rests entirely upon the deed of gift to the 4th May, 1883, and that the plaintiff claims the property as the share which the donor Fateh Ali is said to have inherited from Shakurullah and to have gifted to the plaintiff under that deed; that there is no allegation in the plaint that Fateh Ali ever obtained possession of the share which he claimed to have inherited from Shakurallah; and that therefore the plaintiff's suit will fail if the gift upon which he relies is found to be invalid under the Muhammadan Law.

The grounds of appeal and the arguments which have been addressed to us on behalf of the parties raise only two main questions for determination:—

(1) Whether the gift of the 4th May, 1883, was a *hiba bil-iwaz*, or a gift for an exchange as understood in the Muhammadan Law, rendering delivery of possession of the gifted property unnecessary for the validity of such gift.

(2) If not, was the gift of the 4th May, 1883, valid under the Muhammadan Law in view of the circumstance that the donor Fateh Ali was never in possession of the gifted property either at the time of the gift or at the time of his death, and that, as a matter of fact, the plaintiff, donee, never obtained possession of the property which he claims under the gift?

The view of the law which I entertain upon these two questions renders it unnecessary for me either to consider the question as to the exact extent of the share which the donor Fateh Ali may have [4] inherited from Shakurullah, or to decide the question of fact raised in the seventh ground of appeal relating to the house in Jafra Bazar, which is alleged by the appellant to have been built by himself. Nor

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is it necessary to consider the question raised by the plea that the defendant-appellant had spent a large sum of money in performing the several ceremonies of Shakurullah, and that such money was a charge upon the estate which the plaintiff was bound to pay before claiming any share in the estate.

In dealing with this case I shall confine myself to the two points abovementioned, because according to my opinion the decision upon those points will be fatal to the plaintiff's whole suit.

In considering the first of those points it is necessary to examine closely the terms of the deed of gift, dated the 4th May, 1883, executed by the deceased Fateh Ali in favour of the plaintiff-respondent Muhammad Hasan. That deed, after making certain recitals as to the manner in which the donor felt himself entitled to inherit a share in the estate of Shakurullah, goes on to say :—

"I, the executant, have now become old and weak and have no issue, Sheikh Muhammad Hasan, a near relative of mine, has all along, with cordial affection and love, rendered service to me, maintained and treated me with kindness and indulgence, and shown all sorts of favours to me. Besides the above the executant cannot attend even to the necessary management of the said share. Therefore for this reason, as also in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him, I, the executant, have, with my free will and consent, and in sound state of body and mind, without coercion or restraint, transferred and given away to Muhammad Hasan my entire share in the estate of Muhammad Shakurullah specifid below, which devolves upon me as a residuary heir, together with all the zemindari rights appertaining thereto. For my heirs have now no connection with the aforesaid share. Sheikh Muhammad Hasan is the absolute owner of the said share from this date, and he is authorized to get his name entered in the revenue department on the strength of this deed [5] and take possession of the property transferred. He should spend out of his own pocket what is necessary for the purpose of bringing any suit in connection with the share. I, the executant, shall not be liable for it, nor have I any claim in respect of the share transferred. If in present or in future, any claim in respect of the said share be made under the Muhammadan law or otherwise by me or my heirs, contrary to this deed and to the transfer in favour of Sheikh Muhammad Hasan aforesaid, it will be held false and unentertainable. The value of the property transferred is Rs. 7,500. These few words have therefore been written by way of a deed of transfer that they may be of use in time of need."

In interpreting this document, the lower Court has held that "it is a deed of gift executed in exchange of services" and that "the word *iwaz* (exchange), includes service, and a gift in exchange of service cannot be revoked." Upon this ground the Court has held that "Fateh Ali, not being in possession of the subject of gift, which had been left by Shakurullah, could not deliver the possession thereof to the plaintiff," but that this circumstance would not render the gift invalid.

I am of opinion that the learned Subordinate Judge has taken an erroneous view of the Muhammadan law in holding that the transaction of the 4th May, 1883, was a *hiba-bil-iwaz*, or gift for an exchange. The real nature of a *hiba-bil-iwaz* is fully described in Chapter VI of Book VIII on Gift in Mr. Baillie's Digest of Muhammadan Law, which is only an abbreviatedr eproduction of the Fatwa Alamgiri ; but I need only refer to

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such passages as have an immediate bearing upon this case. The fundamental conception of a *hiba-bil-iwaz* in Muhammadan law is that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. " The *iwaz* or exchange, in gift, is of two kinds—one subsequent to the contract, the other stipulated for in it—. " (Baillies' Digest 2nd., ed., p. 541). " When the exchanging takes place subsequent to the gift, the *iwaz* is, without any [6] difference of opinion between our masters, a gift *ab initio.* So that it is valid, where gift is valid, and void where gift void, there being no difference between them except as to the dropping of the power of revocation in the case of the *iwaz*, while it is established in that of the gift, And after possession has been taken of the *iwaz*, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of, whether the *iwaz* were given b y the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the *iwaz*; and the transaction does not come within the meaning of a contract of *mooawuzut*, or mutual exchange, either in its inception or completion. "—(Baillie's Digest, p. 543).

Now, such being the rule of the Muhammadan Law the transaction of the 4th May, 1883, cannot be regarded as a *hiba-bil-iwaz*, or a gift for an exchange, unless it can be shown that the consideration for which that transaction took place was a previous gift passing from the plaintiff, the donee of the deed of the 4th May, 1883, to Fateh Ali, the donor. In other words, does the consideration mentioned in the deed of the 4th May, 1883, represent any gift made by the plaintiff to Fateh Ali on a former occasion ? The answer to this question must be in the negative, because all the deed mentions as the consideration of the gift is "natural love and affection," which induced the plaintiff, donee, to render services to the donor, to maintain him and treat him "with kindness and indulgence," and to show him "all sorts of favours." This being so, the next step in the reasoning is whether such natural love and affection, services and favours, could be made the subject of gift by the plaintiff to Fateh Ali, the donor of the deed of the 4th May, 1883.

The law upon the subject is perfectly clear, for the very nature of gift under the Muhammadan Law requires that the subject thereof must be a right of property in something specific without an exchange.—(Baillie's Digest, p. 515). The Hedaya defines gift in the same sense :—"*Hiba*, in its literal sense, signifies the donation of a thing from which the donee may derive a benefit: in the language of the law, it means a transfer of property, made immediately, and [7] without any exchange."—(Hamilton's Hedaya, Vol. III, p. 673, Grady's Ed., p. 482). It is therefore impossible to hold that the natural affection, kindness, services and favours mentioned in the deed of the 4th May, 1883, can be regarded as a *hiba-bil iwaz*, or a gift for an exchange, as understood in the Muhammadan Law.

There is, however, another aspect of this point to which I should like to refer, because it may have led to misapprehension of the Muhammadan Law by the learned Subordinate Judge. The term *hiba-bil -iwaz* is often misused by the Indian Muhammadans in respect of transactions which either amount to exchange or sale. Mr. Baillie has explained the matter at page 122 of his Digest in the following terms :—

"*hiba-bil-iwaz* means, literally, gift for an exchange ; and it is of two kinds, according as the *iwaz*, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts ; first, the

original gift, and second, the *iwaz*, or exchange. But in the *hiba-bil-iwaz* of India, there is only one act; the *iwaz*, or change, being involved in the contract of gift as its direct consideration. 'And all are agreed that if a person should say, ' I have given this to thee for so much, ' it would be a sale; for the definition of sale is an exchange of property for property, and the exchange may be effected by the word 'give' as well as by the word 'sell.' The transaction which goes by the name of *hiba-bil-iwaz* in India is, therefore, in reality not a proper *hiba-bil-iwaz* of either kind, but a sale ; and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true *hiba-bil-iwaz*."

Even in the light of this explanation, I cannot hold that the learned Subordinate Judge was right in holding that the transaction evidenced by the deed of the 4th May, 1883, was a *hiba-bil-iwaz* amounting to sale, there being no exchange of property for property" in the sense of the Muhammadan Law of sale, nor "a [8] transfer of ownership in exchange for a price paid or promised or part paid and part promised," within the meaning of s. 54 of the Transfer of Property Act (IV of 1882).

I have no doubt that the transaction evidenced by the deed of the 4th May, 1883, is nothing more or less than an ordinary gift under the Muhammadan Law, and that it is therefore subject to all the conditions as to validity which that law provides in respect of such gifts.

This leads me to the consideration of the second point in the case as enunciated by me, namely, whether the facts that at the time of executing the gift of the 4th May, 1883, the donor Fateh Ali was not in possession of the property which he purported to convey by gift, that he never acquired possession of such property during his life-time, and that the plaintiff, donee, has never acquired possession of the property, are circumstances which render the gift invalid under the Muhammadan Law.

The answer to the question is not fraught with any difficulty, because the rule of the Muhammadan Law upon the subject is perfectly clear. Under that law, delivery of possession to the donee is a condition precedent to the validity of a gift; for, to use the language of the Hedaya, "the Prophet has said, 'A gift is not valid without seisin,' meaning that the right of property is not established in a gift until after seisin."—(Hamilton's Hedaya by Grady, p. 482.) "Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract without seisin.'—(Hedaya vol. iii, p. 291.) The same is the effect of the Fatwa Alamgiri as represented in Mr. Baillie's Digest :—"The legal effect of gift is not complete until possession is taken of the thing given, and, in this respect, a stranger and the child of the donor are on the same footing when the child is adult."—(Baillie's Digest, p. 520.) It has, indeed never been doubted that under the Muhammadan Law of the Hanafi [9] school, which governs this case, actual delivery of possession of the gift of property is a condition precedent to the validity of the transfer of ownership to the donee, and, indeed, it is in consequence of the stringent requirements of that law on this point that gifts of property held in joint co-parcenership (*musha*) have been held to be invalid,

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because perfect and exclusive possession of joint undivided sharers cannot be given to the donee—(*vide* Note No. 4 at p. 520 ; Baillie's Digest).

Such then being the rules of the Muhammadan Law as to the indispensability of possession by the donee, it follows, *a fortiori*, that property of which the donor himself is not in possession, and never acquired possession thereof, so as to deliver it to the donee, cannot be made the subject of a valid gift. The exact effect of the rule in respect of property which by its very nature is not capable of actual possession being delivered to the donee need not be considered, because such question does not arise in this case. Here all the property consists of immoveable property, and the donor Fateh Ali could have taken possession of his alleged share upon the death of Shakurullah from whom he claimed to inherit that share. The property was susceptible of possession, but it was in the posession of a trespasser, according to the statement in the deed of the 4th May, 1883, itself and the case now set up by the plaintiff under that deed.

To such a state of things the rule of Muhammadan Law provides no exception from the rule as to possession being a condition precedent to the validity of a gift. Under the precedents of gifts contained in Macnaughten's work on Muhammadan Law, Case No. 6 seems to me to be closely applicable to the present case. There a person had executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands of which the donor was not in possession, but to recover which he had brought an action, during the pendency of which the donor died, and the donee claimed the litigated property under the gift. It was there held that "the gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed con- [10] taining such gift is of no effect, because, in cases of gift, seisin is a condition. Gift is rendered valid by tender, acceptance and seisin ; but in gift seisin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hedaya,—'Gifts are rendered valid by tender, acceptance and seisin. The Prophet had said, a gift is not valid without seisin. So also if the thing given be pawned to or usurped by a stranger.' So also in the *Shurhi Viqaya*,—'A gift is perfected by complete seisin.' As the gift is, therefore, null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed."

Relying upon this precedent, Melvil and Pinhey, JJ., from whom Kemball, J. dissented, held that even in a case where the donor, being the owner of the property subject to the possession of a mortgagee, made a gift of his right of ownership, such gift was invalid under the Muhammadan Law for want of actual possession of the property by the donor at the time of the gift. The case is *Mohinuddin* v. *Manchershah* (1), and I may respectfully say that it probably carries the rule as to seisin too far, as is suggested by a Muhammadan lawyer, Mr. Syed Amir Ali of the Calcutta Bar, at page 70 of his Tagore Law Lectures for 1884. The question arising out of the rule of Muhammadan Law as to possession being a condition precedent to the validity of a gift, was fully argued and well considered by Garth, C. J., in *Mullick Abdool Guffoor* v. *Muleka* (2), who in delivering his judgment has made observations in which I concur, for they draw a clear distinction between cases where from the nature of the gifted property itself actual possession could not be given to the donee, and cases where such possession might be given to the donee or actual possession

(1) 6 B. 650. (2) 10 C. 1112.

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held by the donor. The principle upon which the judgment of Sir Richard Garth in the Calcutta case proceeded is scarcely consistent with the *ratio decidendi* of the Bombay ruling above cited, but it is in accord with the principle of Sir Barnes Peacock's judgment in *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (1) which, though a case of [11] endowment, would, so far as the question of seisin is concerned, be governed by the same principles as questions of gift under the Muhammadan Law on that point.

It is not necessary for the purposes of this case to discuss these rulings more minutely, and it is enough to say that their general principle is that, for the validity of a gift under the Muhammadan Law, possession of the gifted property by the donor at the time of the gift, or at least at some time, so as to enable him to deliver possession of the same to the donee, and the actual delivery of such possession to the donee, are conditions precedent to the validity of gifts such as the gift evidenced by the deed executed by Fateh Ali in favour of the plaintiff on the 4th May, 1883.

The terms of that deed, however, clearly show, and it is proved and practically admitted on all hands, that in the first place no such possession ever existed in the donor Fateh Ali of the property which he intended to convey by the deed as would enable him to make a valid gift of the property: and in the next place it is equally clear, and indeed admitted, as shown by the very form of this suit, that the plaintiff donee never acquired possession of the property to which the suit relates and which he claims under the gift of the 4th May, 1883.

The matter therefore comes simply to this, that the deceased Fateh Ali, feeling himself entitled to a share of inheritance in the estate of the deceased Shakurullah, never having acquired possession of that share, executed the deed of 4th May, 1883, purporting to convey to the plaintiff such chances of success as the aforesaid Fateh Ali may have had in a litigation such as this, and, as a matter of fact, the plaintiff never obtained possession of the gifted share in pursuance of the deed of gift.

Under these conditions I am satisfied that the lower Court misapprehended the Muhammadan Law as to such gifts, and that the gift of the 4th May, 1883, was invalid owing to the absence of possession in the donor and the absence of the delivery of possession to the donee.

[12] The lower Court has, however, relied on two rulings of this Court, one being, *Kasim Hossen* v. *Sharifunnissa* (2) and the other *Sahibunissa Bibi* v. *Haffiza Bibi* (3), in support of its view. So far as these rulings are concerned, I need only say that the first of these, which was a judgment of my brother Straight and Mr. Justice Oldfield, only gave effect to the ruling of the Lords of the Privy Council cited in that judgment, and which was repeated by their Lordships in *Ameeroonissa Khatoon* v. *Abadoonisa Khatoon* (4) to the effect that the rule of Muhammdan Law, that a gift of *musha* or an undivided part in property capable of partition is invalid, does not apply to definite shares of zemindaris, which are in their nature separate estates with separate and defined rents; and that the second ruling, in which the judgment of the Court was delivered by Edge, C. J., related to a class of property of which the nature regulated by statute is vastly different from the nature of the property involved in this litigation. Again, so far as the lower Court has relied upon the Bombay ruling in *Shaik Ibhram* v. *Shaik Suleman* (5) it is enough to say that in

(1) 12 W.R. 498. (2) 5 A. 285. (3) 9 B. 213. (4) 2 I.A. 87. (5) 9 B. 146.

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that case possession such as the nature of the property admitted of was given to the donee, and in the case of the house the property was already in possession of the donee. All these cases are distinguishable from the present, because here the donor Fateh Ali was in no sort of possession of the share which he alleged himself to have inherited from Shakurullah, that the property was capable of being taken possession of by the aforesaid Fateh Ali, that he never obtained such possession either before or after the gift of the 4th May, 1883, and that the plaintiff donee himself never acquired such possession under the gift.

Under these circumstances I hold that the deed of gift, dated the 4th May, 1883, was invalid under the Muhammadan Law, that it therefro did not confer upon the plaintiff any such right as would entitle him to maintain an action such as this, and for these reasons I would decree this appeal, and reversing the [13] decree of the lower Court, dismiss the suit with costs in both the Courts.

STRAIGHT, J.—I am entirely of the same mind.

Appeal allowed.

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11 A. 13=8 A.W.N. (1888) 280.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KIAM-UD-DIN AND ANOTHER (*Plaintiffs*) *v.* RAJJO AND ANOTHER. (*Defendants*).* [12th July, 1888.]

Account stated—Hypothecation-bond for the amount due—Obligor preventing registration of bond by denying execution—Suit on account stated—Civil Procedure Code, s. 586—Small Cause Court-suit.

For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.

The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts.

Held that under the circumstances of the case the plaintiff was entitled to resort to the account stated and sue thereon. *Sirdar Kuar* v. *Chandrawati* (1) distinguished.

Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration,

[**Rel.**—14 Ind. Cas. 399 (400)=8 N.L.R. 7; **Appl.**—15 B. 400 (404), 405.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Hamidullah*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

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* Second Appeal, No. 504 of 1887, from a decree of Munshi Monmohan Lal, Subordinate Judge of Azamgarh, dated the 17th December, 1886, confirming a decree of Maulvi Muhammad Amin-ud-din, Munsiff of Muhammadabad, dated the 27th August 1886.

(1) 4 A. 330.

1888 JULY 12. APPELLATE CIVIL. 11 A. 13= 8 A.W.N. (1888) 280.

JUDGMENT.

STRAIGHT, J.—This was a suit brought by the plaintiffs for two reliefs, the first was for the registration of a bond, purporting to be a hypothecation-bond executed by Musammat Rajjo Bibi, defendant, for the sum of Rs. 247-8-6; the second relief asked was, [14] in the event of the registration of that document being refused, for the recovery of that amount of money upon an account stated. The first Court dismissed the plaintiff's claim upon the ground that, as to the registration, the suit was barred by limitation; and upon the authority of the case of *Sirdar Kuar* v. *Chandrawati* (1) further held that the plaintiffs could not recover upon the account stated, because there had been a novation of contract by the execution of the bond with a fresh promise to pay; and the plaintiff not being able to produce the bond or to maintain a suit upon it by reason of its being unregistered and the registration having been refused, the claim upon the account stated failed.

The plaintiffs appealed to the Subordinate Judge solely in regard to the view expressed by the first Court upon this latter point; and the Subordinate Judge in regard to it adopted a similar view to that expressed by the Munsiff.

From that decision of the Subordinate Judge the second appeal before us is preferred to this Court, and a preliminary objection is taken by Mr. *Madho Prasad* on the part of the respondent, that the suit being in the nature of a Small Cause Court suit, no second appeal lay from the decision of the Subordinate Judge. I overrule that contention of Mr. *Madho Prasad*. In my opinion, for the purpose of determining whether a second appeal lies or is prohibited by s. 586, what must be looked at is not the shape in which the case comes up in appeal to this Court, but the shape in which the suit was originally instituted in the Court of first instance.

It was then contended on behalf of the appellants that the decision of the Subordinate Judge affirming that of the Munsiff is wrong; and I am clearly of opinion that this is so. The ruling relied on by him is wholly inapplicable to this case; and both the lower Courts have proceeded upon a misapprehension of the scope and meaning of that ruling. In that case it was admitted on both sides that there was a bond hypothecating immoveable property as collateral security for the account stated. Therefore, there was a clear and specific contract admitted between the parties which superseded altogether [15] any contract or obligation that might be assumed from the mere statement of accounts between them. But in the present case the fact is wholly different; because here the defendant denied not only the execution of the bond, but that there had been any dealings between herself and the plaintiff or that any account had been stated. As I pointed out in the course of the argument, if such a contention as that which is now put forward upon the other side in support of the judgments of the lower Courts, were to be allowed, these plaintiffs would be absolutely without remedy, because assuming there to have been a contract, then the plaintiffs would have been defeated by the action of the defendant in denying the execution of the bond and so preventing registration, and if there was an account stated, then the plaintiffs could not sue upon it, because the existence of the bond would prevent them from doing so.

(1) 4 A. 330.

1888 JULY 12. — APPELLATE CIVIL. — 11 A. 13 = 8 A.W.N. (1888) 280.

But we cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts. In my opinion where two parties enter into a contract of which it is an essential incident that, in order to give legal effect to that contract and to enable the one party to enforce it against the other, the registration of the instrument embodying such contract is necessary, it is essential that each should do for the other all that is necessary towards securing the registration of the instrument which the law requires. Therefore I am of opinion that the plaintiffs are entitled to resort to their second relief and to bring their claim against the defendants upon the account stated. That being so, this appeal is decreed, the decision of the lower appellate Court being reversed the case will be returned to that Court for restoration to the file of pending appeals and disposal according to law. In dealing with the appeal it will be for the Subordinate Judge to determine whether there is evidence sufficient upon the record to enable him to deal with the question between the plaintiffs and the defendants with regard to the account stated. If there is evidence, he must deal with the case himself; if there is no evidence, or if there is no sufficient **[16]** evidence, then he must pursue the procedure laid down for his guidance in the Civil Procedure Code. Costs of this appeal will be costs in the cause.

BRODHURST, J.—I concur. *Cause remanded.*

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11 A. 16 (F.B.) = 8 A.W.N. (1888) 281.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

KULWANTA (*Decree-holder*) *v.* MAHABIR PRASAD AND ANOTHER (*Jndgment-debtors*). [24th July, 1888.]

Stamp—Court-fee—Security-bond for costs of appeal—Act I of 1879 (*Stamp Act*), *sch. i, No.* 13—*Act VII of* 1870 (*Court-fees Act*), *sch. ii, No.* 6.

Held by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(*a*) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i, (*b*) a Court-fee of eight annas under the Court-fees Act, art. 6, sch. ii.

IN this case, Straight, J., made the following reference to a Division Bench:—

"This is a question of stamp reported to the Court by the Registrar under the following circumstances:—Mussammat Kulwanta, the appellant in this Court, was requried by an order to find security for the costs of the respondent in the event of her appeal failing, and, in pursuance of that order, she has filed two security-bonds, one for Rs. 433-5-4, and the other for Rs. 866-10-8, and they are severally stamped with the Court-fee stamp of eight annas. The Registrar's attention being called to the instrument, and the stamps affixed upon them, has reported the matter to the Court in terms of his order of the 8th of the present month, and the matter has come before me for disposal. The Registrar has referred to an opinion expressed by this Court in the year 1881, which was given by four of the then Judges of the Court, expressing certain views with regard to art. 13, sch. ii. of the Stamp Act, and to art. 6 of the second schedule of the

Court-fees Act. In that opinion it would appear that a view expressed by Jackson, J., in *Soonjhare Koonwur* v. *Ramessur Pandey* (1) was adopted; and [17] the Registrar from that opinion and the ruling to which it refers, suggests that the security-bonds in this case should have been stamped with a stamp under art. 13 of the Stamp Act of 1879. Mr. *Ram Prasad*, for the appellant, contends that his client has sufficiently stamped the two security-bonds. He observes, and I think justly, that the opinion of this Court mentioned by the Registrar in his report was an opinion that was expressed extra-judicially, in the sense that it was without argument being heard. Upon comparing art. 6 of sch. ii of the Court-fees Act with art. 13 of the Stamp Act, I think there is considerable force in Mr. *Ram Prasad's* argument that the wide scope which has now been given to art. 6 of the Court-fees Act, in comparison with its terms in the older Court-fees Act, suggests that the instruments in this case are instruments of obligation given by the direction of the Court, and not otherwise specifically provided for. As, however, this view is in conflict with what I committed myself to in the former opinion, and as the holding it, if it be a right one, involves the necessity of overriding not only that opinion but the opinions of three other learned Judges, I think my proper course would be to refer the question here involved for disposal to a Division Bench. I direct accordingly."

1888 JULY 24. — FULL BENCH. — 11 A. 16 (F.B.) = 8 A.W.N. (1888) 281.

The question was subsequently referred to the Full Bench.

Munshi *Ram Prasad*, for the appellant.

The following judgment was delivered by the Full Bench:—

JUDGMENT.

EDGE, C.J., and STRAIGHT and TYRRELL, JJ.—We are of opinion that when a bond is given under the order of a Court as security by one party for the costs of another, it is subject to two duties, (*a*) one under the Stamp Act, art. 13, sch. i, according to its amount, (*b*) under the Court-fees Act, art. 6, sch. ii, and is liable to an *ad valorem* stamp and to a court-fee of eight annas. The analogy of an administration-bond is useful as a guide, because such an instrument is necessarily required by every Court granting letters of administration, and must be stamped under the Stamp Act and also under the Court-fees Act. This is our answer to the reference.

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11 A. 18 (F.B.) = 8 A.W.N. (1888) 276 = 13 Ind. Jur. 148.

FULL BENCH.

[18] *Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.*

RAGHUBAR DIAL AND OTHERS (*Defendants*) v. KISHO RAMANUJ DAS (*Plaintiff*). [26th July, 1888.]

Trust—Trust for "public religious purposes"—Private trust—Suit by worshipper at Hindu temple relating to trust—Right to sue—Civil Procedure Code, ss. 30, 539—Act XX of 1863—Hindu Law.

The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour, an acknowledgment of the person whom

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(1) 5 W.R. Misc. 47.

1888 JULY 26.

FULL BENCH.

11 A. 18 (F.B.) = 8 A.W.N. (1888) 276 = 13 Ind. Jur. 148.

they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code.

Held by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple.

Per EDGE, C.J., and TYRRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense.

Held also by the Full Bench that the suit was not maintainable as against those defendants.

Per STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religoius purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit.

Per EDGE, C.J., and TYRRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code, and if for private or *quasi*-private religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple, could maintain it against those defendants who were not trustees but (if they had wrongfully taken possession) trespassers; that Act XX of 1863, could not apply; and that, with reference to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants.

[19] *Jawahra* v. *Akbar Hussain* (1) distinguished, *Manohar Ganesh Tambekar* v. *Lakhmiram Govind Ram* (2) *Lutifunissa Bibi* v. *Nazirun Bibi* (3), and *Hira Lal* v. *Bhaiorn* (4), referred to. *Wajid Ali Shah* v. *Dianut-ullah Beg* (5), approved,

[Overruled., 18 A. 227 (231); F., 20 C. 397 (409); R., 13 A.W.N. 71; 32 A. 503 (514) = 7 A. L. J 761 (773) = 6 Ind. Cas. 219 (222); 33 C. 789 (803, 804) = 10 C.W.N. 581; 2 C. L. J. 460 (470); 91 P. R. 1901 = 113 P. L. R. 1901; D., 2 M. L. J. 251.]

THIS was a reference to the Full Bench by Brodhurst and Mahmood, JJ., the question referred being whether the suit was maintainable under Hindu Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code. The nature of the suit is stated in the judgment of the Full Bench.

Pandit *Sundar Lal* and Pandit *Ratan Chand*, for the appellant.

Mr. *C. Dillon*, Mr. *Dwarka Nath Banerji*, and Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

STRAIGHT. J,—The reference which is now before this Bench arose out of a suit in which one Kesho Ramanuj Das was the plaintiff, and, four persons, Behari Lal, Musammat Kundar Kuar, Raghubar Dial and Mohan Lal were the defendants. The question which is put to us in the order of reference is this:—"Was the suit maintainable under the Hindu

(1) 7 A. 178. (2) 12 B. 247. (3) 11 C. 33. (4) 5 A. 602. (5) 8 A. 31.

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Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code."

It seems to me for the purposes of determining this question, that it is material to look at the terms of the plaint upon which the plaintiff came into Court and summarised they come to this. That Tika Ram was the absolute proprietor of 5 biswas of land situate in the Bareilly District; that he made a gift of those 5 biswas of land in favour of the four defendants, the female defendant being his daughter, Behari Lal being her husband, and the other two defendants being her sons; that Tika Ram died in or about 1867, leaving behind Musammat Pran Kuar his widow; that Musammat Pran Kuar, subsequent to the death of her husband, constructed a temple in honour of the God Janki Ballabhji, and dedicated it to that deity. The fifth paragraph of the plaintiff, which I had better state in terms, goes on to say:—"The defendants, in order to defray the expenses of the temple, made a gift of the said property in favour of [20] Janki Ballabhgi, and voluntarily made an application for mutation of names, which was allowed, and Behari Lal, defendant, was appointed a manager of the temple." The plaint then goes on to say that "in 1875, the Tahsildar, of his own accord, made a report to the effect that the deity had no existence and could not be deemed to be in possession, and that as the donors were in actual possession, their names should be recorded. This was allowed by the Board of Revenue and the names of the defendants were recorded, although the income of the property used to be spent in defraying the temple expenses.

"7. That since November, 1884, the donors have changed their mind and have stopped the payment of the expenses.

"8. The temple is a place of public worship and residents of neighbouring places visit the temple. The plaintiff has been a *pujari* (worshipper) for the last seven years, and resides in it. He, therefore, on behalf of the entire Hindu community who worship in the temple, prays as follows:—

"(1) That it may be declared that 5 biswas, &c., is *wakf*;

"(2) That it may be declared and established that Thakur Ballabhji in whose favour the gift was actually made, is entitled to hold the property in his name, as is customary with reference to temples;

"(3) That the defendants be directed to pay the income of the said property for defraying the expenses of the temple as hitherto;

"(4) That the Court may issue such orders and instructions as may be necessary and proper for the future management of, and as to the payment of the income for, the said temple."

I may as well at once say, in order to clear that consideration out of the way, that, as far as I am aware there is no rule of Hindu Law, substantive or otherwise, that deals with or governs a claim of this description. I am not aware that there is any principle of Hindu law which either sanctions or prohibits such a suit, nor is any suggested on either side. Therefore I reply in the negative as to the first question referred to us.

[21] Then arise the following three considerations. First, looking to the frame of the plaint, is the suit one that comes within the purview of s. 539, Civil Procedure Code? If it is such a suit, then it is conceded on the part of the plaintiff that it is prohibited by that section, and could not be maintained without the sanction of the Collector as provided in the last paragraph of that section. If it is not prohibited by that section, then is it within the provisions of Act XX of 1863? And, lastly, assuming

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it not to be governed by either s. 539, Civil Procedure Code, or the provisions of Act XX of 1863, are the provisions of s. 30, Civil Procedure Code, applicable to it?

The terms of the plaint are unmistakable, and there can be no question as to what the plaintiff alleges. He says that in the year 1870, the four defendants between them, by an endowment, created a trust in respect of this temple of Janki Ballabhji and of the idol contained therein, which endowment consisted of 5 biswas of land, the income of which was to be devoted to the expenses of the temple. I think I may so far look into the evidence in the case as to refer to the mutation proceedings of the 5th August, 1870; because that is specifically referred to by the plaintiff in his plaint; and may be reasonably taken to be incorporated into it. It appears to me, reading the terms of that petition, that it is good evidence that the four defendants made an out and out gift of the 5 biswas of land in favour of the Thakurji; that they had created an endowment in respect of that particular land in favour of that idol; and that whether Behari alone be reg arded as the trustee of that endowment, or whether they and Behari be regarded as joint trustees, there was a trust in favour of the idol, who was the beneficiary so to speak under such trust.

Referring to page 371 of Mr. Agnew's book upon Trusts in British India, I may quote a passage from it, as it rests upon the authority of case law. He says:—"As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expenses of worship. Sometimes the donor is himself the [22] trustee. Such a trust is of course valid, if perfectly created, though, being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect. But the effect of the transaction will differ materially according as the property is absolutely given for the religious object or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent and not a real one, and where it creates no rights in any one, except the holder of the fund.

This is quoted from Mr. Mayne's Hindu Law, para. 362, and I believe, represents the rules bearing upon the subject, which are also very fully stated in the recent ruling of the Bombay High Court in *Manohar Ganesh Tambekat* v. *Lakhmiram Govind Ram* (1). It appears to me, as I said before, that the terms of that petition are an indication of an absolute gift to an endowment in favour of the Thakurji of the 5 biswas of land which belonged to the owners. That being so, it seems to me that one can only regard that, the temple being an open temple, as a public religious purpose. If that be so, we have then the main element that is required for the purpose of bringing into operation the provisions of s. 539, Civil Procedure Code.

Now, then, what does s. 539 provide? It says:—"In case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, &c."

Now, it is not necessary, if I read that section aright, that there should have been any breach of trust; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned

(1) 12 B. 247.

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Judges of Calcutta High Court in *Lutifunnissa Bibi* v. *Nazirun Bibi* (1). Therefore, this may be fairly regarded as a suit, to put it in its narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction [23] of the Collector or such officer as the Local Government might appoint was necessary for the purpose of empowering the plaintiff to bring such a suit. In the referring order the Full Bench ruling in *Jawahra* v. *Akbar Husain* (2) is referred to, and apparently treated by the learned Judges who referred this case as in their opinion applicable to the particular circumstances of this case. In my opinion, it is not applicable. In that case the plaintiff brought his suit as a worshipper for the purpose of removing the interference of the defendants who had altered the structure of the mosque and had turned it into a place for storing straw. My brother Mahmood in that case was perfectly justified in observing that there was no suggestion in the plaint of a misapplication or a breach of trust, or a prayer for the administration of the trust, such as would bring the case under s. 539 of the Code. I, therefore, speaking for myself, do not think the Full Bench ruling above referred to governs this case. That being so, I think that s. 539 was applicable.

If it was not, then does the case fall within Act XX of 1863? It is a pity, I think, that the learned pleader on behalf of the appellants could not have conceded that it did not. But if it does fall within that Act, then undoubtedly that Act required sanction to be given, which sanction has not been given, and therefore it would be prohibited and could not be maintained without sanction.

As to whether s. 30, Civil Procedure Code, is applicable, assuming that I am wrong as regards the view I have taken with regard to s. 539, I am at a loss to see what cause of action could have accrued to the plaintiff alone. It is impossible to understand upon what right the plaintiff can claim to maintain a suit such as the present against the defendants. As most material to this particular question and as supporting the view that I am now expressing, I may refer to the ruling of our late Chief Justice, Sir Comer Petheram, and Oldfield, J., in *Wajid Ali Shah* v. *Dianatullah Beg* (3). I think, therefore, I have now dealt with the matters that [24] seem to me necessary for answering this reference. My answer to it is as given above.

EDGE, C.J.—In this case four persons, defendants in this suit in 1870 made a gift of 5 biswas of land to a Hindu temple for the purpose of *bhog* and *arti* and other expenses appertaining to the idol. They appointed the defendant Behari Lal the manager and agent, and they presented a petition to the revenue authorities to have their names expunged and the name of the deity inserted instead, and to have Behari recognised as the agent or manager. The plaintiff in his plaint alleges that he as a Hindu is interested in worshipping in this temple. He alleges also that the defendants have appropriated the income of the 5 biswas to their own purposes. He has brought this suit claiming the reliefs mentioned in my brother Straight's judgment. The Subordinate Judge who tried the suit decreed the claim against Behari and Bhagat *alias* Mohan. The latter had confessed judgment. Behari did not appeal, neither did Bhagwat, and as to whether the suit was maintainable as far as concerned them is consequently not a matter which we have now to consider. The plaintiff appealed from the decree of the Subordinate Judge, so far as the other two defendants

(1) 11 C. 33. (2) 7 A. 178. (3) 8 A. 31.

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were concerned, and on appeal the suit was decreed against them. They have now appealed to this Court; and out of that appeal has arisen this reference. We must, in my opinion, interpret this reference as applying only to the parties who can be affected by the appeal in this Court, that is, the defendants other than Bhagwat and Behari.

The first question to consider is as to whether a trust had been in fact created. It appears to me that the four defendants, short of executing a deed of declaration of trust, did everything else in their power to create a trust. They purported to give the 5 biswas to the god; they successfully applied to the revenue authorities for mutation of names in favour of the god, and for acknowledgment of the person whom they nominated as the manager or agent. One thing appears to me to be quite clear, that the defendants other than Behari, who was the manager, and whose case is not now before us, did not constitute themselves trustees in any sense. In [25] fact, as far as I can see, they divested themselves of their separate interest in these 5 biswas. That I think has some bearing upon the answer we should give to this reference. I may mention incidentally that of the two defendants now before us, one was found and the other was alleged to be a minor in 1870.

On behalf of the plaintiff, it was said that this was not a case coming within s. 539 of the Code, it being contended by Mr. *Banerji* that there was no express or constructive trust here for public religious purposes. He contends, of course, that there was a trust, but denies that the endowment of this small temple could be considered to be an endowment for public religious purposes. If this was an express or constructive trust for a public religious purpose, there is sufficient in the plaint itself to show that the case would come within s. 539, Civil Procedure Code, because in effect the plaint alleges that there has been a breach of such trust, that is, that Behari, who was appointed a manager, and who was also a donor, and the other defendants, who were donors, have, contrary to the objects of the trust, and the objects of the endowment, repossessed themselves of the 5 biswas and the profits accruing from them. It is quite true that in terms none of the reliefs claimed in this plaint are precisely the reliefs mentioned in clauses *a*, *b*, *c*, *d*, and *e* of s. 539 of the Code. But they are all, in my judgment, comprised within the phrase "or granting such further or other relief as the nature of the case may require." Here, not only does the plaintiff's plaint, if it states the facts truly, show that there has been misapplication and non-administration of the trust funds and trust property, but he asks in terms to have it declared that the 5 biswas were trust property of the god; and he calls in aid the assistance of the Court to enforce the trust. Consequently if the purpose for which the endowment was made was a public religious purpose, the suit must fail, the provisions of s. 539 of the Code not being complied with. On the order hand, if, as Mr. *Banerji* contends, the purpose was not a public religious purpose in the sense of s. 539, but a private trust, for a private religious purpose, I fail to see on what principle the [26] plaintiff is entitled to bring this action. I confine myself to the case of the two persons now before us in this appeal. They are not trustees. As far back as 1870 they did appoint a manager and did divest themselves of the property. If they have since that date wrongfully taken possession of those 5 biswas and appropriated to their own purposes the income, that in my judgment does not constitute them trustees, but would make them trespassers dealing with the property to which they are not entitled. How in that case a person, who is really one of the public, although he

can worship in the temple, can maintain an action against these persons as trespassers, I fail to see. I have seen no authority to show that such an action is maintainable.

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I may say also that I also fail to see how Act XX of 1863 can apply in this case. The temple and trust, if there was one, came into existence in 1870 and was not in existence at the date of that Act.

There is another question raised, as to whether this action could be maintained by reason of s. 30 of the Civil Procedure Code? In my opinion neither the plaintiff, nor the body of Hindus who might worship in this temple, nor the body of Hindus generally, could maintain this action, if the trust were a private trust. The fact that the plaintiff apparently had notices issued to the Hindus interested could not, in that view, entitle him to maintain the action alone, on his own behalf or on behalf of himself and others. If this trust was for a public religious purpose, s. 539, Civil Procedure Code, would still apply, whether the notices required by s. 30 of the Code, had issued or not. I fully agree with my brother Straight that the ruling in the case of *Jawahra* v. *Akbar Husain* (1) referred to in the order of reference does not govern this case. That was a case in which a Muhammadan was suing the persons who, by their act of converting a mosque to purposes other than religious purposes, had prevented him exercising his undoubted right of using the mosque for purposes of prayer. The case which appears to me to be practically on all fours with this case is that [27] of *Wajid Ali Shah* v. *Dianatullah Beg* (2), and I must say, so far as the facts of that case are applicable here, I agree with the judgment of the late Chief Justice which was concurred in by Oldfield, J.

The passage quoted by my brother Straight from para. 362 of Mayne's Hindu law (3rd ed.) in my opinion correctly lays down the Hindu law with regard to trusts in favour of idols. That passage is elaborated and other considerations are referred to in subsequent paragraphs.

To put it shortly, whether this trust was a public trust or a private one, whether the purpose was a public religious or private *quasi*-private religious purpose, in my opinion this suit is not maintainable as against the appellants to this appeal. From what I have already said may be gathered the opinion that I might have as to whether the suit was maintainable at all: but I decline to express any opinion whether it was maintainable against those defendants who are not parties to this appeal. It is not quite clear, from the form of the reference, whether our opinion was asked as to the suit being maintainable against all the defendants, or merely those defendants who are parties to the appeal.

TYRRELL, J.—I entirely concur with the opinions expressed by the learned Chief Justice; and would add this only that the true scope and purview of s. 30, Civil Procedure Code, has been laid down by three Judges of this Court in a case which was before four Judges of the Court, —*Hira Lal* v. *Bhairon* (3).

(1) 7 A. 178. (2) 8 A. 61. (3) 5 A. 602.

1888
JULY 27.

FULL BENCH.

11 A. 27 (F.B.)= 8 A.W.N. (1888) 254.

11 A. 27 (F.B.)=8 A.W.N. (1888) 254.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

HARI TIWARI AND OTHERS (*Defendants*) *v.* RAGHUNATH TIWARI AND ANOTHER (*Plaintiffs*). [27th July, 1888.]

Exchange—Agreement that if either party were deprived of land received he should receive other land—Suit for specific performance—Act XV of 1877 (Limitation Act), sch. ii, No. 113.

In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing [28] an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiffs' title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land) they sued on the deed of 1871 to have the exchange therein provided for carried out.

Held by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by art. 113, sch. ii of the Limitation Act (XV of 1877).

[R., 10 O.C. 218 (224).]

THE facts of this case were as follows:—By a deed dated the 14th April, 1871, executed by the plaintiffs and defendants, who were "*gawandadars*" in the villages of Bishunpura and Baghauli, 12 biswas and 2 dhurs of land in Baghauli belonging to the plaintiffs were exchanged for the same quantity of land in Bishunpura belonging to the defendants. The deed contained the following agreement by the parties:—"It is to be observed that if any co-sharer of the village or zemindar of the mahal in either village claims or interferes with the lands the subject of the exchange, we all, both parties, shall unite with one another to prevent him. The costs which may be incurred in consequence of such interference shall be paid by both parties in proportion to their shares, *viz.*, two shares by the first party (defendants) and one share by the second party (plaintiffs): and if there can be any loss of land, the subject of exchange, we shall make it up and equalize the difference from the waste land owned by each party close to the *pucka* wells in the two villages."

In 1881, the plaintiffs sued one Jadupat Tiwari and certain other persons for possession of a portion of the land which they had received in exchange, alleging they had been dispossessed by those persons. They joined as defendants in that suit the persons from whom they had received the land, the defendants in the [29] present suit, who supported them in their claim. That suit was dismissed on the ground that the land belonged to Jadupat and others, and not to the transferors. The decision was affirmed by the High Court in July, 1882.

Upon this, in August, 1885, within three years from the time the defendants refused to give them other land, the plaintiffs brought the present suit against the defendants, claiming by virtue of the deed of

exchange to recover land from the defendants in the place of the land of which they had been deprived. The lower appellate Court gave the plaintiffs a decree, from which the defendants appealed.

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The appeal, which raised the question whether the suit was barred by limitation or not, was eventually referred to and heard by the Full Bench.

Mr. *J. E. Howard*, for the appellants.

Munshi *Juala Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J.—This is a suit brought upon a deed of the 14th April, 1871. The suit must be regarded as a suit for specific performance of one of the covenants contained in that deed. By that deed the parties to this action exchanged certain lands, and they covenanted in somewhat loose language, but legally to the following effect:—that if any co-sharer or zemindar should claim or interfere with the lands, the subject of exchange, the parties to the deed of exchange would unite with each other to resist such claim or interference; and that the costs to be incurred in consequence of any such interference should be borne by the parties to this deed, in the proportion of two-thirds and one third. Then came the material words of the covenant. Those words as translated are as follows:—"And if there be any loss of the lands, the subject of exchange, we will make it up and equalize the difference from the waste land owned and possessed by each party close to the *pucka* wells in the two villages."

I have no doubt that the true construction of that covenant, taking all those terms together, the terms that I have quoted, and [30] the terms that I have referred to, is that each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the land exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of those legal proceedings one of the parties was deprived of the lands exchanged, or any part of them, the other party should make it up out of his own land situate close to *pucka* wells.

The plaintiffs alleged that they were dispossessed in 1881; it is doubtful whether they ever were in possession at all. But I think that point is not material in this particular case. In 1881, the plaintiffs brought an action against Jadupat Tiwari and others, who claimed title to some of the exchanged lands. In that action they joined the present defendants, who were the other parties to the deed of 1871, as defendants. They could not have joined them as plaintiffs. The present defendants, acted up to their covenant, in this respect that they assisted the plaintiffs in that case by admitting their title as against Jadupat Tiwari and the others. The result of that litigation was that in 1882, by a decree which was confirmed in this Court, Jadupat Tiwari and his co-defendants who claimed title along with him in this land were held to be entitled to the land in question.

On that, and within three years, the plaintiffs brought their present claim on the deed of 1871, to have the exchange therein provided for, carried out. The only question which we have got to decide is whether the plaintiffs' suit was brought within time. It was contended on behalf of the defendants that the cause of action arose in 1871, on the execution of the deed of exchange; that contention being based upon the fact that at that time the now defendants had not got title to the lands which are now in suit. If we had merely to consider the case in which a defendant was sued

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for the breach of a covenant for title, no doubt the period of limitation would begin to run from the time when the deed was executed. But this is not a covenant for title; this is a covenant to provide for what might happen in case of either of the parties to the deed be-[31]ing dispossessed by adverse title; and until the event arose which was contemplated by the covenant, the cause of action of the present plaintiffs could not arise. Now that even did not arise according to our construction of the covenant until 1882, when there was a loss owing to the adverse decision of the litigation. After the decision in 1882, the defendants were called upon specifically to perform their covenant, and this action was then brought within three years of their refusal to perform it. It was therefore brought within the time fixed by art. 113, sch. ii, Limitation Act. The appeal must be dismissed with costs.

STRAIGHT, J.—I am of the same opinion, and I concur with the learned Chief Justice that this suit was not barred by limitation.

MAHMOOD, J.—I agree with the learned Chief Justice.

Appeal dismissed.

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11 A. 31 = 8 A.W.N. (1888) 282.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GIRWAR SINGH AND ANOTHER (*Defendants*) v. SITA RAM (*Plaintiff*).*
[11th August, 1888.]

Jurisdiction—Remand—Act XII of 1881 (*N. W. P. Rent Act*), s. 208.

An Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal, the District Judge held that it was unnecessary to determine the question of jurisdiction as he had power in any event under s. 208 of the N. W. P. Rent Act, to remand the suit to the Assistant Collector, and he remanded it accordingly.

Held that the Judge had rightly construed s. 208 of the Rent Act, and that the remand was proper. *Ahmaduddin Khan* v. *Mojlis Rai* (1) distinguished.

THIS was a suit under s. 93 (*g*) of the N.W.P. Rent Act (XII of 1881) by a lambardar against certain co-sharers for arrears of Government revenue paid by him on account of their shares. The suit was dismissed by the Assistant Collector of Aligarh, without entering upon the merits on the ground that, when it was ins-[32]tituted, the defendants were no longer co-sharers in the village, and that he had therefore no jurisdiction to entertain it. The plea as to jurisdiction was raised before the Assistant Collector by the defendants. The plaintiff appealed to the District Judge of Aligarh, who observed :—" Under s. 208 of the Rent Act, this Court has power to remand the suit to the Revenue Court, whether that Court was competent to entertain the suit or not. It therefore is superfluous to determine the question whether the Revenue Court was competent or not to hear the suit. In any case I am clearly of opinion that the issues raised are such as would be more appropriately decided by a Revenue Court. I therefore under s. 562 of the Code of Civil Procedure and s. 208 of the Rent Act remand the case to the Court of the

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* First Appeal, No. 95 of 1888, from an order of H.E. Evans, Esq., District Judge of Aligarh, dated the 27th March, 1888.

(1) 5 A. 438.

Assistant Collector with directions to re-admit the suit and proceed to investigate and dispose of the suit on the merits." 1888 AUG. 11.

The defendants appealed to the High Court from the order of remand. APPELLATE CIVIL.

Mr. *A. H. Reid*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

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JUDGMENTS.

EDGE, C. J.—I think the District Judge of Aligarh is perfectly right in the construction he put on s. 208 of the Rent Act. Even if it was not strictly a Revenue Court suit, I do not think that the judgment of the Full Bench in the case of *Ahmaduddin Khan* v. *Majlis Rai* (1) shows that the District Judge had not power to remand the case to the Revenue Court. The question before the Court there was whether the District Judge, believing that the suit was brought in the wrong Court, was right in dismissing the suit altogether, or whether he ought not to have remanded it to the Court which he thought had jurisdiction. I infer from the judgment of my brothers Straight, Brodhurst and Tyrrell that that was all they meant to decide. I think the appeal should be dismissed with costs.

MAHMOOD, J.—I agree with the interpretation which the learned Chief Justice has placed upon s. 208 of the Rent Act, and agree-[33]ing with him I need say nothing further except that the order which he has passed is the only order which could be passed in the case.

Appeal dismissed.

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11 A. 33=8 A.W.N. (1888) 283.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

INDAR KUAR (*Plaintiff*) v. GUR PRASAD AND ANOTHER (*Defendants*).* [16th August, 1888.]

Civil Procedure Code, ss. 28, —Misjoinder of causes of action.

The judgment of the majority of the Full Bench in *Narsingh Das* v. *Mangal Dubey* (2), except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further.

In a suit for possession of immoveable property part of which had been usufructuarily mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title.

Held, that inasmush as the title of defendant No. 2, was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right, by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action.

[F. 24 A. 358 (360)=22 A.W.N. (1902) 85; R., 29 A. 267=A. W. N. (1907) 36=4 A. L. J. 121; 30 A. 560=A. W. N. (1908) 235=5 A.L.J. 647=4 M.L.T. 392; 13 C. P. L. R. 9 (13).]

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* First Appeal, No. 85 of 1887, from a decree of Babu Promoda Charan Banerji, Subordinate Judge of Allahabad, dated the 22nd March, 1887.

(1) 5 A. 438. (2) 5 A. 163.

1888 AUG. 16. — APPELLATE CIVIL. — 11 A. 33 = 8 A.W.N. (1888) 283.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru* and Pandit *Bishambhur Nath*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

ORDER OF REMAND.

STRAIGHT, J.—The plaint in this case is somewhat prolix, but stripped of superfluous details and allegations, it comes to this, that as to the defendant Gur Prasad, the plaintiff seeks to have her title declared to and to obtain possession of a 4 annas 8 pies share in mauza Lahra, and as to the defendant Bank, to eject it as a trespasser in possession from 2 annas 8 pies out of the 4 annas 8 pies of Sisai Sipah, which it professes to hold under a usufructuary mortgage executed in its favour by the defendant Gur Prasad, by [34] having it declared that he had no title to make such a mortgage, the share mortgaged, as well as the remaining share, being the property of the plaintiff by inheritance from his deceased mother Musammat Biija. It is unnecessary to say more of the defendant Gur Prasad's defence to the suit than that he denies that any share in property belonging to the plaintiff is now in his possession, and as to the 2 annas 8 pies of Sisai Sipah, he says it was mortgaged by him to the defendant Bank with possession in order to raise funds to save the share from auction-sale for arrears of Government revenue. The defendant Bank reiterates this statement, and claims the right of a usufructuary mortgagee to hold possession of the share until the mortgage-debt has been discharged. It is clear therefore from this that any right the defendant Bank has, flows through and from the defendant Gur Prasad: in other words, that as to part of the plaintiff's claim, they have a united interest, in the sense that any title the Bank can make must be made through him. The learned Subordinate Judge, who had the case before him, as the Court of first instance, has held the suit bad for misjoinder of causes of action for the reasons stated by him in his decision, relying more especially on a Full Bench ruling of this Court, *Narsingh Das* v. *Mangal Dubey* (1). As I am responsible for the terms of the judgment of the majority in that case, having written it, I think it right to say that, except in so far as the general observations in it as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action are concerned, it proceeded upon and had reference to the special facts and circumstances of the case itself and to the allegations made by the plaintiff in his plaint. I may also add that I know my brother Judges, who were parties to the ruling, took the same view, and had no intention that it should be carried further than the particular case in which it was made. In the present suit, as to the one head of claim in which the defendant Bank is interested, any title that it possesses flows through and is derived from the defendant Gur Prasad, and if he has usurped or appropriated rights [35] which belong to the plaintiff as to the village Sisai Sipah, such title stands or falls, according as the plaintiff establishes or fails to establish her claim against him. There cannot therefore properly be said to be two causes of action; on the contrary, there is a single cause of action, namely, the infringement of the plaintiff's right by the defendant Gur Prasad, out of which has flowed the title asserted by the defendant Bank and denied by the plaintiff. For these reasons I think the learned Subordinate

(1) 5 A. 163.

Judge was wrong in the view he took, and in applying the Full Bench ruling to the present case. I allow the appeal, and reversing his decree, direct him to restore the suit to his file of pending cases and to dispose of it according to law. Costs will be costs in the suit.

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MAHMOOD, J.—I agree in all that has been said by my brother Straight in respect of this case; and as I was the only dissentient Judge in the Full Bench case of *Narsing Das* v. *Mangal Dubey* (1), I wish to say that I am very glad to adopt the interpretation which my brother has put upon that ruling, and concur in the order which he has made.

Cause remanded.

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11 A 35=8 A.W.N. (1888) 284=13 Ind Jur. 190.

APPELLATE CIVIL.

Before Sir Jhon Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

CHEDA LAL AND ANOTHER (*Plaintiffs*) *v.* BADULLAH AND OTHERS (*Defendants*).* [23rd May, 1888.]

Practice—Appeal on full court-fee from decree dismissing suit in part—Remand of whole case, though no cross-appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed—Civil Procedure Code, ss. 544, 561, 562, 578.

A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff, [36] not appealing under s. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the lower appellate Court confirmed the decree. On a second appeal to the High Court—

Held (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to distrub that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code.

Per MAHMOOD, J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole.

Maharajah Moheshur Singh v. *The Bengal Government* (2), *Forbes* v. *Ameeroonissa Begum* (3), and *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (4), referred to.

[R., 12 A. 510 (513); 13 A.W.N. 144; 24 C. 725 (740); 9 Ind. Cas. 173 (174)=9 M. L.T. 251.]

THIS case was referred to a Division Bench by Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C. J.

Babu *Ratan Chand*, for the appellants.

Munshi *Madho Prasad* and Mir *Zahur Husain*, for the respondents

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* Second Appeal No. 2086 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 24th July, 1886, confirming a decree of Muhammad Ezid Bakhsh, Munsif of Moradabad, dated the 22nd December, 1884.

(1) 5 A. 163. (2) 7 M.I.A. 283. (3) 10 M.I.A. 340. (4) 12 M.I.A. 157.

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APPELLATE CIVIL.

11 A. 35 = 8 A.W.N. (1888) 284 = 13 Ind. Jur. 190.

JUDGMENTS.

EDGE, C. J.—The plaintiffs brought their suit in the Munsif's Court of Moradabad. They claimed possession of land and to have a door which had been recently opened by the defendants closed. The Munsif decreed the plaintiffs claim as to the land, and dismissed their suit as to the door. The plaintiffs appealed as to so much of that decree as dismissed their suit to the door. The defendants filed objections to so much of that decree as decreed the plaintiffs' claim to the land. The Subordinate Judge on that appeal and on those objections remanded the whole case under s. 562 of the Code of Civil Procedure. The Munsif on that remand again decreed the plaintiffs' claim as to the land and dismissed their claim as to the [37] door. The plaintiffs again appealed as to so much of the decree as dismissed their suit as to the door. The defendants did not appeal or file objections. The plaintiffs stamped their appeal with a stamp which would have covered an appeal against the whole decree. On that appeal the Subordinate Judge again remanded the whole case under s. 562. The Munsif heard the case again, and on this occasion dismissed the whole of the plaintiffs' suit. From that decree the plaintiffs appealed. On appeal the Subordinate Judge confirmed the decree of the Munsif and dissmissed the appeal. From that decree of the Subordinate Judge this second appeal has been preferred. As to so much of this appeal as relates to the plaintiffs' claim to have the door closed, Mr. *Ratan Chand* for the appellants does not contend that we can interfere with the findings below, those findings being findings of fact, so we need not consider that portion of the case. Mr. *Ratan Chand* contends that the second order of remand, namely, that of the 10th December, 1885, was *ultra vires* so far as that portion of the decree of the 25th September, 1885, which related to the plaintiffs' claim to the land was concerned, and that the only valid decree relating to the plaintiffs' claim to the land is the decree of the 25th September, 1885, which was not the subject of appeal, and as to which the defendants did not file objections. On the other hand, it is contended that we cannot in second appeal consider whether the order of remand of the 10th December, 1885, was good or bad, as it was not specifically appealed against as it might have been under s. 588 (28) of the Code of Civil Procedure, and that the plaintiffs by appealing from the last decree of the Munsif waived any right to object to the order of the 10th December, 1885, and further that this is a case within s. 578 of the Code of Civil Procedure.

As to our power in second appeal to consider the validity or propriety of the order of the 10th December, 1885, there can be no doubt. There are two or three decisions of the Privy Council which show that that is a power we can now exercise. Was the order of the 10th December, 1885, so far as it related to the land, *ultra vires* or not? The Subordinate Judge thought that because [38] the plaintiffs had stamped their appeal with a stamp which would cover an appeal on the whole case, he might treat the appeal which, in truth, was only in respect of so much of the Munsif's Court's decree as dismissed the claim to close the door, as if the plaintiffs were appealing against the whole decree. It is an extraordinary proposition that a Subordinate Judge is to look at the stamp on a memorandum of appeal and not at the memorandum itself in order to see which part of a decree is the subject of an appeal before him. The plaintiffs' claim as to the land having been decreed on the 25th September, 1885, they could not have appealed against that portion of the decree; it gave them what they asked. The Subordinate Judge could no more deal with a part of a decree which

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was not challenged by a memorandum of appeal or by objections filed by the opposite party than he could pass an order reversing the decree of a Munsif when that decree was not in appeal before him. The memorandum of appeal or objections when filed are what give the Judge on appeal jurisdiction to interfere with the decree below. He cannot of his own motion deal with a decree which is not the subject of appeal to him, or with a portion of a decree against which portion there has been no appeal and no objections filed.

In so far as he assumed, to set aside the decree of the Munsif of the 25th September, 1885, which decreed the plaintiffs' claim as to the land, he acted without any jurisdiction whatever. The fact that the plaintiffs on that remand appeared before the Munsif could not give the Munsif jurisdiction to re-open the question as to the land. The appeal against the decree of the munsif could not validate the portion of the order of remand of the 10th December, 1885, which was made without jurisdiction. The parties by appearing before a Court which has no jurisdiction cannot give that Court jurisdiction in the absence of legislative enactment. In my opinion nothing which had taken place did make or could make that portion of the order of the 10th December, 1885, which remanded the case as to the land, valid. As to the contention that this is a case within s. 578 of the Code of Civil Procedure, the [39] answer to that is threefold. First of all, there is here more than an irregularity, it is an exercise of jurisdiction where there was none. Secondly, the act of the Subordinate Judge did affect the merits of the case in this way, that the plaintiffs, rightly or wrongly having got a decree establishing their right to the land and that portion of the decree not being before the Subordinate Judge on appeal, they had established their title so far as a Court of law could establish it for them. Thirdly, it is a question affecting the jurisdiction of the Court. In my opinion the Subordinate Judge had absolutely no jurisdiction to deal with that portion of the decree which was not the subject of the appeal before him. I am of opinion that this appeal should be dismissed with costs so far as it relates to the claim to close the door, and that it should be allowed with costs here and below so far as it relates to the claim to the land, and that so much of the Subordinate Judge's order of the 10th December 1885, and of his last decree as relates to the plaintiffs' claim to the land must be reversed, and the decree of the Munsif of the 25th September 1885, be restored.

MAHMOOD, J.—I agree in all that has fallen from the learned Chief Justice and in the order which he has made. This being a case referred by me for decision, I wish to add a few observations. I understand the case now as I did when I made my order of reference of the 28th July, 1887, and that order enunciated the three points on which the decision of the case depends. As to the first of these points I have to refer to s. 544 of the Code of Civil Procedure, which is the only section on which any reliance could be placed for the contention that when the plaintiff who has only partly succeeded had appealed from such portion of the decree as was against him upon the stamp valued in proportion to the whole amount of the claim in the appellate Court, he would be placed on a worse footing than that on which he stood before he had preferred an appeal. S. 544 of the Code of Civil Procedure applies in my opinion only to appeals by parties arrayed on the same side of a litigation in the original Court, and against whom judgment on a common ground has been passed and only some of them appealed from such judgment [40] on behalf of themselves and others who do not join the appeal. "That

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11 A. 35 = 8 A.W.N. (1888) 284 = 13 Ind. Jur. 190.

section does not relate to cases in which a party (be he plaintiff or defendant in the original Court) who has been unsuccessful only to a certain extent of the subject-matter of the litigation in appeal from so much of the decree as has been passed against him, happens to value the appeal as if it related to the whole subject-matter of the litigation, or to pay court-fees on such amount. No Court could take a matter such as the payment of the court-fee stamps as a test whereby its jurisdiction is to be decided. I hold, therefore, on the first point in the referring order that that question should be answered in the negative. As to the second question enunciated in my order of reference I agree with the learned Chief Justice in holding that so much of the decree of the first Court as was not appealed from was not within the scope of the jurisdiction of the lower appellate Court, and that Court in making its order acted *ultra vires* or without jurisdiction, because no tribunal has any power to deal with the subject-matter of the litigation which is not brought before it as the subject for adjudication. On the third question as stated by me in the order referring the case, I have no doubt, for the reasons which have been stated, that the provisions of s. 578 of the Code do not cover the case even though in consequence of the remanding order of the 10th December, 1885, which was passed under s. 562 of the Code of Civil Procedure, a trial *de novo* has taken place in this case and a decree has been passed by the first Court dismissing the claim, and that decree has been confirmed by the lower appellate Court. The scope of that section cannot be so extensive as to bring within the scope of adjudication matters not subject to adjudication in the Court of first instance or in the Court of appeal, and therefore the interference by the lower appellate Court which it made by the order of the 10th December, 1885, was illegal, and, as such, fit for being interfered with by us even at this stage. It has been argued that because the lower appellate Court's order of the 10th December, 1885, might have been appealed from under s. 588 of the Code of Civil Procedure, and, inasmuch as such appeal was not preferred, it **[41]** is no longer open to us in second appeal to consider the validity of that order. Orders of remand such as s. 562 contemplates are necessarily orders of an interlocutory character because they do not definitely purport to dispose of the litigation with which they deal. Such orders may no doubt be appealed from, and the Court of appeal can adjudicate on them with such power as to finality as the appellate Court possesses. But when in a case such as this such order is not appealed from, and, having been carried out, adjudication in pursuance thereof has been made, I do not think that the circumstance of such order not being appealed from would preclude the parties from bringing up such questions when the final decree in the case has been made and is rendered the subject of an appeal. The learned Chief Justice has stated why this should be so on legal reasoning, and indeed, if any further reason were required, I should say that the rulings of their Lordships of the Privy Council in *Maharajah Moheshur Singh* v. *The Bengal Government* (1), *Forbes* v. *Ameeroonissa Begum* (2) and *Shah Mukhan Lall* v. *Baboo Sree Kishen Singh* (3) were authorities for this proposition. These rulings proceeded no doubt on earlier law, but I am not aware that the rule has been modified in the Civil Procedure Code by which this case is covered. The effect of this view is to agree with the decree of the learned Chief Justice.

Appeal allowed in part.

(1) 7 M.I.A. 283. (2) 10 M.I.A. 340. (3) 12 M.I.A. 157.

11 A. 41 (F.B.)=9 A.W.N. (1889) 1.

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FULL BENCH.

11 A. 41= (F.B.)= 9 A.W.N. (1889) 1.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood. [2nd June, 1888.]

KHUMAN SINGH AND OTHERS (*Defendants*) *v.* HARDAI (*Plaintiff*).*

Pre-emption—Wajib-ul-arz—Construction—"Karibi" meaning of.

The word "*karibi*" used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders "near" to the vendor, is ambiguous and inadequate to express the intentions of the shareholders.

[42] The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale by shareholders, first to "*bhai hakiki*" (own brothers), next to "*karibi*" (near), and next to co-sharers in the same *thoke* as the vendor.

Held that although the word "*karibi*" must be read in connection with the preceding word "*bhai*," the words "*bhai karibi*" could not reasonably be confined to cousins, but must be construed as meaning "*bhai bund*" "or *bhai log*," so as to include all near relatives, both male and female.

Held also that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor.

[F., 2 A.L.J. 346; R. 5 Ind. Cas. 669 (970).]

THIS was a suit for pre-emption, based on the following clause in the *wajib-ul-arz* of a village:—

"A shareholder wishing to sell his share, will sell it (*i e.*, offer it for sale) at a fair price, first to a *bhai hakiki* (an own brother), after that to *karibi* (near), after that to a sharer in the *thoke* or in a second (or another) *thoke*."

The plaintiff was one Musammat Hardai, widow of one Jawahir Lal. The vendors (who did not contest the claim) were her nephews—sons of her husband's brother. The defendants-vendees were sharers in the village, and in the same *thoke* as the plaintiff. Among other pleas they contended (i) that the plaintiff was not a sharer within the meaning of the *Wajib-ul-arz*, as she was in possession of the share by virtue of which she claimed, by way of maintenance as a Hindu widow, and not by right of inheritance, (ii) that assuming her to be a sharer, she did not come within the category of "*karibi*," and so had no right preferential to their own.

The Court of first instance (Subordinate Judge of Meerut) dismissed the suit. The Court observed :—

"Now the question is whether the plaintiff in this case, who is the aunt of the vendors, that is, the vendors' father's brother's wife, comes within the word '*karibi*'. Reading the word '*karibi*' with the preceding words '*bhai hakiki*' there remains no doubt that these words *hakiki* and *karibi* (real and near), are used in connection with the word *bhai* (brother), and that they both qualify the same word *bhai*. In fact, I see that no other construction can reasonably be [43] put to it. Whoever else may come under the words *bhai karibi*, I do not think that a female relative, such as the plaintiff, can be brought within those words. If the words *bhai kakiki* and *bhai karibi* be construed strictly, they would not include any but the brothers and cousins; by a broader construction, as the word *bhai* sometimes is used in vernacular common

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* S.A. No. 1734 of 1886.

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dialogue, it may mean and include some other male near relatives; but to include an aunt in the word *bhai* would certainly be going too far, and giving it a meaning which is never applied to it. I am of opinion that the second issue must be decided against the plaintiff and the plaintiff's case must fall with this finding. The vendees being also sharers in the *thoke*, the plaintiff has no preferential right over the vendees. It is not now necessary to go into the other issues. I dismiss the plaintiff's case on the above finding, and order her to bear the costs of both sides."

On appeal, the District Judge of Meerut, being "clearly of opinion that the appellant as the widow of a *karibi* relative of the vendors, holding her husband's share by inheritance, is entitled to pre-emption" reversed the first Court's decision, and remanded the case, under s. 562 of the Civil Procedure Code, for trial on the merits. On the remand, the Court of first instance decided the remaining issues in favour of the plaintiff, and so decreed the claim. On appeal, the District Judge affirmed the decree. The defendants appealed to the High Court.

On the 24th January 1888, this appeal came for hearing before Edge, C. J., and Brodhurst and Mahmood, J.J., who made an order, the material portion of which was as follows:—

"We remand this case under s. 566 of the Code of Civil Procedure for a finding as to whether at the date of the sale, and at the date of the commencement of this action, the plaintiff was in possession of the share in the *thoke* by way of maintenance or by right of inheritance. The share to which we refer is the share by reason of which her pre-emptive right is alleged to accrue."

To this remand, the lower appellate Court returned a finding to the effect that at the dates mentioned the plaintiff held her [44] share absolutely, by right of inheritance to her deceased husband. No objections were filed to this finding.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

The Hon. *T. Conlan* and Pandit *Bishambhar Nath*, for the respondent.

JUDGMENTS.

BRODHURST, J.—Plea No. 1 was withdrawn before we remanded the case under s. 566 of the Civil Procedure Code. The finding on the issue we remanded, namely, "whether at the date of the sale and at the date of the commencement of the action, the plaintiff was in possession of the share in the *thoke* by way of maintenance or by way of inheritance," is in the plaintiff's favour, the lower appellate Court having found that Musammat Hardai held her share absolutely as the heir of her deceased husband, Jawahir Lal, and was thus in enjoyment of it at the time of the sale, and to this finding no objection has been taken. The only other plea that on the former occasion was seriously pressed is No. 2; thus the sole point that remains for consideration is as to the meaning of the *wajib-ul-arz*. The passage in dispute is as follows:—"A shareholder wishing to sell his share will sell it (*i.e.*, offer it for sale) at a fair price, first to a *bhai hakiki* (own brother), after that to '*karibi*' (near), after that to a sharer, in the *thoke* or in a second (or another) *thoke*." The question here is, what is the meaning of the word "*karibi*"?

The difficulty that has arisen on this part of the case is owing to a word having been used that is ambiguous and inadequate to convey clearly the intentions of the shareholders. Obscure language such as that above

referred to, should not be permitted by any settlement officer to be made use of in a *wajib-ul-arz.*

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I have referred to several dictionaries, including those of Forbes, Wilson, Shakespear, Richardson, and Fallon. In none of them is the word "*karibi*" mentioned, but "*karib*" is shown in all of them to mean near either in space or relationship. In Wilson's Glossary, the meanings of the word are given as "near [45] near to, also near in relationship, a kinsman, a relative, a connection by birth or marriage excepting the relation of parent and child." "*Karibi*" apparently is not a word that could correctly be used alone, as are the words *karabut-daran* or *rishtadaran* to denote relations, and so far as I can learn it is not generally so used even by uneducated persons.

The first Court—the Subordinate Judge of Meerut—observes, "Now, the question is whether the plaintiff in this case, who is the aunt of the vendors, that is, the vendor's father's brother's wife comes within the word '*karibi.*' Reading the word "*karibi*" with the preceding words '*bhai hakiki*' there remains no doubt that both these words '*hakiki*' and *karibi* (real and near) are used in connection with the word *bhai* (brother), and that they both qualify the same word *bhai.* In fact, I see that no other construction can be reasonably put to it. Whoever else may come under the words *bhai karibi*, I do not think that a female relative such as the plaintiff can be brought within those words. If the words *bhai karibi* and *bhai hakiki* be construed strictly, they would not include any but the brothers and cousins. By a broader construction, as the word *bhai* sometimes is used in vernacular common dialogue, it may mean and include some other male near relations, but to include an aunt in the word *bhai* would certainly be going too far and giving it a meaning for which it is never applied." I agree with the Subordinate Judge in thinking that the word *karibi* as well as the word *hakiki* must be read in connection with the word *bhai.*

I was first much impressed by the arguments of the learned pleader for the appellants, and was strongly inclined to think that the Subordinate Judge had placed a right interpretation on the words above referred to, and I was more especially inclined to think so as the lower appellate Court had given no reason whatever for arriving at a different conclusion; but, having regard to some remarks that fell from my brother Mahmood at the first hearing of the case, I consider that that although *karibi* must be read in connection with the preceding word *bhai*, the words *bhai karibi* must [46] be held to include more than cousins; for it appears unreasonable to suppose that the shareholders of the village in question can have intended to allow the right of pre-emption to a second or third cousin and to deny it to a father or an uncle or even to a paternal nephew, who among Hindus is frequently regarded with almost, if not as strong, affection as an own son.

Our attention has been drawn to the judgments in an earlier case, Second Appeal No. 316 of 1886, from the same district of Meerut (1). In that case, the lower appellate Court, the then Judge of Meerut, in considering similar words in a *wajib-ul-arz* observed: "The decision in this case depends on the interpretation to be put on the *wajib-ul-arz.* That document lays down that an own brother and then a *karibi* and then a co-sharer should have the option of purchase. The words are "*awal bhai hakiki ba bhai karibi.*" The lower Court holds that the word *bhai* governs

(1) Not reported.

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the word *karibi* and that it is own brothers and then near brothers or cousins that have the preference, and that after them all co-sharers are equal, and consequently the plaintiff and the purchaser both being sharers, the plaintiff has no right of pre-emption over the defendant, the purchaser. In the opinion of this Court the words in the *wajib-ul-arz* mean that after own brothers, persons *karibi*, that is, in any way connected, have a right of pre-emption, and that the word *karibi* is not confined to cousins. Even supposing that the word *karibi* is governed by the word *bhai*, the Court holds that the word *bhai* cannot be confined to cousins, but that the word is used in a much wider sense and means *bhai bund*. Connections, however distant, being of the same stock, are called *bhais*. Under either interpretation the Court holds that the plaintiff has a preferential right of pre-emption."

A Bench of this Court, Edge, C. J., and Straight, J., in disposing of that second appeal, remarked: " It seems to us that the Judge has placed a reasonable construction upon the *wajib-ul-arz*, and one which we ought not to distrub " and the appeal was accordingly dismissed.

[47] I am now of opinion that the point was properly decided, and I may add that if in the present case the words *bhai karibi* were intended to refer to cousins only, there was no necessity to have previously used the words *bhai hakiki*, as an own brother would have been included in the words *bhai karibi*, he being not only a near *bhai* but the nearest "*bhai*" of all. Moreover, if own brothers and cousins were the only relations that were to be allowed to pre-empt, own brothers having been clearly mentioned, cousins should not have been referred to in the words *bhai karibi*, but should have been described by the words "*bhai chachera*," "*phuphera*," " *mamera mausera*," according to the intentions of the share-holders.

Having regard to the considerations above mentioned, I think that in order to obtain the meaning intended by the co-sharers, we must not only read the words *karibi* with the word *bhai*, but must also regard the word *bhai* as meaning *bhai bund* or *bhai log*, so that *bhai karibi* shall include all near relations both male and female.

Under these circumstances I am of opinion that this appeal should be dismissed with costs.

EDGE, C. J.—I am of the same opinion.

MAHMOOD, J.—So am I. *Appeal dismissed.*

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11 A. 47 (P.C.) = 15 I.A. 211 = 5 Sar. P.C.J. 260 = 12 Ind. Jur. 450.

PRIVY COUNCIL.

PRESENT:

The Earl of Selborne, Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces.*]

BASSU KUAR AND OTHERS (*Plaintiffs*) v. DHUM SINGH (*Defendant*).
[21st June, and 7th July, 1888.]

Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 64 *and* 97—*Act IX of* 1872 (*Contract Act*), *s.* 65.

Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. ii, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the

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subject of an [48] arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.

In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.

Held that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97.

The matter might also be regarded as falling under s. 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it."

[F., 25 A. 618=A.W.N. (1903) 117; 31 A. 68 (P C.)=11 Bom. L.R. 525=9 C.L.J. 512=19 M.L.J. 295=6 M.L.T. 89=1 Ind. Cas. 890=36 I.A. 44; 30 M. 316=17 M.L.J. 149; App., 28 A. 466=3 A.L.J. 228=A.W.N. (1906) 88; R., 35 C. 209 (213)=7 C L.J. 59 =12 C.W.N. 326=3 M.L.T. 90; 1 C.L.J. 337 (347); 8 M L.J. 61 (63); 17 C.P.L.R. 67 (72); D., 26 B. 750 (755, 756)=4 Bom. L. R. 571; 3 C.P.L.R. 173 (175); 10 Ind. Cas. 486 (487).]

APPEAL from a decree (12th March, 1886) of the High Court, reversing a decree (26th March, 1885), of the Subordinate Judge of Saharanpur.

The suit out of which this appeal arose was commenced by Lala Baru Mal, lately a Shraf at Saharanpur, with his wife Musammat Bassu Kuar, against Lala Dhum Singh. Baru Mal died pending the suit, and his sons having been joint with the widow as plaintiffs, were now appellants with her.

In 1879, Dhum Singh owing money to Baru Mal, they entered upon an arrangement that Baru Mal, buying villages of Dhum Singh, for Rs. 55,000, should give credit for and write off so much as was equal to the debt, receiving only the balance in cash; it appearing from the accounts down to 1st September, 1879, that the debt was Rs. 3,359. The conveyance was to be made to Bassu Kuar, the wife. But, disputes afterwards arising, completion was refused by Baru Mal. On 3rd September, 1880, Dhum Singh sued him for specific performance; but his suit, although decreed by the Court of first instance, was dismissed by the High Court on the 14th March, 1884; that Court holding that there had been no unqualified acceptance of the terms by Baru Mal, and [49] that no binding contract, enforceable by law, had been made between the parties (1).

The present suit was brought on the 18th September, 1884, the plaint stating that the defendant refused to refund the amount, for which an allowance in the "sale consideration" had been made, although, in consequence of his own acts, the contract of sale had been declared by the High Court, on the 14th March, 1884, not to be enforceable; and inferring that the cause of action had arisen on that date.

The defendant by his written statement set up limitation under Act XV of 1877, alleging that nothing had occurred during the transactions and litigation between the parties to alter the nature of the original debt which had accrued in 1879.

The Subordinate Judge, M. Muhammad Maksud Ail Khan, decreed the claim for Rs. 3,359, with interest at 7 annas 9 pies per cent. per month,

(1) 4 A. W.N. (1884) 161.

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that being the rate at which it had been entered in the books, and in conformity with custom. This decision was reversed on appeal by the High Court in the following judgment :—

"Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the plaintiff of Rs. 33,359-3-6, that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property and negotiations took place for the sale of this property to the plaintiffs and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dis-[50]pute arose as to what had been settled as the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is that the contract set up in that suit was not proved, because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in an agreement, and the original debt due by the present defendant to the present plaintiff always remained due and is so still. It is alleged that the contract was completed on the 1st September, 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date by reason of prior transactions, but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a latter date than that. The present suit was brought on the 18th September, 1884, that is to say much more than three years from latest possible date upon which the debt can be said to have become due. Under these circumstances the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed, and under its terms this money having been credited in the present defendant's books, was to be [51] treated as a payment by the present plaintiff as a deposit on account of the sale, and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court decided that the contract set up by the

present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself which is now set up by the plaintiff, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to treat the money as any thing but the old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs."

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Mr. *R. V. Doyne*, for the appellant, argued that the effect of the respondent's suit upon the agreement, which treated the debt as a subsisting part of the consideration, and to that amount part payment was that the appellant's claim was not barred under article 64, as on a debt upon an account stated in 1879. Upon one view, the transaction between the parties, and the suit for specific performance, showed grounds for deduction of the period occupied by the suit. This would give an addition to the three years, as the suit lasted from 3rd August, 1880, to 14th March, 1884. Until the agreement for the sale of the land had been finally brought to an end, the appellant was in the position of a person whose claim had been satisfied by the substitution of the land for his debt, and no suit could have been successfully brought. Upon this part of the argument *Musammat Rani Surnomoyi* v. *Shoshi Mokhi Burmonia* (1) was cited, and it was argued that in another view, and if there was no **[52]** such suspension of the right to sue upon the account stated, the date itself of the decree, *viz.*, 14th March, 1884, was the starting point of limitation, inasmuch as, on the dismissal of the suit, a new cause of action accrued. Also acknowledgment of liability had taken place. [Reference was made by one of their Lordships to *Rose* v. *Watson* (2) in regard to a suggestion of a temporary lien on so much of the land as would have been covered by the proportionate part of the purchase-money, represented by the debt retained for a time.] It was also argued that the claim should have been held to fall within the Contract Act, IX of 1872, s. 65. The interpretation clause, s. 2, of that Act explained a "void" agreement as being an agreement "not enforceable by law;" and it was submitted that Dhum Singh, on the dismissal of his suit on the 14th March, 1884, became bound to pay the amount of the debt previously retained; being made liable, by s. 65, to restore an advantage received under a contract that had become void.

Mr. *Charles H. Hill*, for the respondent, argued that the question raised must be disposed of upon the law of limitation as applied in the judgment of the High Court. It was the completion of the contract that alone could turn the retention of the debt into a payment, as the price of the land was not to be paid till then; and the debt remained, from first to last, the balance of the old account. Had there been a complete contract, a decree for specific performance would have followed. He referred to what was expressed in the judgment in *Lachimi Bakhsh Roy* v. *Runjit Ram Panday* (3), showing that the law of limitation is strict and inflexible, and argued that article 64 alone could be applied. No later

(1) 12 M.I.A. 244. (2) 10 H.L. Ca. 679. (3) 13 B.L.R. 177.

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acknowledgment than the commencement of Dhum Singh's suit could be found, and that was too far back to be of any avail to the plaintiff. Reference was also made to the *E. I. Company* v. *Odit Chum Paul* (1), showing that on a simple contract the breach gave the date of the cause of action from which the period of limitation commenced, not the time of the refusal to perform the contract. Not till the bringing of the present suit was it ever [53] alleged that the principal sum now claimed was other than the debt due on the 1st September, 1879. No act had been done, with effect to alter the nature of this debt, or to afford a starting point for limitation, other than that date. What was now alleged for the appellant differed from the contention of Baru Mal, in his resisting the suit for specific performance, and was inconsistent with there having been, as the Court decreed, no definite terms of contract settled.

Mr. *R. V. Doyne*, replied, arguing that the 14th March, 1884, was the starting point for the period of limitation.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

LORD HOBHOUSE.—The question in this case is whether a debt which at one time was due from the respondent to one Baru Mal, whom the appellants represent, and which has never been paid, has been extinguished by lapse of time. The High Court, differing from the Subordinate Judge, have decided the point against the appellants, and have dismissed the suit brought by them for recovery of the debt.

Baru Mal and Dhum Singh, who were bankers in Saharanpur, had dealings together, and Dhum Singh came to owe Baru Mal Rs. 33,359-3-6. It was then agreed between them that Dhum Singh should convey to Baru Mal or to his wife, Bassu Kuar, certain villages for the sum of Rs. 55,000, and that his debt should be set off against the price. On the 1st September, 1879, he executed and delivered to Baru Mal a deed by which he acknowledged the receipt of the whole purchase-money, and conveyed the villages to Bassu Kuar, and he endorsed on the deed a memorandum showing that the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid.

On the same day Baru Mal took away the deed and signed a letter prepared by Dhum Singh, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stipulated, and, declining [54] to complete the purchase, he demanded what was owing to him. Dhum Singh on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd August, 1880, against Baru Mal and Bassu for specific performance of the contract, praying that the deed might be registered, and that Baru Mal might be ordered to pay the balance of the Rs. 55,000 with interest, after setting off the debt of Rs. 33,359-3-6.

On the 24th of February, 1881, the Subordinate Judge decided in favour of Dhum Singh's view, and gave him a decree according to his prayer. Baru Mal appealed to the High Court. After reviewing the evidence, their conclusion was that Dhum Singh did not make out to their satisfaction that the sale-deed ever became a contract binding on Baru Mal,

(1) 5 M.I.A. 43.

and enforceable against him in law. They therefore dismissed his suit. Their decree was made on the 14th of March, 1884 (1).

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Upon that event Baru Mal renewed his demands for the payment of his debt, and not being able to get it, he, in conjunction, with his wife Bassu, instituted the present suit on the 10th of September, 1884. He is since dead, and his sons have been substituted for him as co-plaintiffs with the widow. In this plaint he states the deed of the 1st of September, 1879, and alleges that, in the preparation of the deed, Dhum Singh took steps contrary to the engagement, that so disputes arose, that Dhum Singu unjustly brought a claim for enforcement of the contract, but that the claim was dismissed by the High Court, who held the contract to be invalid. He then claims that the amount for which Dhum Singh had given credit to him in the sale-deed ought to be refunded, and claims interest upon it.

Dhum Singh's defence is that Baru Mal always denied the existence of a contract; that the High Court held there was no contract; that the character of the debt never was altered; and that there was nothing to save it from being barred by limitation.

[55] The High Court hold that this defence is sound in law, and their decree dismisses the suit as being barred by limitation. They do not state under which article of Act XV of 1877 the case falls; but they consider Baru Mal's claim to be for nothing but the old balance due from Dhum Singh. Probably they would hold it to fall, as was argued at their Lordships' bar, under article 64 (in the second schedule); therefore, as none of the statutory provisions by which the time for suing is enlarged can be applied to this case, except that which relates to acknowledgment, and as no written acknowledgment can be found later than the plaint filed by Dhum Singh in the specific performance suit, Baru Mal's right to sue would be barred at latest long before he sued.

Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants, that there was a contract made between them, and that among its terms were the sale of the villages for Rs. 55,000, the retention by Dhum Singh of his debt of Rs. 33,359-3-6 as part payment, and the payment by Baru Mal of the balance. Their quarrel was about other matters. Dhum Singh alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. Baru Mal alleged that there were other terms, accused Dhum Singh of dishonesty, and after a time claimed the right of receding from the bargain altogether. But the Subordinate Judge took the view of Dhum Singh, and decreed completion of the contract according to that view. Up to the date of the Subordinate Judge's decree in 1881, Dhum Singh retained the amount of his debt as of right, and in accordance with the contract alleged by him. After the decree of 1881 he still retained it as of right, and with a title which could not be disputed in any Court of Justice, except by the one mode of appeal from the decree of 1881. Baru Mal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till [56] after decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the

(1) 4 A.W.N. (1884) 161.

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contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.

In their Lordships' view, the decree of the High Court in 1884, brought about a new state of things, and imposed a new obligation on Dhum Singh. He was now no longer in the position of being able to allege that his debt to Baru Mal had been wiped out by the contract, and that instead thereof Baru Mal was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the Contract Act, IX of 1872, or according to the terms of the Limitation Act, XV of 1877.

By the 65th section of the Contract Act "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. In this case there most certainly was an agreement which as written, was in the terms alleged by Dhum Singh. But it was held not to be enforceable by him because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so when the High Court decreed it to be so. The advantage received by Dhum Singh under it was the retention of his debt. Therefore by the terms of the statute he became bound to pay his debt on the 14th March, 1884.

[57] Trying the case by the terms of the Limitation Act, their Lordships think that it falls within article 97. An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a Court of justice authorized the retention, and in effect substituted the land for the debt. Dhum Singh retained the money, and Baru Mal lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to Baru Mal's own reluctance to take it under the conditions insisted on by Dhum Singh.

The result is that in their Lordships' opinion the High Court ought to have sustained the Subordinate Judge's decree, and to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to reverse the decree of the High Court, and to make an order to that effect. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors of the appellant: Messrs. *T. L. Wilson and Co.*
Solictors for the respondent: Messrs. *Barrow and Rogers.*

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

CHUNNI KUAR (*Plaintiff*) *v.* RUP SINGH (*Defendant*).*
[26th June, 1888.]

Unconscionable bargain—Maintenance—Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (*Contract Act*), s. 23.

The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners or remaindermen, the fact that [58] the bargain was declined by others as not being sufficiently advantageous does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners or remaindermen. The judgment of the Privy Council in *Srimati Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (1) does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain.

The judgment of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2) shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced.

For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there [59] was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal, on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application.

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* First Appeals Nos. 8 and 40 of 1887 from the decrees of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 16th December, 1886.

(1) 12 I.A. p. 215. (2) 4 I.A. 23.

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Held that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so ; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced.

Held also that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700 ; and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce.

The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment.

[F., 11 A. 128 ; R., 11 A. 118 ; 20 P. L. R. 1906=26 P. R. 1906 ; 61 P. R. 1907=45 P. W. R. 1907=33 P. L. R. 1907 ; 115 P. R. 1908 ; 2 O. C. 149 (170) ; 8 O. C. 210 (216) ; 10 O. C. 173 (176) ; 1 S. L. R. 21 (26).]

[N.B. 11 A. 57 and 11 A. 118 may be read together.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Dwarka Nath Banerji* and Pandit *Moti Lal Nehru*, for the appellant.

Mr. *Roshan Lal* and Mr. *Malcomson*, for the respondent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—In the suit out of which these two first appeals arise, Bibi Chunni Kuar sued Raja Rup Singh on his bond, dated the 10th December, 1878, for Rs 25,000 with future interest at one per cent. from the date of the institution of the suit to the date of realization ; she also claimed the costs of the suit. In her plaint she alleged that the defendant had, in 1877, instituted a suit *in forma pauperis* against Rani Baisni and the Collector, as Manager of the Court of Wards, for the recovery of the estates of Raj Barah ; that the suit was dismissed, and that in order to enable him to file an appeal to this Court, he borrowed from her Rs 3,700 on the 10th December, 1878, and in considera-[60]tion of that advance executed the bond in suit, by which he promised her to pay Rs. 25,000 within a year from recovery of possession of the estate. In the plaint it was also alleged that the appeal to this Court was dismissed, and that subsequently the defendant executed a sale-deed in favour of the plaintiff and others in respect of the costs of an appeal to the Privy Council, in which he admitted that the debt sued for would, in future, be due by him, that a decree was passed by the Privy Council in the defendant's favour (1), and he obtained possession of the estate on the 13th August, 1884, but still evades payment of the debt due under his bond.

The defendant by his written statement pleaded amongst other things that the contract was one of champerty and, as such, illegal, that it was void as being contrary to the provisions of ss. 23 and 30 of the Indian Contract Act ; that the plaintiff had not given any portion of the Rs. 3,703 to the defendant ; that the moneys for the expenses incurred in this Court were advanced by Maulvi Muhammad Mohsin out of his own pocket ; that the bond did not provide that the money would be paid in case of

(1) 11 I.A. 149=7 A. 1.

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the defendant succeeding in the Privy Council, and that the defendant not having succeeded in this Court, the plaintiff was not entitled to make her claim.

The suit was heard by the then Subordinate Judge of Mainpuri, who held that the claim was not based on champerty; that ss. 23 and 30 of the Indian Contract Act did not apply; that the provision in the bond as to payment on the defendant succeeding was a general one and was not confined to the event of his succeeding in the High Court. The Subordinate Judge found that the defendant had received the consideration of the bond. The Subordinate Judge also found that the defendant's contract was entered into at a time when he was not in a composed state of mind, that at that time the defendant was without means and had to provide for an expense of several thousands of rupees at a critical time, and held that, under the circumstances, the plaintiff was not entitled to the full amount sued for, but only to the amount actually advanced with interest and costs. The Subordinate Judge on the 16th [61] of December, 1886, made a decree for Rs. 6,722-13-9 with proportionate costs and interest at 8 annas *per centum*, from the date of the suit to the 15th December, 1886, on the principle sum and thenceforth on the aggregate amount as against the defendant, and dismissed the rest of the claim with proportionate costs to the defendant, and allowed the pleaders' fees in full. From that decree the plaintiff and the defendant respectively appealed. Their appeals were heard by us, and we took time to consider our judgment.

The facts of the case are few and simple. The defendant on the death of his nephew, which happened in or shortly prior to 1877, made a claim to the Raj Barah estates. That claim was disputed, and in order to establish his title to the estates it became necessary for the defendant to institute a suit. At that time and until the defendant obtained his decree in the Privy Council, he was without any means, even the means of subsistence, and had no money except what he from time to time managed to borrow from others. He had, however, a friend, Maulvi Muhammad Mohsin, a vakil, who had previously acted for him and who also acted for him in some of the stages of the litigation as to the Raj Barah estates and in negotiating, amongst others, the loan in respect of which the bond in suit was given. The defendant requested Maulvi Muhammad Mohsin to assist him to bring a suit for possession of the estates. In view of the large expenses which such a suit would probably involve, Muhammad Mohsin hesitated, but ultimately Muhammad Mohsin and Babu Hemraj, a pleader, undertook to institute on behalf of the defendant a suit *in forma pauperis*. That suit was instituted, on the 24th July, 1877, in the Court of the Subordinate Judge of Mainpuri. Whilst that suit was pending in the Court at Mainpuri, the defendant and Lala Punni Lal agreed that Lala Punni Lal should assist the defendant to take his case to the Privy Council, and should for such assistance raise one lac of rupees. Muhammad Mohsin, on being informed by Lala Punni Lal of this agreement, told the defendant that he had made a mistake in agreeing to give a lac of rupees [62] to Lala Punni Lal without consulting him, Muhammad Mohsin. At that time the defendant had executed a *vakalatnama* in favour of Muhammad Mohsin and Babu Hemraj, who were conducting the defendant's suit in the Court at Mainpuri. The defendant told Muhammad Mohsin that he had given his word to Lala Punni Lal but that Muhammad Mohsin was to do what he could for him. Muhammad Mohsin replied that he

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and Babu Hemraj were willing to assist and provide for the expenses in the Court at Mainpuri, but that as the matter had been negotiated with Lala Punni Lal, he, Muhammad Mohsin, would ask Lala Punni Lal not to interfere with the suit in the Court of first instance, and to take Rs. 75,000 for assisting in the conducting of the case in this Court and in the Privy Council, that is, that Lala Punni Lal should receive a bond for Rs. 25,000 if it should be necessary to prosecute or defend an appeal in this Court, and a further bond for Rs. 50,000 if it should be necessary to conduct or defend an appeal in the Privy Council. The defendant's suit was dismissed by the Subordinate Judge of Mainpuri. After the suit was dismissed in the Court at Mainpuri, it was, at first, intended that the defendant should file an appeal to this Court *in forma pauperis*, and that Lala Punni Lal should not be called upon for assistance. However, a well-known and most respected vakil of this Court, Munshi Hanuman Prasad, who has recently died, advised that the defendant could not get leave to appeal *in forma pauperis* except on grounds of law, and that the law did not provide for the re-admission of an appeal after it had been rejected *in forma pauperis*. The effect of the opinion of Munshi Hanuman Prasad was communicated to the defendant by his general attorney, Ganga Prasad, after which the defendant and Ganga Prasad went to Lala Punni Lal at Mainpuri, and after some discussion Lala Punni Lal agreed to the terms which, as we have above mentioned, had been suggested by Muhammad Mohsin to the defendant, that is to say, he agreed to defray the expenses of an appeal in this Court on receiving the defendant's bond for Rs. 25,000, and further if necessary, to provide for the expenses of an appeal to the Privy Council in consideration of the defendant giving him his bond for Rs. 50,000. [63] Muhammad Mohsin applied to Lala Punni Lal to advance Rs. 3,700 for the purpose of filing and prosecuting the defendant's appeal in this Court. The defendant having executed the bond in suit on the 10th December, 1878, Lala Punni Lal advanced the Rs. 3,700, and that sum was applied in the following manner :—Rs. 2,500 was paid for the stamps required for the memorandum of appeal, Rs. 200 was paid for the translation fees, and Rs. 1,000 paid to the vakils employed on behalf of the defendant in this Court in his appeal, as their fees. Bibi Chunni Kuar was the wife of Lala Punni Lal, in whose favour the bond of the 10th December, 1878, was executed by the defendant. On the 18th December, 1878, the defendant's appeal to this Court was filed through Pandit Ajudhia Nath and the late Pandit Nand Lal, who for the purposes of that appeal were his vakils in this Court. The defendant's appeal was dismissed by this Court on the 7th May, 1880. Shortly before or after the dismissal by this Court of the defendant's appeal, Lala Punni Lal died. After the death of Lala Punni Lal and the dismissal of the defendant's appeal by this Court, Muhammad Mohsin on behalf of the defendant applied to the plaintiff, Chunni Kuar, to advance the money required for an appeal to the Privy Council on a bond being given in his favour. Chunni Kuar replied that she had no one to look after her business, and she was therefore not prepared to undertake the expenses of the appeal alone. The defendant urged Muhammad Mohsin to get an appeal to the Privy Council filed, and represented to him that he, the defendant, would not mind parting with a four annas or an eight annas share in the Raj Barah estate, or giving a lac of rupees for the necessary assistance. After several fruitless attempts to negotiate a loan, Muhammad Mohsin at last succeeded in getting several persons, Chunni Kuar being one of them, to agree to provide for security for the cost of the contemplated appeal to the Privy Council to the extent of Rs. 4,000 and

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for translation charges, pleader's fee, and other expenses of every kind to the extent of Rs. 8,500, on the terms, which are contained in the deed executed in their favour by the defendant on the 13th March, 1882. In the defendant's deed on the 13th March 1882, the defendan tacknowleged his liability [64] to the plaintiff, Chunni Kuar, under his bond of the 10th December, 1878, which is now sued on. The plaintiff, Chunni Kuar, and the other parties, who had agreed as abov e mentioned, provided the necessary security and the moneys which were required. The defendant filed the appeal to the Privy Council on the 9th Novmeber, 1880. On the 14th April, 1884, the defendant obtained a decree in the Privy Council, which established his title to the Raj Barah estates and the accumulated income. The respondents in the appeal in the Privy Council applied for a review of judgment, which application was dismissed. It is admitted on the pleadings that the defendant on the 13th August, 1884, obtained possession of the Raj Barah estates. He has declined to discharge his bond of the 10th December, 1878, and has repudiated all liability under it, and also all liability under the deed of the 13th March 1882. In addition to the facts which have been found by us as above, we find as a fact that the defendant perfectly understood his position and the effect of the bond of the 10th December, 1878, and the sale-deed of the 13th March, 1882; that there was no pressure brought to bear upon the defendant to execute the bond of the 10th December, 1878, and the sale-deed of the 13th March, 1882, other than the pressure of the position in which the defendant owing to his poverty found himself placed; that Muhammad Mohsin and Ganga Prasad acted throughout in the negotiations honestly and to the best of their ability in furtherance of the interests of the defendant, and that there is nothing to show that the defendant could have obtained the necessary assistance for the filing and prosecution of his appeal in this Court on better terms than those on which that assistance was actually obtained, which are the terms contained in his bond of the 10th December, 1878. Without that assistance the defendant could not have appealed to this Court. We also find that it was the defendant who applied to Lala Punni Lal for assistance. Mr. *Roshan Lal*, who with Mr. *Malcomson* appeared for the defendant before us, contended in the first place that the bond of the 10th December, 1878, was inadmissible in evidence as it had not been registered under the Indian Registration Act, and, secondly, that on the true [65] construction of the bond, the Rs. 25,000 was payable only in the event of the defendant succeeding in this Court in the appeal which he filed on the 18th December, 1878, and that having failed in that appeal the defendant was under no liability under the bond. As to Mr. *Roshan Lal's* first point it is sufficient to say that he cited no section of the Indian Registration Act and no authority in support of his contention, and that the Indian Registration Act does not prohibit bonds of this description being given in evidence if not registered. As to his second point, the bond does not, in our opinion, bear the narrow construction which he attempted to place upon it, a construction, moreover, which would defeat the intention of the parties at the time when Lala Punni Lal agreed to advance the money required for the appeal to this Court.

Mr. *Malcomson*, on behalf of the defendant, contended that the bargain was unconscionable and was against public policy, and that we should apply to the transaction the principles which the Courts of equity in England have applied to dealings with reversioners. It was also contended on behalf of the defendant that as the plaintiff had not in the event

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and alone undertaken all the expenses of the appeal to the Privy Council, she was not entitled to recover on the bond of the 10th December, 1878. It appears to us that the bond of the 10th December, 1878, and the sale-deed of the 13th March, 1882, are two separate contracts, and further that as the defendant in the latter document acknowledged his liability under the former, the point, even if it were otherwise a good one, is not now open to him. Mr. *Banerji* on behalf of the plaintiff contended that the agreement was under the circumstances of the case a fair and reasonable one, that it was not unconscionable or against public policy, and that the principles applicable to dealings with reversioners were not applicable to this case. In the course of the arguments of Mr. *Malcomson* and Mr. *Banerji*, the following authorities amongst others were referred to, namely *Srimati Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (1), *Grose* v. *Amir-*[66]*tamayi Dasi* (2), *Tara Sundari Chaodhrani* v. *The Court of Wards* (3), *Boodhun Singh* v. *Luteefun* (4), *Chedambara Chetty* v. *Renja Krishna Muthu Vira Puchanja Naikar* (5), *Fischer* v. *Kamala Naicker* (6), *Raja Sahib Prahlad Sen* v. *Baboo Budhu Singh* (7), *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (8), *Lord Chesterfield* v. *Janssen* (9), and the notes to that case in White and Tudor's Leading Cases in Equity, *Bowes* v. *Heaps* (10), *Webster* v. *Cook* (11), *Tyler* v. *Yates* (12), *Aylesford* v. *Morris* (13), *Beynon* v. *Cook* (14), *Moothur Mohun Roy* v. *Soorendro Narain Deb* (15), *Lalli* v. *Ram Prasad* (16), *Banwari Das* v. *Muhammad Mashiat* (17).

If the law of England as to maintenance applied in this country, it is clear to our minds that it would apply in this case, and that it would be our duty to hold that the bond of the 10th December, 1878, was void. As far back as 1862, it was in the case of *Ganesh Prasad* v. *Sheo Ratan Lall and Fakeer Chand* (18) held by the Sadar Diwani Adalat of these Provinces, following a previous decision of that Court and a Full Bench decision of the Court at Calcutta, that the laws and regulations in force in this country did not make it necessary to apply the English law of champerty to its full extent, and no doubt the same would have been held by that Court as to the English law of maintenance. It has now finally been decided by the Privy Council in *Ram Coomar Coondo* v. *Chunder Canto Mookerjee* (8) that the specific English law of maintenance and champerty has not been introduced into India. At page 46 their Lordships are reported to have said, "But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this kind or character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend [67] to render them so have been adverted to in the two judgments of this tribunal already cited. Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be

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(1) 12 I. A. at pp. 225 and 226.
(2) 4 B. L. R. O. C. J. 1.
(3) 20 W. R. 446.
(4) 22 W. R. 535.
(5) 13 B. L. R. P. C., 509.
(6) 8 M. I. A. 170.
(7) 12 M. I. A. 301.
(8) L. R. 4 I. A., pp. 46 and 47.
(9) 2 Ves., 125.
(10) 2 Ves., & B. 117.
(11) 2 Ch. App. 542.
(12) 11 Eq., 265
(13) 8 Ch. App., 484.
(14) 10 Ch. App., 389.
(15) 1 C., 108.
(16) 9 A., 74.
(17) 9 A., 690.
(18) S. D. A. N. W. P., 1862. Vol. I, p. 501.

easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense thereof, but for the purpose of gambling in litigation, or of injuring or oppressing others by abetting or encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

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In that judgment most of the decisions in the Privy Council and in India dealing with the subject were considered. The decision of the Privy Council in *Srimati Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (1) is of great importance, as it shows that in India the Courts may apply to cases in which the dealings sought to be impugned were not with expectant heirs, reversioners or remaindermen, the doctrines or principles which the Courts of Equity of England have applied to hard or unconscionable bargains with expectant heirs, reversioners or ramaindermen. In that case their Lordships are reported to have said (pp. 225 and 226), "The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction. But assuming the validity of the mortgage, a question arises whether under the circumstances the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of equity will give relief against. The doctrine of equity on this subject was laid [68] down by the Master of the Rolls in *Beynon* v. *Cook* (2) and his judgment was affirmed by the Court of Appeal. Rhys Beynon was a reversioner or remainderman, Cook was a money-lender who took from him a promissory note for£100, for which he charged £15 discount for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rollsmade a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed, 'The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the reasonableness which has been laid down by so many Judges.' This equitable doctrine appears to have a strong application to the facts of this case, where we have a borrower a *pardanashin* lady; the lender, her own mukhtar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter exorbitant and unconscionable; and a purchaser with full notice of these circumstances."

It is to be observed that, although their Lordships allude to the fact that the borrower was a *pardanashin* lady and the lender her own mukhtar under the cloak of a benamidar, they accepted the finding of the lower Court that there had been no fraud or undue influence.

The difficulty which we feel is as to what constitutes a hard and unconscionable bargain. In some of the English cases stress was apparently

(1) 12 I.A. 215. (2) 10 Ch. App. 389.

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laid on the fact that the security had not been valued. Yet Sir George Jessel, M. R., in *Beynon* v. *Cook* (1) at page 392, after showing that in many instances in which the Courts of equity applied the doctrine under consideration, the value of the security could not be ascertained, expressly stated that "the value [69] of the security is not an element for consideration." He said at page 393, "The object of the rule is to prevent the distrees of the reversioner being taken advantage of, and to protect him, according to Mr. Swanston (2 Sw. 150 *n.*) "against the designs of that calculating capacity which the law constantly discountenances, the distress frequently incident to the owners of profitable reversions, and the improvidence with which men are commonly disposed to sacrifice the future to the present."

Lord Selborne, L. C., in *Aylesford* v. *Morris* (2), having referred to the repeal of the usury laws and the effect of the 31 Vic. c. 4 said, "These changes of the law have in no degree whatever altered the *onus probandi* in these cases, which, according to the language of Lord Hardwick in *Chesterfield* v. *Janssen* (3), raises from the circumstances cr conditions of the parties contracting, weakness on one side, usury on the other, as extortion, or advantage taken of that weakness,—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances or conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repeal the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable." After referring to some of the considerations which had prevailed in cases in which this doctrine of equity had been applied, he, at page 492, said, "But the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit on it.

How the righteousness of the bargain could, if contested, be established we find it difficult to see, if the value of the security at the time when the bargain was made is to be excluded from [70] consideration. In the case of *Chesterfield* v. *Janssen* (3) and in *Bowes* v. *Heaps* (4) the borrower had offered the security to several persons who had rejected it as not sufficiently advantageous, before it was finally accepted by a party against whom relief was decreed. Sir William Grant, M. R., in *Bowes* v. *Heaps* (4), at p. 119 said, "It is not imputed to them (the defendants) that they used any endeavours to prevail upon the plaintiff to enter into the transaction. They merely acceded to the proposal that was made to them. It is not, however, every bargain which distress may induce one man to offer, that another is at liberty to accept. The mere absence of fraud does not necessarily decide upon the validity of the transaction; as is proved by many cases, from *Banny* v. *Pitt* down to *Gwynne* v. *Heaton*. In the latter, Lord Thurlow says, the defendant is not charged with misleading the plaintiff's judgment or tampering with his poverty. In that case, too, as in this, the bargain had been hawked about and offered to many persons. That, Lord Thurlow says, only shows the distress of the borrower," and at the same page Sir William Grant also said, "It would not,

(1) 10 Ch. App. 389. (2) 8 Ch. App. 484. (3) 2 Ves. 125. (4) 3 Ves. & B. 117.

I think, be endured that a money-lender should take from a distressed man dealing for his reversionary interest, an engagement to pay four to one upon the contingency of a person, of the age of twenty-seven in perfect health, out-living another of the age of thirty-two, debilitated by disease and ruined in constitution by long continued habits of intemperance." After referring to the nature of the risk in that case, Sir William Grant, at page 120, said, "Allowing the risk to be still considerable, against that must be set the unusual amount of the stipulated return. Combining the two together, it seems to me that there is more inequality in this bargain than existed in some of the cases in which the contract has been set aside," and he granted relief.

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The result of the English cases appears to be that in dealings with expectant heirs, reversioners or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous, does not raise a presumption that it was a fair and reasonable [71] bargain; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity to which we are referring is, so far as we are aware, applicable in England only to dealings with expectant heirs, reversioner or remaindermen. Sir George Jessel, M. R., in *Beydon* v. *Cook* (1), at p. 392, said," It has never been said a man can be relieved because he happens to be a reversioner, and the money-lender does not know it, but lends him money upon his promissory note at usurious interest. In order to be relieved, he must have been trusted upon the credit of his expectation." Many of the considerations stated by the earlier equity Judges in England for the doctrine we are considering do not arise in cases such as that which he have to decide here. We do not gather from the judgments of their Lordships of the Privy Council in *Srimati Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (2) that the doctrine which the Courts of Equity in England have applied to cases of snatching bargains with expectant heirs, reversioners or remaindermen, is to be applied in India to cases except where it would have been applied in England or except where the cases is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, orexcept there is some fiduciary relationship between the lender and the borrower, although there may be no fraud or undue influence, or except there is incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his or her bargain. To apply it to all cases where the contracted return was exceptionally large or the rate of interest was high, would be for the Judges to make contracts for the parties which they never intended to make for themselves.

In our opinion Sir George Jessel, M. R., in *Wallis* v. *Smith* (3) with sound common sense said, "I have always thought, and [72] still think, that it is of the utmost importanceas regards contracts between adults, persons not under disability, and at arm's length, that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character."

(1) 10 Ch. App. 389. (2) 12 I. A. 215. (3) L. R. 21 Ch. D. 243

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We have arrived at the conclusion, but we confess after much doubt and difficulty, that we may hold that this is a case to which we may apply the ruling of their Lordships of the Privy Council in *Srimati Kamini Sundari Chaodhrani* v. *Kali Prassunno Ghose* (1) to which we have referred, and which is to be found at pages 225 and 226 of the report of that case. There was in this case, so far as we see, no fraud on the part of Lala Punni Lal or the plaintiff or on the part of the agents of the defendant. The defendant entered into the contract with his eyes open and on the advice of his legal advisers, and we doubt if he could at that time, having regard to the risks of his litigation, have obtained an advance of money on terms more advantageous to himself; but that he could not have done so is not sufficiently established by the plaintiff, and it was for her to leave our minds without any reasonable doubton the point. As we have pointed out, mere difficulties in negotiating a bargain, or the fact that the bargain was refused by others as not sufficiently advantageous, have not been held to prove that the bargain was a fair and reasonable one and not a hard and unconscionable bargain within the meaning of the rule. Under the circumstances we find that the bargain was a hard and unconscionable one, which we ought not to enforce.

On the ground also to which we shall now refer we are of opinion that we should not enforce this contract. Gambling in litigation and what are called in England maintenance and champerty are unfortunately only too common in this country. The abuses which in 1869, Phear, J., in his judgment in *Grose* v. [73] *Amirtamayi Dasi* (2) stated to exist in every Court of Civil Justice throughout Bengal, unfortunately exist at the present day in these Provinces. Although fully recognising that in India, as was pointed out by their Lordships of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (3), "a fair agreement to supply funds to carry on a suit in consideration of having share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy, their Lordships were careful to add, " But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring and oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them." Now in this case it appears to us that if Lala Punni Lal or the plaintiff believed the defendant's claim have been a just one or one in which there were not long odds against his chance of success, Rs. 25,000, in the event of success for an advance of Rs. 3,700 could not be and could not have been considered by them or either of them to be a reasonable recompense. On the other hand, if Rs. 25,000 were or were considered to be a reasonable recompense in the event of success for an advance of Rs. 3,700, it could only be on the ground that the plaintiff's claim was of such a highly speculative character as to make the odds long against his chances of success and the transaction one of gambling in litigation. In either view, we are of opinion that to enforce such a contract as that in this case would be against public policy, as it would be only to encourage parties not interested in a litigation to assist, for their own private purposes, a litigant to pursue a litigation in the success of which on the basis of a just claim they did not honestly believe

(1) 12 M.I.A. 215. (2) 4 B.L.R. 1. (3) 4 I. pp. 46 and 47.

or for their assistance in which they required an unreasonably large recompense. 1888 JUNE 26.

[74] Although we are of opinion that we should not enforce the contract in this case by decreeing the plaintiff's claim for Rs. 25,000, we are also of opinion that we should give, as we now do, the plaintiff a decree for the amount actually advanced with simple interest at the rate of 20 per cent. per annum from the date of the bond, that is to say, from the 10th December, 1878, to the date of this decree with proportionate costs of suit and of the plaintiff's appeal and with interest at the rate of 6 per cent. per annum on the amount of such advance, interest, and costs, from the date of this decree until payment. The defendant's appeal is dismissed with costs and the plaintiff's appeal is allowed to the extent above indicated with proportionate costs. We have allowed interest at the rate of 20 per cent. per annum as that is not an unusual rate in these Provinces where there is no security or but a doubtful security.

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Appeal allowed in part.

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11 A. 74=8 A.W.N. (1888) 275.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

JANGI NATH AND OTHERS (*Plaintiffs*) v. PHUNDO AND ANOTHER (*Defendants*).* [10th July, 1888.]

Civil Procedure Code, ss. 244, 283—Decree against mortgagor for mortgage-money and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.

In a suit upon a hypothecation-bond, a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree the debt not being satisfied by sale of the mortgaged property, the decree-holder, caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree.

[75] *Held* that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. *Kamezhwar Pershad* v. *Run Bahadur Singh* (1) referred to. *Mulmantri* v. *Ashfak Ahmad*(2) and *Nimba Harishet* v. *Sitaram Praji* (3) distinguished.

[Diss., 15 C.P.L.R. 106 (111); F., 18 A. 52 (53)=15 A.W.N. 153; App., 23 A. 346 (351)=21 A.W.N. 97; R., 6 C.W.N. 10 (12)=30 C. 134; 15 M. C. C. R. 247 (249).]

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* First Appeal, No. 85 of 1886, from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 14th November, 1885.

(1) 12 C. 458. (2) 9 A. 605. (3) 9 B. 458.

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THE facts of this case were as follows :—On the 13th February, 1876, Bhika Mal, styling himself son of Dwarka Das and proprietor of the firm of Dwarka Das Bhika Mal, executed an instrument in favour of Babu Baijnath, whereby he promised to pay Rs. 15,000 to the latter, and mortgaged certain immoveable property as security for the payment of the money. In July, 1882, Baijnath brought a suit on this instrument against Bhika Mal, styling him the "adopted son" of Dwarka Das, and against Musammat Phundo, widow of Dwarka Das. In this suit Baijnath claimed to recover the money due under the instrument from Bhika Mal personally, and by the sale of the mortgaged property, "by enforcement of lien as against both defendants." He stated in the plaint in this suit, with reference to Musammat Phundo, as follows :—"As the defendant No. 2 now declares herself proprietor of the whole property, she has also been impleaded, although she has no right to the property, and defendant No. 1 (Bhika Mal) is the owner of the property and of the share of Dwarka Das, because he was his own brother and was adopted by him, and he is a proprietor by right of inheritance."

The plaintiff's contention in this suit was that Bhika Mal, step-brother of Dwarka Das, was his adopted son and sole heir, and had inherited the mortgaged property from Dwarka Das. Musammat Phundo contended that Bhika Mal was not the adopted son of Dwarka Das ; that the mortgaged property was the separate property of her husband, to which she had succeeded, and that Bhika [76] Mal had no authority to mortgage the property, and it was not liable to the plaintiff Baijnath's claim. On the 17th January, 1883, Baijnath obtained a decree in this suit for the recovery of the money claimed from Bhika Mal, and for enforcement of the mortgage contained in the instrument of the 13th February, 1876.

The mortgaged property having been sold, and the mortgage-debt not being satisfied, Baijnath caused certain immoveable property in the possession of Musammat Phundo to be attached in the execution of the decree as the property of Bhika Mal. Musammat Phundo objected to the attachment, alleging that she had inherited the property from her deceased husband, Dwarka Das, and it was not liable to be attached and sold in execution of Baijnath's decree against Bhika Mal. This objection was allowed by the Court executing the decree on the 13th March, 1885. In May, 1885, Baijnath brought the present suit against Musammat Phundo and Bhika Mal, in which he claimed a declaration that the property belonged to Bhika Mal, and was liable to attachment and sale in execution of his decree.

The Court of first instance (Subordinate Judge of Agra) held that the suit was barred by the provisions of s. 244 of the Civil Procedure Code, and dismissed it.

The representatives of Baijnath, who had died, preferred this appeal.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellants.

Mr. *Dwarka Nath Banerji* and Babu *Jogindra Nath Chaudhri*, for the respondents.

JUDGMENT.

EDGE, C. J.—In this action the plaintiff claims a declaration that the property alleged by Musammat Phundo to be her own property is liable to attachment and sale under a decree obtained by the plaintiff in a previous action. In the previous action the plaintiff sued one Bhika Mal on a hypothecation-bond, claiming, among other things, enforcement of lien by sale. Musammat Phundo was made a party to that action as a defendant because she [77] claimed the hypothecated property. The main issue in

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that action was whether the hypothecated property was Bhika Mal's. The decree in that action was against Bhika Mal personally and for sale of the property hypothecated. In that action a decree was given against Bhika Mal personally, and Musammat Phundo was interested simply and solely in respect of her claim to the hypothecated property, and she was made a defendant solely to prevent her disputing the plaintiff's right to sell the property. The hypothecated property was sold under the decree in that action, and thereupon the plaintiff proceeded to attach and sell the property involved in this action, alleging that the property was the property of Bhika Mal. The property in question formed no part of the hypothecated property affected by the first decree. Musammat Phundo objected in the execution department. Her objection was allowed, and the property was released from attachment. On that the present action was brought. The Court below dismissed the claim on the ground that s. 244, Civil Procedure Code, applied.

It is argued before us on behalf of the respondent that, as Musammat Phundo was a party to the previous suit, the question here was one which arose between the parties to the suit in which the decree was passed, and related to the execution or satisfaction of the decree, within the meaning of s. 244, Civil Procedure Code. Now that decree, as I have said, affected Musammat Phundo or any interest of hers only so far as it negatived her alleged interest in the hypothecated property. In that action no claim was made against her personally or in a representative capacity. The only claim, so far as she was concerned, was what amounted to a claim for a declaration that she was not entitled to the hypothecated property.

I am consequently of opinion that so far as the decree was sought to be enforced against property other than the hypothecated property, Musammat Phundo was a stranger to the action, and her objection is to be looked at as having been decided under ss. 278 and 280, Civil Procedure Code. The present action was therefore rightly brought under s. 283, Civil Procedure Code.

[78] I think the decision in *Kameshwar Pershad* v. *Run Bahadur Singh* (1) is based on a correct view of the law and supports the view which I take. The case cited by the respondent, *Mulmantri* v. *Ashfak Ahmad* (2) and the case of *Nimba Harishet* v. *Sitaram Paraji* (3) are clearly distinguishable.

The appeal will be allowed, and the case will come on at a later date. All the records of which Mr. *Chaudhri* and Pandit *Sundar Lal* will give lists to the office, will be sent for.

TYRRELL, J.—I concur with the view expressed by the learned Chief Justice. It appears to me that the Court below has taken an erroneous view of the import of the plaintiff's pleadings in the former case. It is true that in that case the plaintiff said, "As the defendant No. 2 now declares herself proprietor of the whole-property, she has also been impleaded, although she has no right to the property, and defendant No. 1 is the owner of the property and of the share of Dwarka Das, because he was his own brother, and was also adopted by him, and he is a proprietor by right of inheritance." These words, no doubt, seem, to refer to the whole of the property of the firm of Dwarka Das Bhika Mal, but it is obvious, on a closer inquiry, that the plaintiff's meaning was that Musammat Phundo's pretensions were such as to raise a question of right

(1) 12 C. 458. (2) 9 A. 605. (3) 9 B. 458.

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on her part in hypothecated property which was the sole subject of that suit, and therefore that she was interested in the issue to be raised in respect of that hypothecated property and it only.

When the appeal came on again for hearing, the Court (EDGE, C. J., and TYRRELL, J.) remanded the case for re-trial.

Cause remanded.

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11 A. 79=8 A.W.N. (1888) 289=13 Ind. Jur. 193.

[79] APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* GANGA CHARAN. [23rd November, 1888.]

Accomplice—Tender of pardon, effect of—Subsequent trial of accomplice for connected offences—Criminal Procedare Code, ss. 337, 339.

A prisiner charged before a Magistrate at Benares with offences punishable under ss. 471, 472 and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473 and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first-mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the conditions specified in that section, and the prisoner accepted the pardon, and gave evdince for the prosecution. The Magistrate held that this evdince was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently the prisoner was committed by the Magistrate of Benares for trial before the Court of Sessions upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty, but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused.

Held that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472 and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal.

Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for committal against several persons, tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339) such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339 for "any other offence of which he appears to have been guilty in connection with the same matter," [80] while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit.

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THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Dwarka Nath Banerji* and Babu *Jogindhro Nath Chaudhri* for the appellant.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

JUDGMENT.

STRAIGHT, J.—The facts material to the determination of the main question raised by this appeal are as follows :—On the night of the 29th January last the appellant was arrested at Benares for uttering some forged five-rupee currency notes to a tradesman in the *chauk* at Benares, and immediately after, the house at which he was stopping in Bengali Tolah in that city was searched, and two tin boxes were found, in one of which were seven hundred unnumbered counterfeit currency notes of Rs. 5 each, and one separate numbered note for a like amount, as also six dies marked with numbers for stamping. On the same day the appellant was taken before Mr. Adams, the District Magistrate, to whom he made the following statement :—" These notes (Rs. 5—R. 74-80909, March, 1884, and the others without numbers), were found in my possession in my box, which was in my house, which I rented in Bengali Tolah. This note for Rs. 5 (M. R. 74-80915) was given by me last night to a *Bazaz* in the Dalka Mandavi. These three notes (80302, 80926, 80929) were given by me to Fazlu, shopkeeper of Char Mihman, yesterday night in payment for a time-piece, a pair of socks, a bottle of scent, and two pocket-knives. I got Rs. 2 or Rs. 2-8 (I forget which) cash in change. The six types produced were found with the notes in the box in my house. I and others made the plates for these notes and printed them. I engraved the plates, being a seal engraver by trade. I made the several plates at my home in [81] Andul. The notes were printed by Mahandar Nath Bhattacharji of Andul. They were printed in his house by him and by his son Suresh Chandar, and Kali Kumar Pal, and myself. Suresh Chandar and his *Bahnoi*, also named Suresh Chandar, got the Press from Calcutta from Tantania, Cornwallis Street, Calcutta. They paid Rs. 125, I think for it. Suresh Chandar, son of Mahandar Nath, and I bought the copper plates in Calcutta in the Bara Bazaar. Mahandar Nath paid me Rs. 20 a month to do the work with the condition that he and I were each to have half the notes made. Kali Kumar Pal gave some money to Mahandar Nath for the expenses of the Press. We printed 1,300 or 1,400 notes for Rs. 5 each. Mahandar Nath's son-in-law, Suresh Chandar, without letting us know, passed some of the notes in Andul ; passed some twenty or thirty or so, and the matter was blown upon and the police came from Howrah or Calcutta. Then Mahandar Nath said we would print no more there but would do so in Calcutta. He took possession of the notes and the plates, and would give me nothing. I said I would inform if he gave me nothing. Then he gave me a thousand notes, or it may have been less. He gave me notes without number like these produced. I made the types produced myself, they are not good ones. The good ones were kept by Mahandar Nath. It is a year since we began this work. I have not made any others. I and Suresh Chandar (son of Mahandar Nath) bought the paper at a shop in China Bazar, which I can point out, I heard that two men were convicted in the High Court at Calcutta of forging ten-rupee notes, and sentenced to ten or twelve years' imprisonment. We made five-rupee notes because Mahandar Nath said it was easy to pass them. He gave me the notes last *Katik*, and I left Andul only last Wednesday.

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I was afraid to pass them before. I did not pass any of the notes except at Benares. I have passed some twenty or thirty of the notes since I arrived here on Friday. I did not go to Magh Mela at Allahabad. This note produced (R. 74-80505) sent from Allahabad by the police, looks like one of our printing, but I cannot say for certain. Mahandar Nath Bhattacharji is of fairish complexion (wheat colour), about forty [82] or forty-five years of age, of average height and middling figure, with moustache but not a beard. Suresh Chandar, his son, is about twenty or twenty-two years of age, of the some complexion, about my height, five feet five inches or five feet six inches, middling figure, wears a small beard, but he may have shaved it. Suresh Chandar, his son-in-law, is fair (*gore rung*), age about twenty-nine or thirty, without a beard, and of average height and thin figure, wears a moustache. Kali Kumar Pal is of the complexion of Mahandar Nath, age about forty years, shorter than I am, middling figure, with a moustache only. When I left Andul I had not seen Mahandar Nath and the others for about ten or twelve days. The engraving tools were thrown into the Ganges. The engraving of the plates was delayed by my illness, which made Mahandar Nath angry. The silver anklets produced are mine. I bought them in Benares in the *Chauk* yesterday or the day before. I paid for them with some of my notes and Rs. 25 cash. The cash produced Rs. 74-12, I brought part from Calcutta and part is change received here for notes. I learnt the trade of seal engraving ten or twelve years ago but never before forged notes. Mahandar Nath's son, Suresh Chandar, came to me and said :— " You are poor, if you do this we shall all get rich."

This confession was certified according to law by Mr. Adams, and on the same date he passed the following order :—" The accused, Ganga Charan Chatterji, is charged with an offence under ss. 465, 467 and 468, Indian Penal Code, and also 417, Indian Penal Code. He is also liable under s. 472, Indian Penal Code. Information will be given to the Calcutta Police, but in the meantime he may be put on his trial here for cheating, s. 417, Indian Penal Code. Case made over to Mr. McLean, Joint Magistrate." Information was, as directed, sent to the Calcutta Police, and on the 3rd of February, Mahandar Nath Bhattacharji and Surendro Nath Bhattacharji and on a subsequent date, Suresh Chandar Mukerji and Kali Kumar Pal, were arrested by them. On the 12th of February, the appellant was sent to Calcutta in charge of the Police Sub-Inspector, arriving there on the 13th. On the 17th of February, the four persons I have mentioned above, along with the [83] appellant, were brought before a Calcutta Magistrate upon charges under ss. 467, 473 and 475, Indian Penal Code, and upon the same date the Inspector of Police conducting the prosection filed the following application :—

"To the Magistrate of Howrah—Empress *versus* Mahandar Nath Bhattacharji and others ; charge under ss. 467, 473 and 475, Indian Penal Code. As there is no sufficient evidence obtained in the case to warrant the conviction of the four accused persons named, I under instructions on behalf of Government, pray that accused Ganga Charan Chatterji be offered a pardon and made Queen's evidence, I have, &c., Signed Ram Krishto Rai, Inspector of Police." Thereupon the Magistrate made the following order : — " Whereas it has been brought to my notice that in this case there is no sufficient evidence to proceed with the case of Empress *versus* Mahandar Nath Bhattacharji, Surendra Nath Bhattacharji, Suresh Chandra Mukerji, and Kali Kumar Pal, under ss. 467, 473

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and 475, unless the evidence of Ganga Charan Chatterji, an accused in dock, is recorded. As the offences under all these sections are triable exclusively by the Court of Session, I direct, under the power vested in me by s. 337, Criminal Procedure Code, a pardon to the said Ganga Charan Chatterji, on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences committed under ss. 467, 473 and 475, Indian Penal Code, and to every other person concerned, whether as principal or abettor in the commission thereof. Signed C. N. Banerji, First-Class Magistrate.—The 17th February, 1888.

"Read and explained to Ganga Charan Chatterji, who accepts the pardon on the condition stated in the above order. It has been further explained to him that, unless he makes a full and true disclosure, the pardon is liable to be withdrawn and will be withdrawn."

This was also signed by the Magistrate and by the appellant. Upon the same day the appellant, having been removed from the dock, was placed in the witness-box as a witness for the prosecu-[84]tion, and he made a long and detailed deposition, fully disclosing the parts he and the four accused had played in purchasing the implements and materials with which to forge the notes; in forging them and in disposing of them, and in the latter connection he said:—"A portion of these forged notes I took to Benares, but they were without numbers. I put on the numbers on those notes at Benares the very night I reached there. I put the numbers with my own hands. I passed four notes the day following, buying a silver necklet. This was in part payment. After passing sixteen notes I was arrested through the instrumentality of a shopkeeper where I had gone to purchase four gold mohurs. I did the engraving during the day. The notes would be printed at times in the day and at dead of night, and at times about 2 A.M. The notes were given by Mahandar Nath accused. I had threatened to disclose the matter if I were not paid my share for labour." There is nothing whatever to show that the Magistrate was dissatisfied with the statements made by the appellant, or considered that he had not complied "with the conditions on which the tender was made;" on the contrary I must take it, in the absence of any withdrawal of the pardon, that it remained, and remains, in full force and effect for what it is worth. On the 9th March the Calcutta Magistrate, holding there was no sufficient corroboration of the evidence given by the appellant, discharged the four accused before him. Meanwhile proceedings had been carried on, commencing on the 21st February, against the appellant in the Court of the Joint Magistrate at Benares for offences under ss. 420, 474, 472 and 471, Indian Penal Code, and on the 10th March he was committed to take his trial before the Court of Session. He was then put on his trial on the 4th April and pleaded not guilty, being defended by a pleader, and in passing it must be noted that at the outset of the proceedings no plea in bar of the trial was raised on the ground of the pardon given by the Calcutta Magistrate. At the close of the evidence for the prosecution, however, the appellant did say: "I was examined at Howrah. There was a Bengali Magistrate. He read over something from a paper. He said as a witness for the Queen. I don't remember any more."

[85] "*Q.*—Did the Magistrate make any promise to you?

"*A.*—The police said they would get me off. The Magistrate did not."

The learned Judge then recalled the Police Sub-Inspector, Ganesh Prasad, and he stated: "I took the prisoner to Howrah. He was produced

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before the Deputy Magistrate there and I heard that he was given the oath, and that his deposition was taken. I was not in the Court when his examination was begun, but was towards its close. The Magistrate, when his examination was closed, simply told me to take him away. I first took him before the Superintendent of Police of Howrah. The Suprintendent took him before the Deputy Magistrate. The case was not finished. I took the prisoner away from Howrah and I do not know what has been the result." Upon this matter the learned Judge remarks: "From what was mentioned orally in Court I thought it better to make a brief enquiry as to what happened when the prisoner was taken in police charge to Howrah. I see no sufficient reason for holding or reasonably suspecting that he was given a conditional pardon there." In the result the appellant was convicted under ss. 474, 472 and 471, Indian Penal Code, and sentenced to two years' rigorous imprisonment under s. 474; one year under s. 472, and five years under s. 471.

He now appeals to this Court, and the main, and indeed the only, ground seriously urged on his behalf is that "as he had previously received a full and complete pardon as an approver, the present trial and the sentence passed are illegal." When the case came before me on the 4th of August, I directed the Registrar to apply to the Calcutta High Court to sanction the record of the Howrah Magistrate being sent to this Court, and such sanction was at once granted, and I have had an opportunity of perusing the whole of his proceedings. It is true that the charges on which the appellant with the four accused was brought before the Magistrate were for forgery of valuable securities under s. 467; under s. 473 for making, counterfeiting, and having in possession plates and instruments intending to use the same for purposes of a for-[86]gery which would be punishable under s. 467, and for counterfeiting a device or mark within the meaning of s. 475; and that that there were no charges preferred under ss. 474, 472, 471 and 420 for which offences the appellant was subsequently tried at Benares. It is equally true that the evidence on which the appellant was convicted related the distinct individual possession by him of implements of forgery and of forged notes with knowledge and intent, and of specific utterings with knowledge and intent, at Benares. But it is impossible not to say that his conduct there was more or less mixed up and concerned with the conspiracy at Calcutta of which he made disclosure as a witness, and the passage from his evidence I have already quoted, as to what he had done at Benares, was a material portion of a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences then under enquiry. Though approvers may be infamous persons, they are nevertheless entitled to have faith kept with them by the Courts, and in dealing with the question as to what a pardon is to cover, and how far it is to extend, I should not be inclined to apply too technical tests, and should rather look to substance than mere matters of form. I have no hesitation whatever in holding that the pardon granted by the Calcutta Magistrate on the 17th February to the appellant, on condition of his making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under ss. 467, 473 and 475, Indian Penal Code," was accepted by the appellant on such condition as his signature at its foot shows, that he subsequently gave his evidence in consequence of such pardon, and that whatever its force of operation may be it has never been withdrawn. Looking to the special facts of this case, it does not appear to me that the circumstance that the appellant had made a complaint to

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Mr. Adams on the 29th January, or that the pardon was tendered him by another Court in another Province with a different territorial jurisdiction, should affect the decision of the point before me. As to this latter matter, I think the case must be looked at in exactly the same light as it would have had to be regarded had the appellant and the four other persons been before the Joint Magistrate at [87] Benares charged with offences within his jurisdiction under ss. 467, 473 and 475, and there being a charge against the appellant alone of uttering under s. 471. Could it be seriously pretended for a moment that if the Joint Magistrate of Benares had tendered a pardon in the same terms as those contained in the Calcutta Magistrate's order of the 17th February, and the appellant had given the same evidence before him as he did at Calcutta, such pardon would not have protected him? I hold that it would, and I am fortified in this view by what appears in s. 339, Criminal Procedure Code, as to the consequences that follow on a non-compliance by an approver with the conditions of his pardon and its withdrawal. He may be tried for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. So that while on the one hand the condition is "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence," on the other a non-compliance with it leaves him open to trial for the offence in respect of which the pardon was tendered, or any other offence in connection with the same matter. It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver, on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence, or offences, as to which he gives evidence, and when he has given his evidence, I do not think that the question of how far it is to protect him, and what portion of it should not protect him, ought to be treated in a narrow spirit. In a note by Mr. Greaves to the 4th edition of Russell on Crimes, vol. III, p. 597, it is said: "If however, the prisoner, having been admitted as an accomplice to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had given previously as to the robbery of other property he had delivered himself from the conse- [88] quences of having the property he so disclosed in his possession, Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property:" *Garsides case*, 2 Lew, 18. I quote this passage as illustrative only of the principles upon which a learned Judge has acted in such a matter in England. The first question which it appears to me I have to ask myself is, looking to the offences under inquiry before the Calcutta Magistrate, should the pardon granted to the appellant be held to extend beyond those special offences, and to exempt him from punishment for the offences charged against him at Benares? I have read the evidence given by the appellant at Calcutta, and as the Magistrate nowhere upon this record indicates that he withdrew the pardon, I think I am bound to assume, as I have already said, that he believed the appellant had made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under inquiry, and so satisfied the

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conditions of the tender. It was suggested by the learned Public Prosecutor that the fact that the appellant had already made a confession to the Magistrate of Benares destroys the effect of his subsequent evidence at Calcutta. I do not think so, any more than I should have thought so had he simply made his statement to a police officer and the information contained therein had been forwarded to Calcutta and had led, as his confession to the Magistrate did, to the arrest of the persons implicated and to his being examined as a witness. Upon what appears to me a reasonable construction of the terms of the pardon tendered by the Calcutta Magistrate, I think that, looking to the particular facts of this particular case, and in no way laying down any rule to govern other cases, it ought to protect the appellant from punishment for the offences under ss. 471, 472 and 474. It is obvious to my mind that almost from the moment of his arrest it was contemplated by the police, and most properly, to make him the instrument of bringing the other conspirators to justice. The application of the Calcutta Inspector of the 17th February shows this, and I have no doubt that when the appellant gave his evidence at Calcutta as to his own proceedings at Benares, he did so in the belief that as to his whole con-[89]nection with the conspiracy he would be exempted. Then arises the question as to in what way the pardon granted by the Calcutta Magistrate should have been given effect to, so far as the trial in the Benares Sessions Court was concerned. Could it be pleaded as a legal plea in bar like "*auterfois convict*" or "*auterfois acquit*"? I confess I am placed in somewhat of a difficulty to answer that question from the absence from the Criminal Procedure Code of any specific directions on the subject. Primarily the power of pardon rests in the Sovereign, and the provisions of s. 417, Criminal Procedure Code, authorising the Governor-General in Council or a local Government to suspend the execution, or remit the whole or part of any sentence passed upon any person sentenced to punishment, in no way interfere with the prerogative of the Crown in that respect. The special authority therein conferred, however, relates to persons sentenced to punishment and does not touch cases under s. 337 of the Criminal Procedure Code, in which a person charged along with others with a crime has, under a conditionally tendered pardon, given evidence against such persons and satisfied the conditions precedent upon which it was tendered. I must, therefore, look to that section, and, as far as it throws light on the matter, to s. 339, to see what effect a pardon so tendered is to have. Taking s. 337, it is clear that it does not in terms cover a case in which a Magistrate holding a preliminary inquiry for committal against several persons, tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case to justify committal. But it appears to me that the words "every person accepting a tender under this section shall be examined as a witness in the case," mean that for all purposes, subject of course to his failure to satisfy the conditions of his pardon as provided for by s. 339, he ceases to be triable for the offence or offences under inquiry, or, looking again to s. 339, for "any other offence of which he appears to have been guilty in connection with the same matter while making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences," directly under inquiry. It is clear to my mind, there-[90]fore, that, at least, as to the charges under ss. 467, 473 and 475, Indian Penal Code, upon which the appellant was brought up with the other four persons before the Calcutta Magistrate, he ceased to be an accused

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and became a witness, and that such pardon never having been withdrawn, it could have been pleaded in bar to further proceedings against him had they been subsequently instituted under those sections before the Calcutta Magistrate. It remains then to see whether the pardon stood good for the same purposes as to the offences under ss. 474, 472 and 471, that is to say, (1) for being in possession of the forged notes, knowing them to be forged, and with intent that they should be used as genuine; (2) being in possession of instruments of forging notes with intention to use them, punishable under s. 467, only a more aggravated form of the offence with which he was charged at Calcutta under s. 473; and (3) uttering forged notes to the various persons at Benares. I have already said that in dealing with this point the terms of the pardon must be looked at in connection with the special facts of the particular case. The condition precedent imposed by the Calcutta Magistrate and accepted by the appellant was that he should make "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under ss. 467, 473 and 475;" in other words, that he should make a clean breast of his whole connection with the conspiracy to forge currency notes, in which he alleged the other four persons to have been concerned with him. I need not point out the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence, which may be capable of corroboration, and this is what I understand the Criminal Procedure Code to mean, when it speaks of a "full and true disclosure of the whole of the circumstances within his knowledge." It is true that the appellant did not in terms plead this pardon in the Court of Sessions as a bar to his trial there, but contented himself with a plea of not guilty to the charges, though he did say something about it towards the end of the proceedings. The case, however, is before me in appeal, and I think, seeing that there are no specific directions in the Code of Criminal Procedure as to how such matters are to be [91] pleaded and what are to be the consequences of not specifically pleading them, that if I hold the appellant protected by the pardon given him, I ought to give him the benefit of it, as no doubt the learned Judge would have done had he had the materials before him that I have, just as much as if I were now satisfied that the appellant had been formerly acquitted or convicted of the offences of which he has now been convicted, I should feel bound to give effect to such a plea in appeal. To sum up the matter, having before me the additional evidence contained in the Calcutta record, I am of opinion that, by terms of the conditional pardon granted to the appellant, on the 17th February, the conditions of which were satisfied by him, as is shown by its never having been withdrawn, he was protected from trial at Benares in respect of the offences under ss. 474, 472 and 471 of the Penal Code, and was not liable to be proceeded against in respect of them. I therefore hold such trial to have been illegal, and accordingly I reverse the findings and sentences of the learned Judge, and quashing all the proceedings of the Sessions Court, discharge the appellant and direct that he be released.

Conviction quashed.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

MUHAMMAD SADIK AND OTHERS (*Defendants*) v. MUHAMMAD JAN AND OTHERS (*Plaintiffs*). [24th July, 1888.]

Dismissal of suit for insufficient Court-fee on plaint—Decree—Appeal—Civil Procedure Code, ss. 2, 54, 158—*Act VII of* 1870 (*Court Fees Act*), s. 12.

The Court of first instance being of opinion that the plaint bore an insufficient Court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower appellate Court held that the Court-fee was sufficient, and remanded the case for trial on the merits.

Held that s. 158 of the Civil Procedure Code was not applicable to the case; that the first Court's disposal of the suit must be treated as being under s. 54, and was therefore a decree within the meaning of s. 2, and appealable as such, and that such [92] appeal was not prohibited by s. 12 of the Court Fees Act. *Ajoodhya Pershad* v. *Gunga Pershad* (1) and *Annamalai Chelti* v. *Cloete* (2) referred to.

[R., 12 A. 129 (154); 4 M.L.J. 183 (188); U.B.R. (1892—1896) Civil 253.]

THIS was a reference to the Full Bench by Edge, C. J., and Tyrrell, J. The facts are sufficiently stated in the judgment of the Full Bench.

Mr. *Hamidullah*, for the appellants.

Mr. *Dwarka Nath Banerjee*, for the respondents.

JUDGMENT.

EDGE, C.J., STRAIGHT and TYRRELL, JJ.—This was a suit for redemption of mortgage. The mortgagor had assigned. The mortgagee and the assignee were the defendants. The Munsif decided that the fee payable on the plaint was insufficient, being of opinion that the relief sought by the plaintiff must include a further relief against the assignee by a declaration that the assignment was bad. The Munsif consequently held that the relief sought in the plaint was under-valued. He dismissed the suit without entering into the merits, on the ground that the plaintiff did not then and there make good the fee which he, the Munsif, had determined to be payable. The plaintiff appealed, and on appeal the Subordinate Judge, holding that the fee paid by the plaintiff was more than sufficient and that no cancelment of the deed of assignment was sought, allowed the appeal and remanded the case for trial on the merits. From that order this appeal has been brought. If the relief sought was, in fact, under-valued, it was the duty of the Munsif to reject the plaint. He, in fact, recorded evidence, and having recorded evidence he dismissed the suit without expressing any opinion on that evidence. It is obvious that if he was right as to the fee, the only proceeding open to him was to reject the plaint under s. 54 of the Code of Civil Procedure on failure of the plaintiff within a reasonable time to make good the deficiency. We are not prepared to hold that s. 158 was applicable to a case of this kind, when there is a plain direction in s. 54 as to the course a Court must adopt. We must regard the Munsif's disposal of the suit as being under s. 54. If that be a correct view, his order rejecting the plaint

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(1) 6 C. 249. (2) 4 M. 204.

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[93] was a decree under s. 2 of the Code. An order rejecting a plaint is in terms included in the definition in s. 2, and being a decree was appealable when there is no statutory prohibition to the contrary. The next question is, is there such statutory prohibition? On behalf of the appellants, s. 12 of the Court-fees Act is said to be a direct prohibition against an appeal in this matter. If that argument is to be accepted there would be no appeal when a Judge of first instance wrongly decided that a suit was under-valued, and on that decision rejected the plaint. In our opinion the intention of the framers of the Code of Civil Procedure was that there should be an appeal in every case falling within s. 54; otherwise we should have found in the definition of decrees in s. 2, words limiting those orders under s. 54 which might for the purpose of the Code be considered decrees. A similar view was taken in the case of *Ajoodya Pershad* v. *Gunga Pershad* (1). We are of opinion that the decree of the Munsif should be regarded as passed in rejection of the plaint and was appealable. Several cases have been referred to. In *Annamalai Chetty* v. *Cloete* (2) the learned Judges endeavoured to reconcile s. 54 of the Code of Civil Procedure with s. 12 of the Court-fees Act. We do not think it necessary to consider whether those sections can or cannot be reconciled, as we are of opinion that an appeal lies under the Code of Civil Procedure of 1882. If we had to consider whether those sections could be reconciled or not on the lines on which those Judges proceeded, we should have a great difficulty in coming to the conclusion that a Court could determine the amount without deciding the question as to the relief sought, and yet that the relief sought was not a question relating to the valuation for the determination of the fee chargeable. The Subordinate Judge may have been wrong in remanding the case under s. 562, as the evidence had been recorded. The Subordinate Judge ought to have treated the decree of the Munsif as an order rejecting the plaint. The Munsif should have been told to accept the plaint as properly stamped and to proceed to dispose of the case on the merits. To that extent we allow the appeal and direct the Munsif to restore the suit to its place in the list of pending cases on the basis of its being [94] a suit in which a proper Court-fee has been paid, and dispose of it according to law. Costs here and hitherto to abide the result.

Cause remanded.

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11 A. 94 (F.B.)=9 A.W.N. (1889) 10=13 Ind. Jur. 272.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

KESHABDEO (*Petitioner*) v. RADHE PRASAD (*Opposite-party*).*
[1st August, 1888.]

Execution of decree—Civil Procedure Code, ss. 311, 313, 320, 322-*B*, 322-*C*, 322-*D*—*Transfer of execution to Collector—Application to Civil Court to set aside sale held by Collector on the ground of irregularity.*

Held by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code,

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* First Appeal from Order No. 116 of 1887.

(1) 6 C. 249. (2) 4 M. 204.

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11 A. 94 (F.B).= 9 A.W.N. (1889) 10= 13 Ind. Jur. 272.

a sale held by the Collector in execution of a decree transferred to him for execution under s. 320, cannot be entertained by a Civil Court. *Madho Prasad* v. *Hansa Kuar* (1) followed. *Nath Mal* v. *Lachmi Narain* (2) distinguished.

Per EDGE, C. J.—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322-B, 322 C, or 322-D.

[R., 9 C.P.L.R. 113 (115); D., 23 B. 531 (534).]

THIS was a reference to the Full Bench of an appeal which originally came for hearing before Brodhurst and Mahmood, JJ. The facts are sufficiently stated in the judgments of Edge, C. J., and Straight, J.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

JUDGMENTS.

EDGE, C. J.—In this case the respondent in the appeal before us obtained a money-decree against the appellant. The decree was transferred to the Collector for execution under the rules framed by the local Government under s. 320 of the Code of Civil Procedure. After the sale by the Collector, the judgment-debtor (appellant) applied to the Munsif to set aside the sale, on the ground of their having been irregularity in the conduct of the sale. The Munsif dismissed the application on the ground that he had no jurisdiction. [95] I assume for the purposes of this judgment, but not otherwise, that the irregularity complained of was an irregularity within the meaning of s. 311 of the Code of Civil Procedure. The judgment-debtor from the order of the Munsif brought this appeal. I have not the slightest doubt that the case is governed by the decision of the Full Bench of this Court in *Madho Prasad* v. *Hansa Kuar* (1). The case has come up from the Division Bench to the Full Bench, it having been contended that the judgment delivered by me and concurred in by Mr. Justice Oldfield in *Nathu Mal* v. *Lachmi Narain* (2) decided in contravention of the decision of the Full Bench that an application of this kind lay to the Civil Court. The case of *Nathu Mal* v. *Lachmi Narain* (2) was a case in which the Collector in executing a decree transferred to him, had sold the property, and the purchaser had come to the Civil Court to set aside the sale under s. 313, on the ground that there was no saleable interest of the judgment-debtor in the property sold. In that case, for the reasons which I therein gave, I came to the conclusion that the application was properly made in the Civil Court and was entertainable by the Civil Court. I do not see that that decision, in any way, contravenes the judgment of the Full Bench to which I have referred. In the Full Bench case the question before the Court was whether an application to set aside a sale on the ground of irregularity, when the sale had been conducted by the Collector, would, under ss. 311 and 312, lie to the Civil Court or would lie to the Collector. When I say so, I thoroughly agree with the view of the Full Bench that the object of transferring the execution of that class of decrees which fall within s. 320 of the Code to the Collector is to give him, speaking generally, a free hand to deal with the property in the best interests of the parties concerned. In the Full Bench case the point in *Nathu Mal* v. *Lachmi Narain* (2) was not before the

(1) 5 A. 314.

(2) 9 A. 43.

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Court, and the question did not arise in the case that there might be a distinction between the power of the Collector in the carrying out of a decree transferred to him subject to the limits imposed upon him by the Code itself, and a power to decide upon a question of title or a question as to whether the decree should be executed at all. As I [96] take it, the Collector, when a decree is transferred to him, is bound to carry out the decree subject to the discretion given to him by s. 321 and the following sections and subject to the provisions contained ss. 322 B, 322 C, and 322 D. But I find in those sections no power given to the Collector and nothing which would suggest the giving of a power to the Collector to decide that the property which was directed by the decree to be sold was not the property of the judgment-debtor mentioned in the decree. When such a question arises before a sale, s. 322 B shows that it is for the Civil Court and not for the Collector to decide it. The Civil Court under s. 313, which passed its own decree, it appears to me, would be the tribunal to say what shall take place when property directed by it to be sold has been sold, and it subsequently appears that it was not the property of the judgment-debtor. If the Collector exercised the powers undoubtedly given to the Civil Court under s. 313 in cases of sales conducted by the Civil Court, the Collector would, if he set the sale aside, on the ground that the judgment-debtor had no saleable interest in the property which he was directed to sell, have, in fact, declined to carry out the decree of the Civil Court and would have decided on a question of title which, if it had arisen before the sale, he was bound to refer to the Civil Court. Then what is he to do? If he set aside the sale on the ground that the judgment-debtor had no interest in the property which was directed by the decree of the Civil Court to be sold, is the Collector to re-sell the property to someone else when no better title can be made, or is he to decline to give any effect to the decree? In the latter event he would be absolutely interfering with the decree of the Civil Court. Now the sections of the Civil Procedure Code from 321 forwards undoubtedly give the Collector, subject to ss. 322B, 322C and 322D, a discretion as to what he may do where a decree is transferred to him for execution, but there is nothing in those sections to suggest that the Collector need do nothing to give effect to the decree. So far I am aware, there have been no regulations framed by the Local Government which would give the Collector power to set aside a sale on the ground that there was no title. I do not think that what was the intention of Legislature when a statute was passed can be [97] gathered from subsequent legislation, unless by the subsequent legislation that intention is specifically declared. Nevertheless I may observe that s. 30 of the Civil Procedure Code Amendment Act (VII of 1888), although it authorises expressly rules to be made under s. 320 giving the Collector power to exercise the powers of a Civil Court under s. 312, makes no suggestion that any rules may be framed giving him power to decide questions arising under s. 313, namely, to decide whether the judgment-debtor had or had not title in the property sold. It appears to me that the two classes of cases are totally distinct; that it was not the intention of the Legislature to allow any delegation to the Collector of a power to adjudicate upon title; but that it was the intention of the Legislature in other matters to hand over all the proceedings, to the Collector and to withdraw those matter so handed over from the purview of the Civil Court to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322B, 322C, 322D, if they arose, I have expressed these opinions, because I wish to be understood that

1888 AUG. 1. — FULL BENCH. — 11 A. 94 (F.B.) = 9 A.W.N. (1889) 10 = 13 Ind. Jur. 272.

I do not question in anyway and did notintend, in the case of *Nathu Mal* v. *Lachmi Narain* (1), to question the authority or propriety of the decision of the Full Bench in the case of *Madho Prasad* v. *Hansa Kuar* (2). Agreeing as I do with the decision of the Full Bench in that case, I must still say that in my opinion the two cases are totally dissimilar and different principles must be applied to them. I am of opinion that the judgment of the Full Bench governs this case, and that the appeal should be dismissed with costs.

STRAIGHT, J.—This is an appeal from an order of the Munsif, dated the 23rd July, 1887, by which order he rejected an application made to him by a judgment-debtor to set aside a sale which had been held by a Collector in execution of a Civil Court decree transferred to him under the provisions of s. 320 of the Civil Procedure Code. The ground upon which avoidance of the sale was sought was that there had been an irregularity of the kind mentioned in s. 311 of the Civil Procedure Code. The Munsif held that the decree in execution of which the sale had taken place having been [98] transferred by him under s. 320, he had no jurisdiction to entertain the application. It is this decision of his which was the subject-matter of the appeal before my brothers Brodhurst and Mahmood, which by their order has been referred to the Full Bench for disposal. The ground of the reference mainly was that according to the opinion of those two learned Judges it was difficult to reconcile the Full Bench ruling of this Court, which is to be found at page 314 of I.L R.5,All, and a decision of the learned Chief Justice and Mr. Justice Oldfield which is to be found at page 43 of I.L.R.,9. All. The course that the discussion has taken and the suggestions that have been thrown out during the argument render it, in my opinion, unnecessary for us to consider whether the view expressed by the learned Chief Justice in the ruling referred to was a correct one or not, or in other words, whether the learned Chief Justice was correct in the view that he took with regard to s. 313 of the Civil Procedure Code. It is enough for the purposes of this case to say that we have not s. 313 before us; if we had, I am not at all prepared to say that there is not great force in the view expressed by the learned Chief Justice in the ruling referred to, and what has been said by him to-day, as to the distinction that is to be drawn between the exceptional class of cases falling under s. 313 and those more directly concerned with proceedings in direct execution of a decree. In passing I may, however, say that under the rules which have been framed by the Local Government in accordance with the provisions of s. 320, dated the 20th November, 1880, there is no re-production of the provisions of s. 313, although in all other particulars they have re-produced, for the purpose of guiding the Collector in execution of decrees transferred to him, the provisions of the Civil Procedure Code. It is also noticeable that, in clause 12 of s. 17 of those rules, where reference is made to the setting aside of a sale, the rules say that in the event of the sale being set aside, the Collector may order the refund of the "*fee*," and this seems to be all the Collector has power to refund. Under the Civil Procedure Code, however, upon the setting aside of a sale, the Civil Court has power to order the refund of the purchase-money if it has been paid. The omission in the rules to which I have pointed is possibly due to the [99] circumstance that it is into the Civil Court that the proceeds realized by the sale are to be paid. However, it is not necessary for me to determine whether, in cases under

(1) 9 A. 43. (2) 5 A. 314.

1888 AUG. 1. — FULL BENCH. — 11 A. 94. (F.B.) = 9A.W.N. (1889) 10 = 13 Ind. Jur. 272.

s. 313 of the Civil Procedure Code, I should follow the decision of the learned Chief Justice or should hold a different view. I think it right to say, having been a party to the Full Bench ruling in *Madho Prasad* v. *Hansa Kuar* (1), that what was intended to be laid down there and what was laid down is that where a decree has been transferred to a Collector for execution, his proceedings in execution were not to be governed by the provisions of the Civil Procedure Code, but they were to be governed and were governed by the rules which were made in that behalf by the Local Government; and that considering the objects of those rules and the procedure of the Collector under those rules, s. 244 of the Civil Procedure Code did not apply, and there was no such appeal as there would be from the ordinary decision of the Civil Court in executing decrees, under that section. This is what the Full Bench ruling laid down and that is all it laid down. I agree with the learned Chief Justice that it is a distinct authority for the proposition that when, in the execution of decree transferred to a Collector for that purpose, an application has to be made to set aside a sale which the Collector has held, the application must be made to him and cannot be made to the Civil Court. This being so, I agree with the learned Chief Justice's order that the appeal must be and it is dismissed which costs.

MAHMOOD, J.—I have arrived at the same conclusion, and being one of the Judges who referred the case to the Full Bench, all I need say is that the Full Bench ruling of this Court in *Madho Prasad* v. *Hansa Kuar* (1) governs this case, and that I accept the distinction which the learned Chief Justice has drawn between the Full Bench ruling and his Lordship's own ruling in *Nathu Mal* v. *Lachmi Narain* (2). The exact point raised and decided in that case does not arise in this case. It can scarcely be doubted, and I say this advisedly after having had to deal with the transfer of decrees to the Collector under the provisions of s. 320 and the following sections, that the state of the law, even as represented in the statute, [100] is full of complications and difficulties, and that any attempts that have been made to amend it have scarcely done enough to remove these doubts and difficulties. Instead of having proved a benefit to the judgment-debtor in whose interests those various sections were introduced in the Code of Civil Procedure, they have tended to increase litigation on the one hand, to prevent the decree-holder from obtaining the fruits of his decree, on the other.

Appeal dismissed.

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(1) 5 A. 314. (2) 9 A. 43.

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11 A. 100 = 8 A.W.N. (1888) 288.

11 A. 100 = 8 A.W.N. (1888) 288.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

BHAGWANT SINGH AND OTHERS (*Defendants*) *v.* KALLU (*Plaintiff*).*
[9th August, 1888.]

Act XXI of 1850—Suit by person born a Muhammadan as reversioner in a Hindu family.

Act XXI of 1850, does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s.1 protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a Muhammadan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu law a share in his father's family.

[R., 104 P.R. 1902 ; 23 P.L.R. 1903 ; 77 P.W R. 1907 ; (1911) 1 M.W.N. 432 (437) = 15 C.W.N. 545 = 8 A.L.J. 552 = 13 C.L.J. 575 = 10 M.L.T. 25. D., 32 C. 871 = 9 C.W.N. 1003 = 2 C.L.J. 97; 52 P.W.R. 1907 = 36 P.R. 1909.]

THIS was a suit brought by one Kallu Khan for possession of certain property which had been sold to the defendants by one Musammat Banno, since deceased. The grandfather of the plaintiff, Hari Singh, had three sons, Mohan Singh, Bacha Singh, and Mahipat Khan. Mahipat Khan, who was father of the plaintiff, was converted to Muhammadanism. The property in suit had belonged to Bacha Singh, second son of Hari Singh, and Banno, whose alienation of it was impugned, was Bacha Singh's widow. The plaintiff, who, as well as his father, was a Muhammadan, claimed the property by right of inheritance, under the Hindu Law, to Bacha Singh. The [101] defendants pleaded, *inter alia*, that the plaintiff being a Muhammadan, was not entitled to claim by inheritance any property belonging to Hindu members of the family; and that Act XXI of 1850 was not applicable to the case, inasmuch as it protected only those persons who had actually changed their religion, and not the children of such persons.

The Court of first instance (Munsif of Tilhar) decreed the claim.

On appeal by the defendants, the Subordinate Judge of Shahjahanpur affirmed the Munsif's decree. In the course of his judgment he said :—

"It is contended that Mahipat Khan died before Musammat Banno, widow of Bacha Singh, and consequently the provisions of Act XXI of 1850 do not apply to Mahipat Khan, inasmuch as the plaintiff has not changed his religion, but was born a Mussalman. The Court cannot, however, allow that contention. The provisions of Act XXI of 1850 clearly mean that nobody will be prejudiced in his right of inheritance by a change in his religion. It is not necessary that he himself should have been a convert: it is all the same whether he or his ancestor (father or grandfather) changed their religion......The result is that inheritance follows descent without reference to religion. As the plaintiff is a descendant of Hari Singh and a relative of Bacha Singh, he cannot be prejudiced by belonging to a different religion, and has the same right as if he and his father were Hindus. Under the Hindu Law, the right of the plaintiff's father to inherit from his father or brother was not confined to

* Second Appeal No. 205 of 1887 from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 10th November, 1886, confirming a decree of Maulvi Muhamad Abdul Ghafur, Munsif of Tilhar, dated the 2nd September, 1886.

himself only, but he could transmit it to his children at their birth. Under these circumstances, the children of Mahipat Khan acquired a right on their birth of which they cannot be deprived by a difference in religion. Now there is no male member in the family except Mahipat Khan's sons, and it is therefore clear that they alone can inherit the property as they would have done if there had been no difference of religion. If the transfer were not made by the widow, these persons alone would have inherited the property."

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The defendants appealed to the High Court, upon the ground that the lower Courts had "erred in their interpretation of Act [102] XXI of 1850," and that" the plaintiff, being a born Mussalman, cannot claim inheritance of a deceased Hindu."

Munshi *Nawal Bihari Bajpai*, for the appellants.

Pandit *Moti Lal Nehru*, for the respondent.

JUDGMENT.

EDGE, C. J.—A Hindu named Hari Singh, had three sons, Mohan Singh, Bacha Singh, and Mahipat Singh. Mahipat became a Muhammadan, and the plaintiff in this case is his son. Bacha died childless, leaving two widows surviving him, Kosila and Banno. Kosila and Banno were recorded proprietors of Bacha Singh's share. On the death of Kosila, Banno was recorded as sole proprietrix of the share. Banno sold the property in question to the defendant. Banno has died. The plaintiff claimed the property which was left by Bacha Singh by right of inheritance. The sole question we have to consider in this second appeal is whether the plaintiff, having been born a Muhammadan, can claim as a reversioner to the share of the Hindu family. This in my judgment depends on the construction of Act XXI of 1850. Mr. *Bajpai* for the purchaser, who is appellant here, very ably argued that that Act applies only to a person who has himself or herself renounced his or her religion or been excluded from caste, and that it does not apply to a case like this in which the person claiming by right of inheritance a share in a Hindu family is the son of the person who renounced his religion, and was born a Muhammadan. I was very much struck with the force of Mr *Bajpai's* argument. It may be, no doubt inconvenient that a Muhammadan should be introduced into a Hindu family or a Hindu into a Muhammadan family, but this is a matter for which, if it is a grievance, we, who have merely to interpret the law, are not responsible. We can only interpret the law as we find it, without any consideration for the opinions of those persons whom the law may affect. Prior to the passing of Act XXI of 1850 there was in force in the Presidency of the Fort William, Bengal, a Regulation known as Regulation VII of 1832. Speaking broadly, s. 9 of that Regulation was passed to relieve Hindus or Muhammadans in that Presidency from any disability with regard to the rights of property under Hindu or Muhammadan law, which might have arisen by [103] reason of a Hindu or Muhammadan having changed his religion, or by reason of a Hindu being out of caste. Act XXI is a very short Act, and I propose to read the whole of it:—

"Wheras it is enacted by s. 9 of Regulation VII, 1832, of the Bengal Code, that whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasion; the laws of those religions shall not be permitted to operate to deprive

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such party or parties of any property to which, but for the operation of such laws, they would have been entitled, and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company, it is enacted as follows :—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in anyway to impair or effect any right or inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories "

The first thing to be observed is that the Legislature in the preamble expresses the intention of the Act to be to extend the principle of s. 9 of Regulation VII of 1832 which was then in operation in the provinces subject to the Presidency of Fort William throughout the territories of the East India Company. That being so, one would expect that in the operative part of the Act the principle of s. 9 of Regulation VII of 1832 would not be cut down or curtailed. We have got to see whether Mr. *Bajpai's* argument is correct that the Act, did, in fact, cut down and curtail the principle of s. 9. His argument was that notwithstanding the intention of the Legislature shown in the preamble, the relief extended to the rest of the Company's provinces was by the operative [104] part of the Act limited by the wording of that part to the actual person who might change his religion or be excluded from caste. No one can read s. 9 of Regulation VII without seeing that if Mr. *Bajpai's* argument is correct the operative portion of the Act instead of extending the principle to the rest of the Company's provinces, would have limited the relief it was intended to extend. As I read the operative portion of the Act, it relates to different classes of persons. In the earlier portion it protects any person from forfeiture of right of property by reason of his or her renouncing their religion or being excluded from caste. In the case before us those words would have protected the father of the plaintiff, who was the person who renounced his religion, and they protected him from losing any right which he had. The latter portion of the section, in my opinion, protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. If the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section.

Reading the section as I do, and I think it is the natural reading of the section, I give effect to the intention of the Legislature in passing the Act, which we find expressed in the preamble, and to the principle of s. 9 of Regulatfon VII.

The effect of this construction of the Act is that the appeal is dismissed with costs.

STRAIGHT, J.—I concur.

Appeal dismissed.

11 A. 104=8 A.W.N. (1888) 287.

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11 A. 104= 8 A W.N. (1888) 287.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice, Tyrrell.

DAYA (*Defendant*) v. PARAM SUKH (*Plaintiff*).* [17th August, 1888.]

Defamation—Suit by father in his own right for defamation of daughter—Suit not maintainable.

A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A [105] suit for defamation can only be brought by the person actually defamed, if the person is *sui juris* and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend. *Dawan Singh* v. *Mahip Singh* (1) and *Parvathi* v. *Mannar* (2) distinguished. *Subbaiyar* v. *Kristnaiyar* (3) and *Lukumsey Rowji* v. *Hurbun Nursey* (4) referred to.

[F., 18 M. 250 (251); 5 M.L.J. 65; R., 32 C. 1060 (1068)=9 C.W.N. 847=2 C.L.J. 396; U.B.R. (1872—1892), 617.]

THIS was a suit for damages for defamatory words spoken by one of the defendants in reference to the plaintiff's daughter; and the plaintiff also claimed damages for expenses incurred by him in connection with his daughter's *gauna* ceremony, in reliance upon an agreement between himself and the defendants, and which expenses he alleged had been thrown away in consequence of the defendant's conduct. One of the two defendants was son of the other, and he had been, some years prior to the institution of the suit, married to the plaintiff's daughter. A date was fixed for the celebration of the *gauna* ceremony, and the plaintiff made the necessary preparations for such celebration; but the defendants did not attend. Shortly afterwards the plaintiff went to the defendants to ask for an explanation, and the father then said that the plaintiff's daughter was a person of bad character, and he and his son would take no part in the *gauna*, and would not dine at the plaintiff's house. This statement was alleged to have been made in the presence of several caste-fellows of the plaintiff. The defence to the suit was, *inter alia*, that it could not be maintained by the plaintiff, or anyone other than the person defamed.

The Court of first instance (Munsif of Kanauj) dismissed the suit on this ground, referring to *Oodai* v. *Bhawanee Pershad* (5) and *Subbaiyar* v. *Kristnaiyar* (3).

On appeal by the plaintiff, the District Judge of Farakhabad reversed the first Court's decree and allowed the claim. The Judge observed:—

"I think that the appellant's third and fourth pleas must be admitted. There can be no doubt that the plaintiff suffered defamation of character from the words used by the defendants, and that he is entitled to compensation for it. The case quoted by the lower [106] Court does not apply, for the position of the parties in the two cases is different. That was a case of a possibly not very closely allied relative suing on behalf of a female presumed to be capable of suing for herself; this is a case of a father suing for injury done to himself by words spoken against his daughter of tender age and under his protection. The rulings also quoted by the appellant's pleader from the reports of the

* Second Appeal No. 546 of 1887 from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 5th January, 1887, reversing a decree of Babu Prag Das, Munsif of Kanauj, dated the 23rd September, 1886.

(1) 10 A, 425. (2) 8 M. 175. (3) 1 M. 383. (4) 5 B, 580. (5) 1 Agra, 264.

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Madras and Bombay High Courts are not applicable to the circumstances of the present case. The injury done to the daughter's reputation in the present instance is undoubtedly a personal injury to the plaintiff himself. In the second place, it does not affect the plaintiff's claim on account of pecuniary loss that no compact is proved to having been made for fixing the date of the *gauna*. It is sufficient that the plaintiff was authorized to presume that the ceremony would be performed at some approaching date, and that he made preparations in anticipation of such performance. The plaintiff's witnesses have given a list of items of expense which verify the plaintiff's estimate of Rs. 200 for cost of entertainment ; and his pleader is willing to reduce his claim for damages on other grounds to an equal sum. I therefore reverse the judgment of the lower Court, and give the plaintiff-appellant a decree for Rs. 400 with all costs."

The defendant Daya appealed to the High Court on the ground, *inter alia*, that the plaintiff had shown no cause of action.

Munshi *Nawal Bihari, Bajpai* for the appellant.

Pandit *Bishambar Nath*, for the respondent.

JUDGMENT.

EDGE, C. J.—The plaintiff brought this suit to recover damages for defamatory words spoken by the appellant in reference to the plaintiff's daughter. He also claimed as damages certain expenses being thrown away by reason of the appellants declining to allow his son to take the plaintiff's daughter to his house and refusing to take part in her *gauna*. The lower appellate Court has awarded Rs. 200 in respect of the defamatory words, and Rs. 200 in respect of the expenses claimed. The appellant did not plead that the words were true ; he merely said he had only repeated what he heard. That does not amount to justification. It is contended on behalf **[107]** of the appellant that this suit should be dismissed. On behalf of the plaintiff-respondent it was contended that a Hindu father could in his own right and not suing as general attorney or on behalf of his daughter maintain an action for defamation of his daughter. For that purpose my brother Mahmood's judgment in the case of *Dawan Singh* v. *Mahip Singh* (1) and the case of *Parvathi* v. *Mannar* (2) were cited. The judgment of my brother Mahmood does not, in my opinion, support that contention. That judgment was directed to show that in India an action for defamatory words spoken could be maintained not by any person other than the defamed person, but by the person who was defamed, without the allegation or proof of special damages and under circumstances in which a similar action could not be maintained in England. I have mentioned to my brother Mahmood this contention as to his judgment, and he has told me that he did not intend to lay down a proposition that any person other than the person defamed could maintain the action for defamation. The case in I. L. R., 8 Mad., to which I have referred, was a suit brought by the person who was actually defamed : consequently it has no bearing on this particular point. In my opinion an action for defamation can only be brought by the person actually defamed if the person is *sui juris*, and if the person is not *sui juris*, then under the provision of the Code of Civil Procedure by the guardian or next friend. If any ralative who suffered pain of mind by reason of defamatory language uttered as to another relative, could maintain an action for defamation, the defamer might be liable to as many actions as there were members of the family of the person defamed. It was held

(1) 10 A. 425

(2) 8 M. 175.

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by the Madras High Court in the case of *Subbaiyar* v. *Kristnaiyar* (1), that a brother could not maintain an action for the defamation of his sister. I think that is a right decision. It was held by the Bombay High Court in *Luckumsy* v. *Hurbun Nursey* (2), that the heir and the nearest relative of a deceased person could not maintain a suit for defamatory words spoken of such deceased person, although they were alleged to have caused damage to the plaintiff as a member of the same family. [108] Those two cases show, as I have always understood the law to be, that an action for damages is a purely personal action which can only be maintained by or on behalf of the person defamed. The same principle was applied, although not in an action for defamation, by this Court in *Oodai* v. *Bhowanee Pershad* (3). I am of opinion that so far as this suit is one to recover damages for the defamation of the defendant's daughter, it cannot be maintained. It is not necessary to consider whether the words are actionably defamatory, as we hold that the father has no cause of action in respect of them. So far, I am of opinion that the appeal should be allowed. As to the part of the suit for expenses incurred by the father thrown away by reason of the acts of the defendants, I am of opinion that the appeal should be dismissed. As I understand the finding of the District Judge, the expenses he has allowed have been reasonably incurred by the plaintiff in reliance on the agreement of the defendant-appellant that the *gauna* should be carried out. The appeal as to Rs. 200 for *gauna* will be dismissed with proportionate costs, and the appeal as to Rs. 200 awarded in respect of the alleged defamation will be decreed with proportionate costs.

TYRRELL, J.—I fully agree with the view expressed by the learned Chief Justice and in his order disposing of the appeal (4).

Appeal allowed in part.

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11 A. 108 = 9 A.W.N. (1889) 17 = 13 Ind. Jur. 238.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

MUHAMMAD WILAYAT ALI KHAN (*Plaintiff*) v. ABDUL RAB AND ANOTHER (*Defendants*).* [13th December, 1888.]

Pre emption—Wajib-ul-arz—Mahammadan Law—Refusal by pre-emptor to purchase—Immediate demand—Pre emptor claiming property as to part of which he has disqualified himself from suing.

The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co sharers, and that first a nearer co sharer and next a more distant co-sharer should have a right of pre-emption. Where, such notice having [109] been given, the co-sharer receiving notice took no action thereon within a reasonable time,—*held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase.

A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October, 1884. The plaintiff pre-emptor and his agent becam

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*First Appeal, No. 49 of 1887, from a decree of D. T. Roberts, Esq, District Judge of Moradabad, dated the 23rd December 1886.

(1) 1 M. 383. (2) 5 B. 580. (3) 1 Agra 264.

(4) See *Ajudhia Parshad* v. *Shibbu Mal* (Punjab Record, 1889, No. 27) in which Rattigan and Roe, JJ., held that a Hindu husband could sue in his own right for damages for defamation of his wife.

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aware of the sale shortly after it took place, and many months prior to July, 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July, 1885. It was found as a fact that no such notice was given.

Held that even if such notice was given, it was too late, and was not a prompt demand in accordance with the Muhammadan law.

The principle of the rule that a pre-emptor must claim the whole of the property included in the sale-transaction, and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale.

Where therefore a pre-emptor was disqualified from claiming a portion of the property sold, by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion,—*held* that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified.

[F., 21 A. 119 ; R., 4 O.C. 397 (399); 10 P.R. 1909 = 24 P.L.R. 1909 ; Cons., 12 A. 234 (273, 274) ; D., 17 A. 288 (292) ; 35 C. 575 (595, 596).]

THIS was a suit for pre-emption in respect of a sale, dated the 12th October, 1884, of a share in the village Muhra in the Moradabad district, and a piece of land in the city of Moradabad. The claim in regard to the share in the village Muhra was based on the *wajib-ul-arz*, the pre-emption clause in which was as follows:—

"A sharer wishing to sell or mortgage his share, or a mortgagee to sub-mortgage his mortgagee's rights, shall first communicate his intentions to the nearer sharer, and in the event of his refusal to the one next to him, to sell or mortgage the share for a proper price, and if he also refuses to buy it or pay a proper price, then he shall be competent to transfer it to whomsoever he chooses. If a sharer, the transferor, through enmity or in collusion with the transferee, alleges or causes to be entered in the deed an excessive price, then the question shall be referred to and decided by the arbitrators chosen by the parties. If the parties do not come to a settlement as to price amongst themselves or by appointing an arbitrator, then the Court [110] shall settle it on its own authority according to the quality of the share or the average price paid before for shares transferred in this or other surrounding villages. If the co-sharers fail to pay the price determined by the arbitrators, then the transferor shall be competent to transfer his share to a stranger, and then no claim as to right of pre-emption shall be admissible. If a sharer, the transferor, makes a transfer in favour of his children or near relations, then no sharer shall have a claim for right of pre-emption, and the nearer relations possess a pre-emptive right as opposed to those more remote."

The claim in regard to the property in Moradabad was based on the Muhammadan law.

The Court of first instance (District Judge of Moradabad) dismissed the claim, and the plaintiff appealed to the High Court. The facts are fully stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. *G. E. A. Ross*, Mr. *Abdul Majid*, Mr. *Hamid-ullah*, and Shah *Asad Ali*, for the respondents.

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JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This was a suit for pre-emption. The defendants were Muhammad Abdul Rab, the vendee, and Wahab Ali, the vendor. The plaintiff and the vendor were half-brothers. They were shareholders in the village Muhra. The property which was sold consists of the shares in the village Muhra, and of a small piece of land in Moradabad itself. The purchaser was a stranger. The sale-deed was executed on the 12th October 1884, and the price was Rs. 4,760. It was one sale transaction for the two properties, and one fixed price. There is no doubt that if the plaintiff had chosen to exercise his rights of pre-emption at the time, he is the person who is entitled to maintain an action for pre-emption in respect of each of these properties. The sale of the share in the village Muhra was governed by the *wajib-ul-arz*, and the sale of the Moradabad land was governed by the principles of the Muhammadan law applicable to pre-emption.

[111] In the Court below, it was contended by the plaintiff that the true price was Rs. 4,375, and not Rs. 4,760. That contention has been abandoned here, and there is ample evidence to show that the true price was, as alleged in the sale-deed, Rs. 4,760. It is proved from the evidence that the vendor was in embarrased circumstances, that some of his property, particularly that in this village, was attached under a decree, and that he was making applications early in 1884 for postponement of the sale. It is also proved, in our opinion, that negotiations for the sale of this property in suit were being carried on, certainly in July, 1884, and most probably previously. In the Court below the parties appeared to have agreed that the Muhammadan law was the law governing this case. We do not consider that they are bound by any such agreement as that. It is true, that in one view of this case the principle of Muhammadan law, which we shall refer to later on, may be a bar to the plaintiff's maintaining the action. The plaintiff's case below was, as it has been here, that he first became aware of the sale in July, 1885; and that thereupon he gave a notice required by Muhammadan law declaring himself a pre-emptor. The defendants' case is that the plaintiff knew, if not before the sale, at any rate soon afterwards, of the fact of the sale in question. The plaintiff was the lambardar of the village, and the defendants say that his agent in the village, a man called Budh Sen, knew perfectly well about the sale, and that the plaintiff must have been informed by his agent of what was taking place in the village, in which he was interested, not only as a shareholder, but also as lambardar. Another part of the case is this. It is said on behalf of the defendant that the vendor in February, 1884, gave the plaintiff notice in writing by a registered letter that he was going to sell the property in question to Abdul Rab, the present purchaser, and the plaintiff had not the means or the desire to become a purchaser at that time. There is a contention as to what was the nature of that notice and as to whether any reply was given in fact.

It will be convenient to consider first of all what is the true construction of the *wajib-ul-arz* in this case. It appears to us that the *wajib-ul-arz* in this case made it incumbent on a sharer, who was going [112] to sell, or was desirous of selling, a share in the village, to give notice to his co-sharers. And it was provided by the *wajib-ul-arz* as we read it, that that notice should be given first to the nearer co-sharer, and if he desired to purchase, he was entitled to purchase at what is called a "proper" or, fair price; and if he did not desire to purchase, then the more distant

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co-sharer might purchase at a fair price; and if the more distant co-sharer did not purchase, then the shareholder desiring to sell might sell the share to whomsoever he pleased. It provides also the means by which a "proper" or fair price was to be ascertained in case of dispute. It must be ascertained by arbitration or by a suit in Court. That is to say, the co-sharer who had notice had the right to say—"I will purchase the property at a proper price;" and he had the right also, if he did say that, to have it determined, by arbitration, or by suit, what the proper price was. It was also competent to him, under this *wajib-ul-arz*, to say: "I decline to purchase at all." Now that being the construction which we place upon this *wajib-ul-arz*, we have got to see what was the nature of the notice given to the plaintiff in February, 1884. As we have said, that notice was in writing. It was sent to the plaintiff under a registered cover; the plaintiff received it and gave a receipt for it. But when the plaintiff is called upon to produce the notice, he does not produce it; but he produces a book in which he says he copied the notice in question. He accounts for copying the notice in the book by saying that he was in the habit of copying important notices into the book to provide for the event of their being lost. The Judge below came to the conclusion that that portion of the book which contains what is said to be a copy of the notice in question was an interpolation. We are not disposed to disagree with him on that point. Assuming, for the purposes of argument, that it is a genuine copy, it is wide enough in our opinion, and sufficiently informed the plaintiff that Wahab Ali was proposing to sell his shares in the villages in the district of Moradabad. The copy shows that Wahab Ali asked the plaintiff to inform him if he wished to purchase the share in any of those villages. We think, therefore, that so far as the giving of a notice was concerned, the vendor complied with the requirements of this *wajib-ul-arz*. The question then arises:—Was any [113] and what reply sent to that notice? The plaintiff says that he did send a written reply to the effect:—"If you sell, I will purchase." He was asked how he sent the reply, and he gave no satisfactory account of it. He was asked whether he wrote it himself. He said it was written by someone else, but was unable to say who was the person who wrote it. He kept no copy of it, although he had in his hands the present vendor's notice to him, and says that he took the precaution of copying that into his book. As he says, he kept no copy of the reply which he alleges he sent, written by a person whom he does not know. Now unfortunately in this case, Wahab Ali has not given evidence. The defendant-vendee is not to be blamed for that; he took all the necessary steps to procure his attendance in Court. So that we have here no direct contradiction to the statement of the plaintiff that he did send that reply. We have, however, evidence which we believe, which is absolutely inconsistent with the plaintiff ever having sent such a reply at all. We know that at that time he was a man involved in debt. We have the evidence of the defendant-purchaser, who tells us that Budh Sen, the plaintiff's particular agent for his village, had told him plainly that he, Budh Sen, as well as his master, the plaintiff, agreed to the sale; and that Budh Sen had told him that he had advised his master to purchase the village, as it was a large one, but his master would not agree to take it. We have also got the evidence of Bulaki Das on this point. He says that Budh Sen told him of his own accord that he and his master were delighted at Abdul Rab becoming a purchaser. We have also got the answer to interrogatories of Hakim Ashgar Ali, in which he tells us that he knew that the plaintiff

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was not willing to purchase the property at the time; and further, with regard to the property which was sold by Zohra Begam, on the 22nd March, 1885, that the plaintiff, when asked whether he would purchase, said that he had not got the money.

Now we have come to the conclusion that the plaintiff has failed to prove that he did, in fact, reply that he would become the purchaser in the event of the property being sold. If, as we are assuming, he simply took no action within a reasonable time, on the notice [114] of February, 1884, that in our judgment was equivalent to an intimation that he declined to become a purchaser. If failing to take action within a reasonable time is not to be held equivalent to a declining to purchase, the result would be that a sharer wishing to sell property to which a *wajib-ul-arz* such as this applies, would practically be unable to dispose of the property at all without the risk of a pre-emption suit. Now on that ground alone we think that the plaintiff would fail in this suit, so far as the share in the village is concerned, to which the *wajib-ul-arz* applies. What we mean is that he had notice that he could purchase, and he acted in such a way as to lead the vendor to conclude that he would not interfere and would not become the purchaser. Of course in all these cases the particular wording of the *wajib-ul-arz* is to be looked at to see what was the custom or contract between the shareholders of the village. The next point to be considered is, when did the plaintiff or his agent know that the sale to the defendant had actually taken place? The patwari of the village knew in July, 1884, that the sale was being negotiated, and in that month he called upon Abdul Rab, the purchaser, to give him information as to the area and rent of the village. He tells us that Budh Sen informed him that two years before the time he was giving his evidence, he called upon the purchaser to make a salaam to him as a new shareholder in the village. He gave his evidence on the 15th September, 1886, so that although two years had not expired from the actual date of the sale, it is pretty evident that the patwari called upon the defendant to make his salaam shortly after the sale, and it is also proved by him that the person who told him that the sale had taken place was Budh Sen. The evidence of the defendant and of Bulaki Das shows not only that Budh Sen knew of this sale about the time, but also that the plaintiff must have known of it too; and that at that time the plaintiff was acquiescing in the sale. Then again there is a letter from Budh Sen to the defendant-purchaser, of the 4th February, 1885, which accompanied a present of some sugar-cane juice. That letter and that present of the sugar-cane juice to our mind evidence corroborative of that given by Bulaki Das as to Budh Sen's knowledge. There was no possible reason why that letter should have been written or [155] that present sent if Budh Sen did not know that he was writing the letter and sending the present to a new share-holder in the village. Consequently we come to the conclusion that not only Budh Sen but the plaintiff knew shortly after the sale of the fact that a sale had taken place but that they had known that fact many months prior to July, 1885. That has an important bearing on one view of the law, which we think is applicable to the case. The property in Moradabad was property not affected by the *wajib-ul-arz* in this case. It was a property which was subject to the ordinary Muhammadan law of pre-emption. It was incumbent on the plaintiff to show that on his obtaining knowledge that the sale had taken place, he gave without delay notice that he claimed to exercise his right of pre-emption. He does not claim to have given such notice until the 17th July, 1885, and he has attempted to prove that it was not until that date

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that he became aware of the sale. He has called some witnesses to show how it was that he became aware of the sale in July, and gave the alleged notice. Those witnesses say that the vendor Wahab Ali told them that the price was Rs. 4,275; in fact, if that is true, he had gone out of his way to give the information. As a fact the price was Rs. 4,700 odd. But it was part of the plaintiff's case, here, and in the Court below, that the price alleged in the sale-deed was an untrue one, and that the true price was Rs. 4,275. We do not see why Wahab Ali shoud have given false information of that kind, or what interest he could have had in giving it; particularly when he was on unfriendly terms with the plaintiff, his half-brother. We believe that the story of those witnesses, as to the statement with regard to price, was a false story, brought in for the purpose of supporting the plaintiff's case that Rs. 4,700 was not the real price. Now the whole of the evidence relating to what we may call the July incident, appears to us to be too well prepared. It appears to us to be evidence that has been prepared for the purposes of this suit. The plaintiff says that he sent a written notice in July. It is curious that although he gave two notices to the defendants to produce documents in this case, the written notice is not included in either of them. We believe that this evidence as to the July incident was concocted, partly with the intention of disputing the true [116] price of the property, and partly to get the plaintiff over the difficulty in which he was with regard to the rules of the Muhammadan law as to making a prompt demand to purchase as a pre-emptor. On that point it has been pointed out by Mr. *Ross* that when there were negotiations in October and November, 1885, for the settlement of this case between the plaintiff and the purchaser, there is not a single thing to suggest in the correspondence, so far as we have seen, that any such notice had been given in the previous July. That was hardly to be overlooked. We have said we have come to the conclusion that no such notice was given, and if it was given, then we still think it was too late, and was not a prompt demand.

This raises another question in this case. It is a question on which although we have formed an opinion, we express that opinion with some hesitation. There can be no doubt that a plaintiff coming into Court in a pre-emption suit, if he is a person having a right to claim the whole property sold, must in his suit make that claim. That is he cannot come into Court and claim a portion only when he is entitled to the whole. That is we think settled law. That question has been considered in the cases of *Kashi Nath* v. *Mukhta Prasad* (1), *Arjun Singh* v. *Sarfaraz Singh* (2), as well as in many other cases decided in this Court. According to the judgment of Mr. Justice Mahmood in one of those cases, the plaintiff must claim the whole of the property included in the sale-deed, if he is a person entitled to claim it, and his action must stand dismissed if he fails to claim the whole of that property. Mr. Justice Mahmood has expressed his reason for that view of the law, and it appears to us that that is a rule of law which is consistent with commonsense. The pre-emptive plaintiff should not be allowed to take, for instance, the best portion of the property brought, and leave the worst on the hands of the purchaser, or on the hands of the vendor. It is said here that the plaintiff is willing to pay the full purchase-money, and leave in the hands of the purchaser the property in Moradabad. Possibly in this particular case the purchaser would not be a sufferer if that was accepted. But we can understand cases

(1) 6 A. 370. (2) 10 A. 182.

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in which the purchaser was induced to take property, which otherwise he [117] would not have taken, in order to obtain the sale to him of other property which he desired. In such a case as that it might well be that although the whole of the purchase-money was refunded to him, it would be to his disadvantage to be left with the incumbrance of a portion of the property. The question then arises, can there be any difference between the case of a plaintiff coming into Court and claiming a portion of the property sold, and the case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us there can be no difference in principle; and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court, and has claimed a part only, when he was entitled to claim the whole. In the view which we take, the plaintiff was disqualified from claiming the property in Moradabad, and we think that disqualification would prevent him from maintaining his suit for any portion of this property which was included in one common sale, and for which one price was paid. There is one word more to be said, and that has reference to the point raised by Pandit *Ajudhia Nath* with regard to a receipt given by the vendor in November, 1884. The Judge below has explained that circumstance on the hypothesis as to family arrangement which had existed between the vendor, the plaintiff, and the other members of the family. We are not satisfied with that explanation, and do not think that it is a correct one. But we are also not satisfied that the money acknowledged to be received then was money which became due out of the sale to the defendant-purchaser. There are certain other receipts which were tendered in evidence before us. They are not on the record, and we have not looked at them, being of opinion that they were not proved and were not admitted by the defendants in the suit.

Shortly, in the result, we are of opinion that the plaintiff's claim must fail so far as the share in the village Muhra is concerned, [118] because we find that the defendant-vendor did all that was required of him by the *wajib-ul-arz* and the plaintiff did not avail himself of the right of purchase given by that *wajib-ul-arz*. We find also that the suit must fail as to the Moradabad property, because the plaintiff did not make a prompt demand as pre-emptor; and also for the reason we have just now explained, the suit must fail not only with regard to the Moradabad property, but also with regard to the share in the village; the plaintiff, having disentitled himself to obtain pre-emption in the Moradabad property, cannot obtain the share in the village. The appeal is dismissed with costs.

Appeal dismissed.

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JULY 12.

APPEL-LATE CIVIL.

11 A. 118= 9 A.W.N. (1889) 72.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

LOKE INDAR SINGH AND OTHERS (*Plaintiffs*) v. RUP SINGH (*Defendant*).* [12th July, 1888.]

Unconscionable bargain—Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (*Contract Act*), *s.* 23.

For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the moneys borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bona fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

[119] *Held* that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class or professional money lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of the defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms.

Held also that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiff's motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back: that simple interest at 12 per cent. per annum on the amounts of the bonds for that period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case; and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment.

Chunni Kuar v. *Rup Singh* (1), *Raja Sahib Prahlad Sen* v. *Babco Budhu Singh* (2) and *Bowes* v. *Heaps* (3) referred to.

[F., 11 A. 128; R., 26 P. R. 1906=20 P. L. R. 1906; 115 P. R. 1908; 1 S. L. R. 21; 10 O.C. 173 (176).]

[*N. B.* **Read in this connection 11 A. 57** ***supra.***]

* First Appeal, No. 125 of 1886, from a decree of Maulvi Mahammad Abdul Basit Subordinate Judge of Mainpuri, dated the 24th April, 1886.

(1) 11 A. 57. (2) 12 M. I. A. 275. (3) 3 Ves. & B. 117.

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11 A. 118 = 9 A.W.N. (1889) 72.

THE facts of this case are stated in the report of *Chunni Kuar v. Rup Singh* (1) and in the judgments of the Court.

The suit was based on a deed of sale executed in favour of the plaintiffs by the defendant on the 13th March, 1882, in the following terms:—

"I, Raja Rup Singh, son of Raja Mukat Singh, caste Thakur Sengar *rais* of Bhara, pargana Uraiya, zilla Etawah, do hereby declare as follows:—Whereas I instituted a suit against Rani Baisni, widow of Raja Mohendra Singh, deceased, caste Thakur, *masnad-nashin* (occupying the throne) of the Bhara Raj, and the Collector of Etawah as the manager of the Court of Wards, for recovery of possession of the Bhara estate, containing of moveable and immoveable property, specified in the plaint, at a valuation of Rs. 3,10,265-8 in the District Court of Mainpuri, where it was dismissed. As I was [120] possessed of no means, it was difficult for me to file an appeal in the High Court, and I appealed by giving a bond to Musammat Chunni Kuar, widow of Sah Panni Lal, *rais* of Marehra, zilla Etah, but unfortunately for me the appeal was dismissed. Thus arose the necessity for filing an appeal to the Privy Council. It is clear I have not a pice, and my only hope for justice lies in an appeal to the Privy Council. I have therefore with entreaties got Raja Loke Indar Singh, Shaikh Narsat Hussain, Lala Bhikari Das, Munshi Har Narain, Bibi Chunni Kuar and Kuar Dharam Singh, persons belonging to the first class given below, to consent that they should meet the costs of the Privy Council including security, by way of a help to me, and should in lieu thereof be the proprietors of an eighth share of the property involved in the case, with the exception of those articles. They have accepted the proposal and deposited the security and the translation fees, and have undertaken to pay the other expenses of the Privy Council appeal. Dewan Ganga Prasad has, from the very beginning, tried in the case, and I owe to him his pay and compensation for his labour. I have got him to agree to take Rs. 5,000 out of the second class of the claim, *i e.*, that for debts when the case is decreed. I do therefore willingly and voluntarily and while in a sound state of my body and mind execute this deed in favour of the following persons:—

"My suit consists of four claims:—

"1. For mauza Bhara the Raj Mahal, together with other villages appertaining to it, bearing a jama of Rs. 34,463-8, five times of which, *viz.*, Rs. 1,72,317-8, is given in the plaint as the valuation.

"2. Outstanding debts of the estate amounting to Rs. 64,155.

"3. Notes worth Rs. 21,020.

"4. Cash and the gadhi, &c., valued at Rs. 52,703.

"Of these four claims, the last two have been exempted from this contract; and I hereby sell the first two claims, amounting to Rs. 29,559-1 to the first class of the following persons, and Rs. 5,000, out of Rs. 56,135-4, the balance left after deducting Rs. 8,019-12, the eighth share referred to above, from the said sum of Rs. 64,155, the second sort of claim, to Dewan Ganga Prasad. The consideration of this sale as against the first class of vendees is Rs. 12,500, the estimated cost of the Privy Council appeal, consisting of Rs. 4,000 for the security of the Privy Council costs, and Rs. 8,500 for the translation of papers, the pleader's fee and other expenses, of every sort in the said department, and as against the second class of vendees, Rs. 2,500, which has been agreed to be his pay from the beginning of July, 1877, *i e*, the institution of the suit. Thus the whole amount of the sale-consideration is Rs. 15,000, with reference to which the court-fee has been paid. I or my heirs, successors and representatives shall not question the genuineness of this sale-deed. The sale-deed shall be acted upon on the following conditions:—

"1. The names of the purchasers and the details of the shares are given at the foot of the sale-deed, and according to them they shall be the sharers in the property sold, and in proportion to their respective shares, they shall be liable to pay the sale-consideration, *viz.*, security and other expenses of the appeal to the Privy Council.

[121] "2. After the passing of a decree by the Privy Council, the purchasers shall have the power to join me in the execution of the decree, to the extent of their share under this sale-deed, and obtain possession of the property sold, and I shall make them co-sharers under this sale-deed. Should there be any remissness on my part in the conduct of the case, or should I come to terms with the opposite party, or there be any apprehension of a failure of the case by any reason, accident or unforeseen event, and even in the absence of any such cause, if the purchasers have any desire to join in the case, they shall have the power, under this document, to join with me to the extent of the property sold, and get their names recorded as the appellants.

(1) 11 A. 57.

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"3. In connection with the powers mentioned above, it has been agreed upon that after the passing of the decree, the purchasers of the first class shall have an eighth share in all the villages concerned. Should I offer to give in lieu of the above entire villages, excepting villages, 1 Bhara, 2 Haroli, 3 Sikranri, 4 Agana, 5 Barera, 6 Gauhani Kalan, 7 Mahewa, 8 Sijanpur, 9 Athesa and 10 Malgawana, yielding profits equal to an eighth share, they (purchasers) shall accept the same without an objection after seeing that the profits amounted to an eighth share.

"4. The purchasers have no concern whatever with the costs already incurred in the lower Courts, and they are not liable or responsible for the same, for they had no concern with the case so long as it pended in the lower Courts. They are only liable for costs that may be incurred in the Privy Council, in respect of which a security has been deposited. They have accordingly deposited the security-money. The remaining expenses are those which may be made on behalf of the appellant.

"5. I am liable to satisfy the old bond executed as between myself and Chunni Kuar, and the demand of the pleaders in the District Court, according to the terms of the deed in their favour. The purchasers, their property or the property sold shall have no concern with the same. The purchasers will get the property free from all liability.

"6. In lieu of the pay of Dewan Ganga Prasad, who has, ever since the institution of the suit, taken great pains to help the conduct of the case, I have sold to the said Dewan Rs. 5,000, out of Rs. 56,135-4, the balance of the debts due to me, forming the second class of claim. After the decree, he and his representatives and heirs shall have the right and power to recover it under this sale-deed, from the debtors, from myself or from the property claimed in this case. I, my heirs and representatives shall have no objection. I have therefore executed these few words by way of a sale-deed, that they may serve as evidence and be used when needed."

In pursuance of this agreement, the plaintiff deposited in the High Court a bond for Rs. 4,000 as security for the appeal, and advanced sums aggregating Rs. 7,542 for translation and other expenses. The defendant on the 24th April, 1884, obtained a decree in the Privy Council, reversing the decision of the High Court and awarding him possession of the estate claimed by him in that [122] suit, and an application for review of judgment was rejected by the Privy Council on the 29th November, 1884. The plaintiffs, on the 31st January, 1888, brought this suit against the defendant for possession of the property conveyed by the deed.

The Court of first instance dismissed the claim, on the ground that the agreement contained in the deed of the 13th March, 1882, was unconscionable, extortionate, and opposed to public policy. The plaintiffs appealed to the High Court.

Upon the case coming on for hearing before Edge, C.J., and Tyrrell, J., the appellants, through their Counsel, informed the Court that in the event of the Court's decree being in their favour they were willing to take, in lieu of the one-eighth share included in the deed, compensation in money equivalent to the share. The Court directed that a commission should issue to the Collector of Etawah requesting him to make an investigation into the market-value, on the 1st December, 1884, of the villages in which the one-eighth share was claimed, and to report thereon to the Court. The Collector reported the market-value of the villages in question on the 1st December, 1884, to have been 4 lakhs of rupees. It thus appeared that the value of the one-eighth share conveyed by the deed of the 13th March, 1882, was Rs. 50,000. The case again came on for hearing before Edge, C. J., and Tyrrell, J.

The Hon *T. Conlan*, the Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellants.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J. and TYRRELL, J.—The suit was brought in the Court of the Subordinate Judge of Mainpuri on a sale-deed executed by the

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defendant on the 13th March, 1882. The Subordinate Judge dismissed the suit with costs. From that decree this appeal has been brought. We have in our judgment in *Chunni Kuar Rup Singh* (1) stated nearly all the material facts which were antecedent to the execution by the defendant of the sale-deed of the 13th March, 1882, and also the result of the litigation in the previous [123] suit, in which the now defendant obtained possession of the Raj Bhara estate and the accumulated income of that estate. So far as the facts concerning the execution of the deed in this case are concerned, there is but little to add. Those facts are given in detail in the evidence of Muhammad Mohsin, which we believe.

We have no doubt, in fact we find, that the defendant perfectly well understood the nature and effect of the deed of the 13th March, 1882; we also find that his agents who negotiated that transaction acted *bona fide* and to the best of their powers in the interest of the defendant, placed as he was in a position of great difficulty at the time. Of anything like actual fraud or of any deception on the part of the plaintiffs or the defendant's agents, we find there was none. It has been contended on the part of the defendant, that, having regard to the judgments of their Lordships of the Privy Council in the case of *Raja Sahib Prahlad Sen* v. *Babu Budhu Singh* (2) we cannot give any relief whatsoever to the plaintiffs here. That case was one essentially different from the case before us. In that case the assignee or vendee was not the person seeking to enforce the contract. The person there who was seeking to enforce the contract was a person who had purchased the contract from the original vendee for a comparatively small sum. It was plain in that case that if the plaintiff failed to enforce the contract he had purchased, he was not in a position to fall back on and ask for the consideration his assignor had given. That was not the right which he had purchased. There is the other distinction between that case and this, that here the plaintiffs performed all that they undertook to perform, whereas in the case of *Raja Sahib Prahlad Sen* v. *Babu Budhu Singh* (2) the original vendee had not nor had the assignee performed the vendor's part of the contract. There were two other cases referred to which in the view we take of the case we need not consider. On behalf of the defendant it was also contended that it was a gambling transaction, that the bargain was unconscionable, and that to enforce the contract would be against public policy. In *Chunni Kuar* v. *Rup Singh* (1) we have given expression [124] to what we have conceived to be the law bearing on cases of this kind. In this case undoubtedly the defendant was in a position of very great distress, his suit had been dsimissed in the Court of the Subordinate Judge, his appeal from the decree of the Subordinate Judge had been dismissed by this Court, he was without any means, and unless he obtained assistance on such security as he could offer, he could not have filed or prosecuted his appeal to the Privy Council. So far as we have been able to ascertain, he had not even the means of subsistence. That he had a good case; was proved by his success in the appeal to the Privy Council. That people generally considered that his case was a bad one, may be inferred from the difficulty he met with in procuring the means to appeal to the Privy Council. At that time he had the decrees of the two Courts against him. The plaintiffs in this case did not seek the defendant. They did not press the defendant to accept the terms contained in the deed of the 13th March, 1882. It was the defendant and his agent who put

(1) 11 A. 57. (2) 12 M.I.A. 275.

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pressure on the plaintiffs to advance the money on the terms contained in that deed. Some of the plaintiffs are not money-lenders by profession. Two of them are independent gentlemen who were residing on their own estates. That the defendant, even after he had obtained his decree in the Privy Council, never thought there was anything unconscionable in the transaction may be inferred from the fact that it was he who proposed that the plaintiffs, instead of taking the shares in the village assigned by the deed of the 13th March, 1882, should take a sum of Rs. 50,000. At that time apparently this defendant Raja, thankful for the assistance which had been rendered to him, an assistance which placed him in the position of a wealthy man and relieved him from the position of being a man without the means of subsistence, honestly intended to perform his contract and discharge the debt which he had incurred. It was not until after that time that this gentleman thought it advisable, having obtained all the benefit which he needed from the use of the plaintiffs' money, to invoke the assistance of the law to enable him to avoid the performance of a contract which the plaintiffs believing in his honour had treated as a valid contract, and on which they had advanced their money and incurred liability. There [125] is in our judgment a very wide difference between this case and many other cases in which persons interfere in litigation not their own for their own benefit. If the plaintiffs here had been professional mukhtars, vakils or person of that class, or if they had been professional money-lenders who had taken advantage of the position of the defendant to obtain from him a contract of this kind, we should without hesitation have given them no relief whatever. But they are not persons of that class, they had not volunteered their assistance to promote the litigation; they had given reluctantly this assistance to help a neighbour in a case which was apparently almost hopeless at the time. They trusted in the honour of the Raja as a native gentleman. He had no security to offer except what then appeared to be the chance of his succeeding in a case in which he had been twice defeated. We confess that in this case our syampathies are entirely with the plaintiffs; and we do not refuse to decree their claim for possession of the share out of any sympathy for the defendant. As we have pointed out in the judgment we have already referred to, the fact that the borrower had fruitlessly sought assistance from other persons who refused the bargain on the ground that it was not advantageous, has been held by the Courts in England to be merely proof of the distress of the borrower and not evidence that the bargain was a fair one and not an unconscionable one. In this case, judging by the disproportion between the liability which the plaintiffs incurred under the contract and the amount of the reward which they were to obtain in the event of the defendant succeeding in the Privy Council, we are compelled to conclude either that the plaintiffs did not believe that the defendant's claim in the action was well-founded, and consequently entered although unwillingly into a gambling transaction, or that if they did believe that his claim was well-founded, then the reward which under their contract they were to obtain was excessive and unconscionable. In either event, we could not enforce this contract in its terms. As was said by Sir William Grant in the case of *Bowes* v. *Heaps* (1), "It is not, however, every bargain which distress may induce one man to offer that another is at liberty to accept." It is true that Sir William [126] Grant was dealing in that case with a reversioner or a remainderman,

(1) 2 Ves. B. B. 117.

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but we are told by their Lordships of the Privy Council that the doctrine of equity which applies in those cases is to be applied in India and apparently in cases which it would not be applicable in England. If we are to apply that doctrine of equity in favour of the borrower, we should also apply the doctrine of equity in such case in favour of the lender. It is contended in this case on behalf of the defendant that we should not even give a pice to the plaintiffs who advanced their money and deposited their security-bond in this Court. As we have said, if this was a case in which we had reason to suspect the motive of the lenders, we would without hesitation leave them without any remedy so far as we are concerned. But this is a totally different case, and we think it would be inequitable on our part if we were to relieve the defendant from all liability to the plaintiffs. On the 31st January, 1881, the plaintiffs deposited in this Court their security-bond for Rs. 4,000 as security for costs to be incurred in the Privy Council. Their Lordships of the Privy Council gave judgment in the appeal in March or April, 1884, in favour of the defendant. On the 21st April, 1884, the Registrar of the Privy Council gave notice of the decree under the seal of the Council. Allowing for the course of the post, the plaintiffs at the earliest could not have obtained their bonds from this Court before the 21st May, 1884. We think that it is only fair between these parties that the defendant should be obliged to compensate the plaintiffs for the use of their bonds during that time, that is to say, from the 31st January, 1881, until the 21st May, 1884. We think that a most reasonable compensation to be paid by the defendant to the plaintiffs for the use of their bonds for that time is simple interest at 12 per cent. *per annum* on the amount of those bonds for that period. The plaintiffs advanced Rs. 783 for expenses of translation and printing of the documents in this Court; of that sum Rs. 691 was actually paid into this Court by the 10th May, 1881, and from that date we allow interest on that sum until the date of our decree at 20 per cent. per annum. Rs. 92 of the Rs. 783 were paid by 22nd September, 1882; the precise date we cannot ascertain, but this is the date on which the papers were forwarded [127] to the Privy Council, and similar interest is allowed on the Rs. 92 from the 22nd September, 1882, until the date of our decree. Then comes the item of Rs. 4,759; that money was advanced, a great portion of it in the early months of 1883, and the whole of it by the 1st August, 1883. We take that as a lump sum and we take the date of the 1st August, 1883, a date rather in favour of the defendant, as a starting point for interest, and we allow on that sum of Rs. 4,759 similar interest to the date of our decree from the 1st August, 1883. There only remains a sum of Rs. 2,000. This was a sum which was advanced by those parties for the purpose of the review. Unfortunately Pandit *Nand Lal*, a well-known pleader of this Court, who might have given us precise information on that point, is not now alive, but we know from the evidence that a sum of Rs. 2,000 was advanced for the purpose of the review which was applied for in the Privy Council, and we conclude that it must have been advanced before the 29th November, 1884, as on that date their Lordships of the Privy Council rejected the application for review. We allow similar interest on that Rs. 2,000 from the 29th November, 1884, to the date of our decree, and we decree that the defendant do pay to the plaintiffs the several sums mentioned by us together with interest from the date which we have mentioned. We do not include in the amount decreed the amounts for which the bond was given. We also decree the costs of this litigation to

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be paid by the defendant to the plaintiffs, and further decree that the amount above indicated which we may call debt and costs will bear interest at 6 per cent. from the date of our decree till satisfaction and payment. The result is we allow with costs this appeal to the extent indicated by us (1). *ppeal allowed in part.*

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APPELLATE CIVIL.

[128] *Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

HUSAIN BAKHSH AND ANOTHER (*Plaintiffs*) *v.* RAHMAT HUSAIN AND ANOTHER (*Defendants*).* [28th July, 1888.]

Agreement opposed to public policy—Speculative transaction—Act IX of 1872 (*Contract Act*), s. 23.

For the purpose of meeting the expenses of a suit for possession of immovable property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that, if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000.

Held that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 per cent. per annum. *Chunni Kaur* v. *Rup Singh* (2) and *Loke Indar Singh* v. *Rup Singh* (3) referred to.

[R., 10 O.C. 173 (176); 115 P.R. 1908; 1 S.L.R. 21.]

THE facts of this case were as follows. The plaintiffs, Husain Bakhsh and Nabi Bakhsh, brought a suit against one Ram Sarup to recover possession of 51 bighas 11 biswas 4 dhurs of land, of which he had dispossessed them. At the time when they brought the suit they were in pecuniary difficulties, and apparently the period of limitation within which the suit had to be instituted was about to expire. For the purpose of meeting the expenses of the litigation, they, on the 20th January, 1881, executed, jointly with the defendants, Rahmat Husain and Amanat Ali, an agreement whereby it was provided, *inter alia*, that the defendants should pay all the plaintiffs' expenses of the suit from the Court of first instance to the High Court, and that, in consideration of such payment, and in the event of the plaintiffs being successful, the defendants should be [129] entitled to half the land recovered with half mesne profits and all costs incurred by them in the suit. The suit was then brought, both the plaintiffs and the defendants in the present suit being plaintiffs, on the 1st February, 1881, and on the 11th April, 1882, was decreed by the High Court on appeal. In execution of the decree, the decree-holders obtained

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* Second Appeal No. 32 of 1887 from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 16th August, 1886, reversing a decree of Babu Abinash Chander Banerji, Subordinate Judge of Allahabad, dated the 10th February 1885.

(1) See *Fry* v. *Lane* (L. R., 40 Ch. D., 312). (2) 11 A. 57. (3) 11 A. 118.

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possession of the land and realized the profits and costs in suit. On the 17th May, 1884, the defendants were recorded in the revenue registers as proprietors of 25 bighas 15 biswas and 12 dhurs, half the land so recovered, notwithstanding objections raised by the plaintiffs.

The plaintiffs thereupon instituted the present suit for recovery of possession of the 25 bighas 15 biswas 12 dhurs and mesne profits, on the ground that the agreement of the 20th January, 1881, so far as regarded the stipulation for giving half the land originally sued for to the defendants, was illegal and void. In defence the defendants contended that the agreement was freely and voluntarily executed by the plaintiffs for good consideration, and that they were entitled to retain possession.

The Court of first instance (Subordinate Judge of Allahabad) decreed the claim. Upon the material issue in the case the Court's judgment was as follows :—

"It appears that on the 19th September, 1882, the plaintiff, Nabi Bakhsh, mortgaged his one-fourth share in the land to Ghazi for Rs. 1,000. The plaintiff contends, therefore, that the whole land, or 51 bighas 11 biswas 4 dhurs is worth more than Rs. 4,000, and so the half of it in the defendants' possession is worth Rs. 2,000 ; and the defendants have not questioned this allegation in their written statement. In the agreement itself half of the land, or 25 bighas 15 biswas 12 dhurs, is valued at Rs. 830, and in the former suit the 51 bighas 11 biswas 12 dhurs, were valued at Rs. 1,660. It is not shown how that former valuation was made. The fact that one-fourth of the land has been actually mortgaged for Rs. 1,000 cannot be ignored.........................The witness Mannu, whose evidence has not been rebutted, swears that the 12 or [130] 13 bighas mortgaged to him yield him a profit of Rs. 30 a year. At that rate also, the plaintiffs' present valuation of the land does not appear to be excessive.

"Then, as to the risk run by the defendants, I sent for the records of the former suit, and they showed that the amount actually spent by them in the three Courts was Rs. 368-10-0 and the amount spent by Ram Sarup was Rs. 222-1-0. If the suit had failed, the defendants would have had to pay Ram Sarup costs. The defendants underwent a risk, therefore, of losing Rs. 590-11-0.

"For this risk the agreement gave the defendants not only all their costs, but also as a reward half the mesne profits, or half of Rs. 347-4-6 (the amount which Ram Sarup paid on account of mesne profits on the 4th September, 1883), and also half the land, which I now find to be worth about Rs. 2,000, and to yield a profit of Rs. 100 a year.

"Now, the question which I have to determine in this case is, whether the plaintiffs are entitled to avoid this agreement, that is, whether they are equitably entitled to be relieved from its effects by paying some reasonable money compensation to the defendants for their trouble and expense in the former suit, for it is on such terms that the plaintiffs themselves wish to be relieved from the effects of the agreement.

"There is no specific law against maintenance and champerty in this agreement, but champertous agreements of this kind have always been looked upon with disfavour by the Courts on the ground that they are against public policy. The matter has been fully and elaborately discussed in the well-known case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) by the Judicial Committee of the Privy Council. After an

(1) 4 I.A. 23.

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exhaustive examination of the numerous rulings and authorities on the point, their Lordships lay down the following propositions, which we are bound to accept for our guidance. [The learned Subordinate Judge read the passage reported [131] at p. 46 of the fourth volume of the Law Reports, Indian Appeals, and quoted in the case of *Chunni Kuar* v. *Rup Singh* (1), and continued :—]

"Applying these rules to the present case, I am of opinion that the agreement in dispute is 'extortionate and unconscionable, so as to be inequitable against' the plaintiffs, and that the recompense provided for by it is not 'reasonable.' The purport of the agreement was that, for an outlay of about Rs. 350, the defendants were not only to get that money but also half the mesne profits and half the property. The pecuniary value of that recompense I find to be nearly Rs. 2,200, or about seven times the outlay. In the result, the defendants not only got their outlay, but make a clear profit of nearly Rs. 200 in cash, and of about Rs. 2,000 in valuable immoveable property.

"The case which I find to be most similar to this case is that of *Grose* v. *Amirtamayi Dasi* (2). [The learned Subordinate Judge, after stating the facts of that case, continued :—] I think that the reasons for which Bamasundari's agreement was set aside are quite applicable to this case, and that, so far as the plaintiffs' agreement gives a moiety of the land in suit to the defendants, it ought to be set aside, and the plaintiffs ought to be relieved from its effects. He, who seeks equity, however, ought to do it himself. Acting on this principle, the plaintiffs have rightly agreed to give the defendants a fair and reasonable compensation for the advances made by them in the former litigation, and they have agreed that the amount that may be found due to the defendants may be made a charge on the moiety of the land that is now in their (the defendants') possession."

The Court decreed the claim, directing that the plaintiffs should pay the defendants, as compensation for the advances made by them, Rs. 330, with interest at the rate of 12 per cent. per annum, and that each side should bear its own costs.

[132] The defendants appealed from this decree to the District Judge of Allahabad. The principal portion of the judgment on the appeal was as follows :—

"On the main issue as to whether the plaintiffs-respondents are entitled to escape from the fulfilment of an agreement deliberately entered into, I do not agree with the conclusions arrived at by the lower Court. The circumstances of the case do not correspond with those of the case quoted by the lower Court, *Grose* v. *Amirtamayi Dasi* (2). That was a case in which an extortionate bargain had been driven with a widow, under which the person supplying the funds for litigation was to get a clear moiety for himself, and to have a charge on the other moiety for recovery of all moneys expended with interest. The claim was resisted not by the widow herself, but by her heirs. Here the plaintiffs are grown-up men of fifty and thirty-five respectively, and presumably able to take care of themselves. There is no evidence to show, or reason to believe, that they were taken undue advantage of, and it is they themselves (and not others whose rights they have given away) who seek to evade the fulfilment of what appears to have been a fair bargain. The bad faith of the plaintiffs-respondents is apparent in their attempt to shuffle out of

(1) 11 A., at pp. 66, 67. (2) 4 B.L.R., O.C.J. 1.

heir agreement on the pretence that the defendants-appellants had not done their part,—a pretence clearly exposed by the lower Court.

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"The remuneration secured to the defendants-appellants was, no doubt, considerable; but there is nothing to show that the transaction had anything in it of a gambling or speculative character, or was otherwise opposed to public policy. It was one involving some risk: the defendants stood to lose Rs. 590, say Rs. 600, on it in costs of the Courts. The suit was dismissed by the Court of first instance and by the lower appellate Court, whose decision was carried in appeal before, and confirmed by, the High Court. It was thus a case of some difficulty, and it was no doubt known that it would be fought out to the end. The lower Court has made no allowance for the defendants-appellants' labour and trouble. The [133] remuneration, though large, was not in my opinion extortionate, and it has perhaps been over-estimated by the lower Court at Rs. 2,000 besides half mesne profits and recovery of outlay with interest. The plaintiffs-respondents themselves valued the whole land in this suit at Rs. 1,660, and its half is valued in the agreement at Rs. 830. To this amount at least the defendants are fairly entitled. But if the land is worth more, they are still entitled to claim it under the express agreement entered into.

"The effect of the lower Court's order, if maintained, would be to create a precedent and make it impossible for any intending litigant unprovided with the necessary funds to obtain them on ordinary terms from persons who would not be willing to advance the money on such terms in view of the risk and want of security, but might be deceived into advancing it on the faith of an agreement securing special terms, which the borrower would repudiate with the sanction of the Court."

The Court accordingly decreed the appeal and dismissed the suit with costs. The plaintiffs appealed to the High Court.

Munshi *Ram Prasad*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

TYRRELL and BRODHURST, JJ.—In this case the defendant-respondents helped the plaintiffs-appellants to recover from one Ram Sarup a *nankar* holding of 51 bighas, 11 biswas, 4 dhurs, the plaintiffs promising the defendants that they should have half the property and half the mesne profits with all their costs in the event of success in the suit. The plaintiffs did succeed in that suit and recovered their 51 bighas, 11 biswas, 4 dhurs with profits. The defendants, who were co-plaintiffs in that suit, and who consequently were entitled to execute the decree obtained in that suit jointly with the plaintiffs in this suit, took half the profits awarded under that decree and their costs, and got possession of half the land amounting to 25 bighas, 15 biswas, 12 dhurs. The present action has been brought to eject them from the land. The Subordinate Judge of Allahabad decreed the claim, holding that the defendants had received sufficient compensation for the advance they made to the plaintiffs by getting [134] the sum of Rs. 330 with interest, which the plaintiffs were to pay to them at the rate of 12 per cent. per annum. The learned Subordinate Judge found that the bargain between the plaintiffs in the former suit was unconscionable and extortionate, and as such, was inequitable against the plaintiffs in the present suit. He found the recompense secured to the present defendants was grossly unreasonable, inasmuch as the expense they had to incur was small, the risks they ran were inconsiderable, the

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labour they had to undergo was little or nothing, while the land which they had taken possession of was worth fully one thousand rupees. The Subordinate Judge accordingly decreed the plaintiffs the recovery of the land on condition of their paying to the defendants Rs. 330 with interest at 12 per cent. per annum, from the 10th February, 1885, to the date of payment. The learned District Judge of Allahabad reversed the decree, and dismissed the plaintiffs' suit upon the following grounds. He found that the bargain was fair, because although the entire land is probably worth Rs. 2,000, the plaintiffs knew their own business and it was undesirable that Court should make contracts for parties. The District Judge also thought that the Subordinate Judge had forgotten to take into account the labour and trouble which fell upon the defendants in their character of co-plaintiffs in the former suit. And lastly he held that there was nothing gambling or speculative about the bargain.

In second appeal Mr. *Ram Prasad*, on behalf of the plaintiffs-appellants, contended that there was no labour and trouble incurred by the defendants in the former action; that the action was necessarily fought by the present plaintiffs, who possessed all the information necessary for the successful conduct of the case, and who only were the persons who did all that was to be done in the way of employing and instructing Counsel, bringing witnesses forward, and the like. Mr. *Ram Prasad* also pointed out the inconsistency in the learned Judge's finding that the transaction was not of a gambling or speculative character, with the learned Judge's remark, which was perfectly true, that the defendants stood to lose six hundred rupees at least in costs. Mr. *Ram Prasad* urged several forcible arguments in support of the finding that the bargain by [135] which the plaintiffs were to yield a thousands rupees' worth of land to the defendants as a recompense for the defendants' assistance in the suit, so far from being fair, was unconsionable, extortionate and unreasonable, as it has been held by the Court of first instance.

We think that this appeal must prevail. Mr. *Amir-ud-din*, the learned Counsel for respondents, argued that it should be remembered that his clients were not common money-lenders nor professional usurers, that they were related to, or connected with, the plaintiffs, and were consequently induced to run the heavy risk they incurred in helping the plaintiffs with their suit, the plaintiffs being unable to get help from any other quarter. The learned Counsel also quoted certain rulings of the Calcutta Court in support of his argument. Those rulings are to be found in *Punchanun Muzoomdar* v. *Doorga Nath Roy* (1), *Nobeen Chunder Ghose* v. *Ramgogenath Gope* (2), *Ramrav Khunderav* v. *Govind Pandshet* (3), and Woodman's Digest, page 699.

The learned Subordinate Judge in his judgment cited certain recent rulings of the Indian High Courts strongly in favour of his view of the case. Indeed, all the current of rulings upon cases of this character is against the respondent. Two cases have lately been before this Court. *Chunni Kuar* v. *Rup Singh* (4) and *Loke Indar Singh* v. *Rup Singh* (5), in which this question has been very fully and carefully considered, and all the case-law upon the subject was under the consideration of the Court. The circumstances of those two cases are very analogous to the circumstances of the case before us. In those cases, as here, the lender of the money for the purposes of maintaining the action was not a common money-lender or

(1) W.R. 1864, 300. (2) W.R. 1864, p. 63. (3) 6 B.H.C.R. 63.
(4) 11 A. 57. (5) 11 A. 118.

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a professional usurer. There also the receiver of the assistance was in extremely great need of help, having found it impossible to get assistance from anyone but the person who lent him the money. In those cases also it was common ground that the persons who advanced the funds ran a very serious risk of losing their money. In those cases this Court decided that the contract [136] by which a large portion of the estate was conveyed to the person who advanced the money necessary to bring the action to recover the estate, was a contract which the Civil Court ought not to enforce. It was held, and we must hold here, that whether the contract be regarded as having been made under very risky circumstances, or whether it was made under circumstances of ordinary or inconsiderable risk, it would still be a contract open to objection, under one or other of the conditions mentioned in s. 23 of the Contract Act. For if it was a very risky contract, then obviously its enforcement would be against public policy on the ground of its being of a speculative character. If it was not of extraordinary risk, then it would be inequitable to enforce the contract, as the recompense secured was out of all proportion to the risk incurred. Approving of the rulings in those cases, we adopt and follow them in this case, and finding that the learned District Judge dissented from the Court of first instance for reasons which are not sustainable, we find that the contract, under which the defendants were to get half the plaintiffs' land in addition to other advantages in return for the pecuniary assistance afforded by them, was unfair, unreasonable and extortionate, and we think that the Court of first instance made a proper decision and decree in the case. We set aside the decree of the lower appellate Court, restore that of the first Court, and decree this appeal with costs.

Appeal allowed.

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11 A. 136 (P.C.) = 16 I.A. 12 = 5 Sar. P.C.J. 281.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

HARI RAM AND ANOTHER (*Plaintiffs*) v. SHEODAYAL MAL AND ANOTHER (*Defendants*). [2nd and 3rd November. 1888.]

Act VIII of 1871, *Registration Act, ss.* 28, 64, 65, 66—*Place of registration of documents.*

The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration, of a document relating to immoveable property in the Office of the Sub-Registrar within whose sub-district any portion of the property is situate. The words "some portion [137] of the property" are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect, by the carrying out of the provisions of ss. 64, 65 and 66.

[R., 5 Ind. Cas. 127.]

[N.B.—See in this connection 7 A. 590 whereon this appeal has arisen.]

APPEAL from a decree (9th January, 1885), of the High Court (1) reversing a decree (24th December, 1884), of the District Judge of Gorakhpur.

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(1) Reported 7 A. 590.

1888 Nov. 2, 3. — PRIVY COUNCIL. — 11 A. 136 (P.C.) = 16 I.A. 12 = 5 Sar. P.C.J. 281.

The question here was whether a mortgage-deed, dated 20th May, 1873, had been sufficiently registered, with reference to the requirements of s. 28 of Act VIII of 1871, having been presented for registration, and registered, at the Office of a Sub-Registrar in a sub-district, within which part of the property mortgaged was situate, that part having borne a very small proportion to the rest of the property.

That section (1) directs presentment for registration in the office of a Sub-Registrar within whose sub-district the whole, or some portion of the property, to which such document relates, is situate.

By the mortgage-deed of 20th May, 1873, Mr. B. P. Brooke, after recitals that he owed to Hari Ram and Raja Ram (the present plaintiffs) Rs. 2,59,594, and that it had been agreed that he should draw upon them down to October, 1873, to the further amount of Rs. 90,000, mortgaged to them his indigo factories and villages in the Gorakhpur district, also agricultural land in Champaran, and a plot of land, 500 yards square, in one of the mohallas in the town of Patna. This instrument was registered in the Sub-Registrar's Office at Patna. Transactions continued between Brooke and the mortgagees, who were bankers in Patna, and who supplied him with funds, and the balance due was reduced. But in January, 1875, Brooke sold his interest in the already mortgaged estate to Sheodial Mal and Hardial Mal.

This suit was brought on the 1st June, 1878, by Hari Ram and Raja Ram to recover from Brooke Rs. 79,655, alleged to be due on balance of accounts, and to realize that sum by sale of the property mortgaged by him to the plaintiffs; also, to have declared invalid as [138] being fraudulent and collusive, the sale of the property made by Brooke to Sheodial Mal and Hardial Mal, who were made the second and third defendants.

The latter, filing their written statements in 1879, set up limitation, and relied upon the sale to them. The first defendant Brooke who was absent from India when the suit commenced, returning in 1881, admitted settlement of account, claiming certain deductions, and denied his personal liability.

Unless the instrument of 20th May, 1873, having been effectively registered, could be taken as admissible in evidence, the debt on the account stated would have been barred by lapse of time. The District Judge, however, found that the plaintiffs were entitled to recover the balance due to them under the mortgage-deed, and decreed to the plaintiff the amount claimed, less Rs. 15,104. He found that Brooke was the owner of the plot of land in Patna, and that therefore, the mortgage had been properly registered in the Sub-Registrar's Office at Patna.

The defendants, Sheodial Mal and Hardial Mal, appealed from this decree to the High Court, which, on the 9th January, 1885, reversed it on the ground that the existence of property worth about Rs. 500 in Patna did not within the true meaning of section 28 of Act VIII of 1871 entitle the plaintiffs to have the mortgage-deed which had been registered in the Sub-Registrar's Office at Patna, considered to have been effectively registered as a document relating to estate of a different nature and far more valuable, in fact, constituting the mortgaged estate, in Gorakhpur and Champaran. The decree of the High Court dismissed the suit.

The judgment is given in the report of the hearing on appeal to the High Court, at page 592 of the 7th vol. of the Indian Law Reports.

(1) Not differing in this respect from s. 28 of Act III of 1877, the Indian Registration Act, 1877.

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The plaintiffs appealed to Her Majesty in Council.

On this appeal,

Mr. *J. Graham, Q. C.*, and Mr. *J. H. A. Branson*, for the appellants argued that the High Court had erred in holding that the [139] mortgage-deed of 20th May, 1873, had not been duly registered as required by s. 28 of Act VIII of 1871, both that Court and the Court below having found that some portion of the property, to which the deed related, *viz.*, Brooke's property in Patna, was situate within the Patna Sub-Registrar's sub-district. They referred to ss. 64, 65 and 66, and the provision made for the forwarding of copies of the document, endorsement, and certificate to the Registrar of every district, and the Sub-Registrar of every sub-district, in which any part of the property might be situated, as securing the publicity which was one of the main objects of the Act, as observed in the judgment of the High Court.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondents, without relying on the proposition expressed in the judgment of the High Court that "portion" meant substantial portion, as that word was used in s. 28, contended that the registration was defective with reference to the entire disconnection between such property, on the one hand, as the indigo factory in Gorakhpur, constituting, with the other agricultural land in Champaran, the actual security given, and, on the other, the few yards of land in the town of Patna.

In regard to the merits of the suit, they also contended that the decree should be upheld on the evidence of satisfaction of the mortgage-debt, examining the accounts for that purpose.

Counsel for the appellants were not called upon, either to reply as to the question of registration or to argue the subsequent matter of the accounts.

Their Lordships' judgment was delivered by SIR R. COUCH.

JUDGMENT.

SIR R. COUCH.—The suit which is the subject of this appeal was brought by the plaintiffs, who are bankers, against the present respondents, who are also bankers, and against a Mr. Brooke. The plaintiffs the appellants sought to recover a sum of Rs. 79,655 as principal and interest, which they alleged to be due to them in respect of a mortgage executed by Brooke on the 20th May, 1873, the plaintiffs alleging that at that date Brooke adjusted his account and executed [140] a mortgage for securing Rs. 3,49,504-4. There is no question that this mortgage was executed by Brooke. The mortgage stated that there had been an adjustment of accounts between Brooke and the plaintiffs, and it was given to secure the money which was then due on the account, together with a sum of Rs. 90,000 to be advanced by the plaintiffs to Brooke for defraying necessary expenses of an indigo concern from May, 1873, to October of the said year. The defence of the present respondents, with whom alone their Lordships have now to deal, was twofold. Having become the purchasers of part of the mortgaged property, another part of it having been previously sold, they objected that this mortgage of May, 1873, was not duly registered; and they have also objected that the whole of the sum of Rs. 90,000 was not advanced before the 1st October, 1873, but a portion only was advanced, leaving a sum of about Rs. 30,000, which they say was subsequently advanced and is therefore not covered by the mortgage.

With reference to the objection as to the non-registration of the mortgage-deed, it appears from the schedule to the deed that it was a

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mortgage of a considerable property, only a portion of which, stated to be 500 yards of land built upon, was situate in the district of Patna; the other part, and of course much the largest part of the property, was situate in other districts. Act VIII of 1871, with regard to registration, contains this provision in s. 28:—"Save as in this part otherwise provided, every document mentioned in s. 17, clauses 1, 2, 3 and 4, and s. 18. clauses 1, 2, 3 and 4, shall be presented for registration in the office of a Sub-Registrar, within whose sub-district the whole or some portion of the property to which such document relates is situate." And this was an instrument which came within the provisions of this section. The registration was made in the district of Patna, where the 500 yards of land were situate. The Subordinate Judge held that this was a sufficient registration. On appeal to the High Court, the learned Judges of that Court, the Chief Justice and another Judge, held that it was not and the ground upon which they came to that decision is stated by the Chief Justice to be this:—"In a case [141] like the present, in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate would be inconsistent with the implied intention of the Legislature that registration should be made with reference to the locality of the property,"—that a literal interpretation of the terms of the section ought not to be adopted; and that it was the intention of the Legislature that the registration should take place where some substantial portion of the property was situate.

It appears to their Lordships that this judgment puts a construction upon s. 28 which cannot be supported, and in fact imputes to the Legislature an intention which does not appear from the provisions of the Registration Act to have been their intention. The words, if we take them in their ordinary sense, "within whose district the whole or some portion of the property to which such document relates is situate," certainly do not show an intention that there should be any inquiry as to whether the place where the document was registered was the place where what may be called some substantial portion of property is situate; and an inquiry of that kind might very frequently lead to considerable difficulty. But the intention of the Act is apparent from the subsequent provisions. In s. 64 it is provided that "every Sub-Registrar on registering a document relating to immoveable property not wholly situate in his own sub-district shall make a memorandum thereof, and of the endorsement and certificate thereon, and send the same to every other Sub-Registrar subordinate to the same Registrar as himself in whose sub-district any part of such property is situate," and then, "such Sub-Registrar shall file the memorandum in his book No. 1." S. 65 and s. 66 contain similar provisions where the property is situate in more districts than one. Thus the information is conveyed to the Registrars or Sub-Registrars of every place where the document ought to be registered, and thus all the information which it is the object of a register to afford is to be [142] found in those different places. It appears to have been the intention of the Legislature in making those provisions that it should be sufficient that the registration be made by the parties, as is stated in s. 28, in the place where some portion of the property—not a substantial portion, but where any portion of the property is situate, leaving it to the office to do the rest. These provisions are calculated to effect that, and are in accordance with what might reasonably be supposed to be the intention of the Legislature.

Their Lordships, therefore, are of opinion that the decision of the High Court with regard to the want of registration of this mortgage cannot be supported. The consequence ordinarily would be that the decree of the High Court reversing the decree of the Judge of Gorakhpur, which was given in favour of the plaintiffs, would be reversed, and the decision of the Judge of Gorakhpur would stand. But their Lordships allowed the learned Counsel for the respondents to submit to them, and argue, that the decision of the Judge of Gorakhpur was wrong, and consequently that, although the High Court had reversed it on a ground which cannot be supported, still, it ought to be reversed, and the decree reversing it ought to stand.

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Now, it is to be observed that the Judge of Gorakhpur had very carefully considered the whole of the case, and had come to the conclusion that the balance which he found due to the plaintiffs, and which they were entitled to recover as mortgagees, was really due to them. The objection taken to his finding appears to be of a twofold character. It is said that only monies which had actually been advanced by the plaintiffs before the 1st of October, 1873, can be recovered by the mortgagees, and that the advances out of the Rs. 90,000 subsequent to that day did not become the subject of the mortgage. That depends upon the construction of the mortgage-deed. Their Lordships think that the mortgage was intended to cover the whole advance of the Rs. 90,000; and whether it was advanced before the 1st of October, 1873, or not, if the parties, that is Mr. Brooke and the mortgagees, thought fit between themselves to allow a portion [143] of that Rs. 90,000 not to be immediately advanced, but to remain in the hands of the plaintiffs in a deposit account in such a way that he could draw upon them and obtain the money at any time, that it was really covered by the mortgage, and it is not an answer to the claim of the mortgagees in respect of the Rs. 90,000, that the whole of it was not advanced before the 1st October, 1873. The way in which the defendants seek to avail themselves of this objection is that they say that if they are right in that contention, and the mortgage only covered what was actually advanced before the 1st of October, 1873, the accounts show that the whole of the mortgage was satisfied, and consequently that the plaintiffs are not entitled to recover upon it as they claim. Their Lordships think that this cannot be allowed.

Then it is also contended that this money was not advanced. Mr. *Mayne* has argued that there is no evidence of it, but one of the defendants when examined said he did not deny that the money was advanced; and there cannot be any doubt the money was actually advanced.

Another answer to this contention on the part of the defendants appears to be this: On the 17th of September, 1874, Mr. Brooke, the mortgagor, settled an account with the plaintiffs, and the whole of the matters between them was gone into, and a balance was then agreed upon as due from him to the plaintiffs, including all these different items which would be the subject of the mortgage. The defendants acquired no interests in the estate till January, 1875, when they took a conveyance from Brooke. Their Lordships are of opinion that the defendants are bound by the account which Mr. Brooks so settled, and that what he, when he settled that account, agreed to be due in respect of the mortgage, and the way in which the different payments appear to be appropriated, cannot be now disputed. They do not think it necessary to go into the evidence which Mr. Cowie, and Mr. Mayne, more especially, have referred to on this subject; but they think that if that evidence was gone into it

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would support the contention of the plaintiffs that the amount which the Judge of Gorakhpur has found to be due is really due to the [144] plaintiffs, and is the subject of the mortgage, and the plaintiffs are entitled to recover it as mortgagees in the way in which they claim.

The case appears to have been very carefully investigated by the Subordinate Judge, and unless their Lordships could see that he was wrong in the way he has dealt with the accounts, and the various facts in the case, they would not come to the conclusion that his decree ought to have been reversed by the High Court. The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be reversed, and the appeal thereto dismissed with costs, and the decree of the Judge of Gorakhpur varied by omitting that part of it which directs the deed of sale to be cancelled. The costs of this appeal will be paid by the respondents. *Appeal allowed.*

Solicitors for the appellants: Messrs. *Watkins and Lattey.*
Solicitors for the respondents: Messrs. *Barrow and Rogers.*

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11 A. 144 = 9 A.W.N. (1889) 41.

APPELLATE CIVIL.

Before Sir John Edge, Kt. Chief Justice, and Mr. Justice Tyrrell.

MURLIDHAR AND OTHERS (*Plaintiffs*) *v.* KANCHAN SINGH AND OTHERS (*Defendants.*)* [7th November, 1888.]

Mortgage—Conditional sale—Foreclosure—Suit for possession—Regulation XVII of 1806, *s.* 8—*Cause of action—Limitation—Act XIV of* 1859, *s.* 1 (12).

A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor.

Held that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which [145] he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863.

Held also that, even if foreclosure proceedings under Regulation XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Denonath Gangooly* v. *Nursingh Proshad Doss* (1) referred to.

[R., 26 A. 4 (8, 9); 10 A.L.J. 538 (545) = 15 Ind. Cas. 240.]

THIS was a suit for foreclosure of a deed of mortgage by conditional sale executed on the 4th February, 1846, by the predecessor-in-title of the defendants in favour of the ancestor of the plaintiffs. The deed was as follows:—

"Musammat Kishen Kuar, widow of Shankar Baksh, deceased zemindar of mauza Kakadeo, &c., pargana Jajmau, having presented herself in the Cawnpore Registration Office, solemnly and truly declared that

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* Second Appeal, No. 653 of 1887, from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 6th January, 1887, confirming a decree of Munshi Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 6th May, 1886.

(1) 14 B.L.R. 87.

she is in possession and enjoyment of a 4 pies 11 krants share in each of the villages Kakadeo and Benaikpur, pargana Jajmau, and that there was not and is not any other sharer, partner or claimant in the said share belonging to her at the time of the execution of the present deed. Now she has voluntarily and willingly mortgaged the said share in its entirety together with all the boundaries and rights, barren and waste lands, *jhil* and *jhabar*, *jalkar* and *bankar* lands, ponds and groves and trees both bearing and not bearing fruit, *sair* and saltpit and other zamindari dues appertaining thereto, bounded as below, for Rs. 200 of the *kuldar* coin, the half of which amounts to Rs. 100 of the same coin, to Shitab Rai, son of Punjab Rai, caste *Kayasth*, for a term of five years as a conditional sale, and does hereby promise to re-pay the said sum with interest at Re. 1 per cent. per mensem within the said term without any objection or excuse, and that during the said term of mortgage she the mortgagor will remain in possession and will make the collections and will bear the profit and loss and be responsible in civil and criminal cases, and the mortgagee shall have nothing to do with them. But if she fail to pay the principal with interest, then after the expiration of the period specified herein, the aforesaid share will be foreclosed (*baibat*) in lieu thereof, and this mortgage-deed will be considered as an absolute sale-deed. I have [146] therefore written these few lines by way of mortgage as a conditional sale to serve as an authority."

No foreclosure proceedings were taken in respect of this deed under Regulation XVII of 1886. The present suit was instituted on the 7th October, 1886, in the Court of the Subordinate Judge of Cawnpore, and the plaintiffs claimed foreclosure in default of payment of Rs. 1,151, the amount which they alleged to be due, as principal and interest, under the deed.

The only plea of the defendants in answer to the suit which it is necessary to notice, was that the suit was barred by limitation. Upon this the Subordinate Judge observed :—

"Although there was a time fixed in the deed of mortgage for payment of the loan, which time has long elapsed, yet at the time of the execution of the mortgage, or while Act XIV of 1859 or Act IX of 1871 was in force, no period was fixed for the presentation of an application for foreclosure, for which proceedings then used to be taken under Regulation XVII of 1806—see *Buldeen* v. *Golab Koonwer* (1). The ruling referred to by the pleaders for the defendants, *Ram Chunder Ghosaul* v. *Juggut Monmohiny Dabee* (2) does not seem to be applicable. Besides this, the Court must follow the rulings of the Allahabad High Court, and hold that the plea of limitation does not affect the claim."

On the merits, however, the Subordinate Judge was of opinion that there was no consideration for the deed of the 4th February, 1846, and accordingly dismissed the suit. The plaintiffs appealed to the District Judge of Cawnpore, whose judgment on the appeal was as follows :—

"The claim is for foreclosure on a conditional deed of sale alleged to be executed on the 4th February, 1846, the term for payment being five years, and it is clear that for forty years the plaintiff has made no claim, and the defendant has not in any way admitted the correctness of the mortgage. It appears to me that previous to Act XIV of 1859, the plaintiff would have been bound [147] to take foreclosure proceedings

(1) N.W.P.H.C.R. 1867, p. 102. (2) 4 C. 283.

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within twelve years from his cause of action. See Regulation III of 1793, and *Prannath Roy Chowdry* v. *Rookea Begum* (1).

"I can find nothing in Act XIV of 1859 operating to change this period of limitation, and the ruling quoted by the lower Court in the appellant's favour insists on the necessity of such admissions in order to extend the period of limitation. Accordingly I find the suit barred by limitation. It is unnecessary to determine the remaining grounds of appeal. Appeal dismissed with costs."

The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Kashi Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This was a suit for foreclosure of a mortgage by way of conditional sale executed on the 4th February, 1846, the condition being for payment within five years of that date. The suit was brought in October, 1886, and the Judge below has found that no claim was made by the mortgagees for forty years and that there was no admission of liability by the mortgagor during that period. The Judge, we think, rightly held that by reason of Act XIV of 1859 the plaintiff's remedy was barred during the currency of that Act. In that view we agree with him. In our opinion the time within which the plaintiff was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. A great deal of the argument before us was directed to show that the cause of action in a case like this arose not on the non-payment at due date but on the expiration of the year of grace provided for by Regulation XVII of 1806. It now appears that no proceedings were taken under that Regulation at all. But even if they had been taken, we should be prepared to hold that the cause of action was the original non-payment of the money on the due date, and that the provisions in Regulation XVII of 1806, which was passed for the protection of mortgagors, could not create a fresh cause of action. To hold as was contended before us would [148] involve this absurdity, that the non-compliance by an alleged mortgagor with the *parwana* obtained *ex-parte* by an alleged mortgagee would create a cause of action whether there had been a mortgage or not. As far back as 1874, Mr. Justice Markby in an elaborate judgment decided that foreclosure proceedings under the Regulation in question did not create a cause of action : *Denonath Gangooli* v. *Nursingh Proshad Doss* (2). The appeal must be dismissed with costs.

Appeal dismissed.

(1) 7 M.I.A. 323.

(2) 14 B.L.R. 87.

11 A. 148=9 A.W.N. (1889) 42=13 Ind. Jur. 309.

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APPELLATE CIVIL.

11 A. 148=9 A.W.N. (1889) 42=13 Ind. Jur. 309.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

BALKISHAN AND ANOTHERS (*Defendants*) v. KISHAN LAL (*Plaintiff*).* [10th November, 1888.]

Pending suits—Malikana—Recurring liability—Different reliefs claimed—Res judicata *—Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—"Final" judgment—Judgment liable to appeal or under appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of lower appellate Court, but before hearing of second appeal in second suit—Civil Procedure Code,* ss. 12, 13, 582, 587, 647.

The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared.

For the purposes of the rule of *res judicata*, it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *The Rajah of Pitapur* v. *Sri Rajah Rau Buchi Sittaya Garu* (1) referred to.

[149] A judgment liable to appeal or under appeal is only a provisional and not a definite or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civil Procedure Code, commented on. *Sri Raja Kakarlapudi Suriyanarayanarazu* v. *Chellamkuri Chellamma* (2) and *Nilvaru* v. *Nilvaru* (3) referred to.

The rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to orginal suits. Having regard to its main object, so far as it relates to the re-trial of an *issue*, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation.

On the 17th August, 1885, a suit was instituted for recovery of an annual *malikana* allowance for the year, 1290, 1291 and 1292 fasli. On the 5th October, 1885, the Munsiff dismissed the suit. On the 10th March, 1886, the Subordinate Judge on appeal reversed the Munsif's decree, and decreed the suit. On the 21st June, 1886, the defendant appealed to the High Court, which, on the 4th July, 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June, 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November, 1886 the lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March, 1886, in the former suit, operated as *res judicata* and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May, 1887, the defendant appealed to

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* Second appeal No. 806 of 1887, from a decree of Saiyid Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 27th November 1886, confirming a decree of Babu Alopi Prasad, Munsif of Mathura, dated the 21st August, 1886.

(1) 12 I.A. 16. (2) 5 M.H.C.R. 176. (3) 6 B. 110.

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the High Court, and on the 16th May, 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July, 1887) the appeal came on for hearing.

Held (i) that the trial of the present suit by either of the lower Courts was not barred by s. 12 of the Civil Procedure Code by reason of the fact that, the time of such trial in August and November, 1886, the previous litigation between the parties was pending in second appeal before the High Court.

(ii) that the lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March, 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June, 1886, was liable to appeal, and, at the dates of the decisions of those Courts, in August and November, 1886, was the subject of a second appeal pending in the High Court, could operate as *res-judicata* in favour of the plaintiff's title to *malikana*.

[150] (iii) That the High Court's judgment dismissing the former suit on the 4th July, 1887, though passed after the decisions of the lower Courts in the present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and being final, was conclusive as *res judicata* against the plaintiff's title to *malikana*.

(iv) That the effect of the High Court's judgment dismissing the former suit on the 4th July, 1887, was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of the plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed.

[F., 32 A. 67 (69); 24 M. 350 (355); Appr. 7 A.L.J. 861 (865) = 7 Ind. Cas. 156 (157); R., 23 A. 5 (12); 24 A. 112 (118); 33 C. 1101 = 10 C.W.N. 934 = 4 C.L.J. 149; A.W.N. (1908), 211; 6 C.L.J. 74 (79) = 11 C.W.N. 732; 12 C.W.N. 739 (743, 744); 15 C.W.N. 930 = 11 Ind. Cas. 161 (163); 11 C.P.L.R. 91 (94); 13 M.L.J. 134; 16 M.L.J. 526 = 2 M.L.T. 40; 21 M.L.J. 31 (38) = 8 Ind. Cas. 736 = 9 M.L.T. 64; 4 N.L.R. 98 (103); 1 S.L.R 104; D., U.B.R. (1897-1901), 535 (537); 31 P.R. 1898.]

THIS was a second appeal which came for hearing originally before Straight and Mahmood, JJ., who directed that it should be laid before the Chief Justice with a view to ultimate disposal by a Bench of three Judges. The facts are stated in the following order of reference :—

MAHMOOD, J.—In order to render the questions of law which arise in this case intelligible it is necessary to state the following facts :—

The plaintiffs Pandit Kishan Lal is the purchaser of the rights and interests of one Bhagwanta who is alleged by him to have possessed zamindari rights in the village.

The defendants-appellants are muafidars of the village and, as such, in possession thereof. The plaintiff's contention is that the aforesaid Bhagwanta whom he now represents was entitled to a *malikana* allowance of Rs. 12 per annum recoverable from the defendants in their capacity of muafidars.

Upon these allegations the plaintiffs instituted a suit against the defendants on the 17th August, 1885, for recovery of a sum of Rs. 30 as *malikana* allowance due in respect of 1290 F., 1291 F., 1292 F., but the suit was dismissed by the Munsif of Mathura on the 5th October, 1885. Upon appeal preferred on the 7th February, 1886, the Subordinate Judge of Agra (Babu Promoda Charan Banerji) reversed the Munsif's decree and decreed the claim on the 10th March, 1886. The Subordinate Judge's decree was, however, appealed to this Court, the appeal having been preferred on the 21st June, [151] 1886, and was numbered as second appeal No. 973 of 1886, and it came on for hearing before Mr. Justice Oldfield, who by his order of the 14th February, 1887, remanded the case under s. 566 of the Code of Civil Procedure for trial of certain issues enunciated in that order.

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In pursuance of that order, findings were recorded by the new Subordinate Judge (Babu Kashi Nath Biswas) on the 25th April, 1887, and those findings came on before me along with the case for final disposal, and by my order of the 4th July, 1887, I reversed Babu Promoda Charan's decree of the 10th March, 1886, and restored the Munsif's decree of the 5th October, 1885, whereby the plaintiff's suit had been dismissed.

Thus ended the plaintiff's suit for the recovery of *malikana* in respect of the years 1290, 1291, and 1292 F., the effect of the adjudication (speaking generally) being that the plaintiff had never received the *malikana* allowance and was not entitled thereto.

Meanwhile the plaintiff, relying probably upon Babu Promoda Charan's appellate decree of the 10th March, 1886, instituted this suit on the 8th June, 1886, upon allegations similar to those on which the former suit proceeded, this suit being for recovery of Rs. 12 *malikana* allowance for the year 1293 F. The suit was resisted, so far as the merits are concerned, upon allegations similar to those on which the defence in the former suit proceeded. But in addition it was pleaded by the defendants that an appeal from Babu Promoda Charan's decree of 10th March, 1886, was, at the time when such defence was made, pending in this Court, and that therefore the trial of the present suit was barred by s. 12 of the Code of Civil Procedure.

On the other hand, the plaintiff contended that the judgment of Babu Promoda Charan, dated the 10th March, 1886, furnished a basis for holding that the plaintiff's right to recover the *malikana* allowance was *res judicata*, entitling the plaintiff to the benefit of conclusiveness and to a decree for the amount which he claimed in the present suit.

[152] The Court of first instance disallowed the defendants' contention in respect of s. 12 of the Civil Procedure Code upon the ground that the plaintiff's present claim was not barred by that section, because it related to a year (1293 fasli) later than the years to which the former litigation related. But that Court, accepting the contention of the plaintiff as to the conclusive effect of Babu Promoda Charan's appellate decree of the 10th March, 1886, passed in the former litigation, held that the judgment furnished conclusive proof of the plaintiff's right to the *malikana* allowance and barred the re-trial of that issue for the purposes of this suit, and upon this ground alone that Court decreed the suit on the 21st August, 1886. The view of the law upon which that judgment proceeded was affirmed by the lower appellate Court, which also declined to enter into the merits of the case, feeling itself bound by Babu Promoda Charan's decree of the 10th March, 1886, *i.e.*, the decree which I have already stated was reversed by this Court on the 4th July, 1887.

The decree of the lower appellate Court in this case relates to an appeal which had been preferred to that Court on the 13th September, 1886, and that appeal was dismissed by that Court on the 27th November, 1886.

It is from this last-mentioned decree that this second appeal was preferred to this Court on the 17th May, 1887, and being valued at less than Rs. 100, it came on for hearing before me sitting as a single Judge for disposal of such cases under the Court's rules of the 11th June, 1887, and it was under those rules that by my order of the 28th April, 1888, I referred the case to a Division Bench consisting of two Judges, and the case has accordingly been heard by my brother Straight and myself under the learned Chief Justice's order of the 1st May, 1888.

In my opinion of the case raises grave questions of law with reference to s. 12 of the Code of Civil Procedure, as also to the rule of *res judicata*

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as defined in s. 13 of that Code, and it is with the approval of my brother Straight that I think that the case is a fit one to be referred for disposal to a Bench consisting of three Judges, [153] and with this recommendation I direct that the case be laid before the learned Chief Justice for such orders as he may deem fit to pass thereon as to the constitution of the Bench which is to dispose of the case.

I may, however, add that somewhat cognate questions were considered by the learned Chief Justice and myself in the case of *Musammat Shakina Bibi* v. *Shikh Amiran and others* (1) and by my brother Straight and myself in *Musammat Amman Bibi* v. *Rai Morari Das* (2), and that in my opinion the exact effect of these cases should be considered when this case comes on for hearing before a Bench of three Judges as proposed.

STRAIGHT, J.—I agree.

By an order passed by the Chief Justice on the 18th May, 1888, the case was laid before a Bench consisting of Edge, C.J., and Straight and Mahmood JJ.

Mr. *Amir-ud-din*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts of this case, so far as they are necessary to indicate the points of law which arise therein, were set forth by me in my referring order of the 16th May last and I need not repeat them now.

In the case of *Sita Ram* v. *Amir Begam* (3) I dwelt at some length upon the question whether the plea of *res judicata* was an estoppel properly so-called, and as such a rule of evidence, or simply a rule of procedure. I adopted the latter view, and the distinction has been duly recognised by the Indian Legislature, for we find *res judicata* enunciated, not in the Evidence Act but in the Code of Civil Procedure. S. 13 of that Code aims at enunciating the whole rule, and the aim has been substantially achieved, though my judgment in the case cited and the judgment of West, J., in *Bholahai* v. *Adesang* (4) and the judgment of Melvill, J., in *Nilvaru* v. *Nilvaru* (5), [154] indicate illustrations of the difficulties which the wording of the section still leave open to doubt.

The present case furnishes another of these illustrations, and in dealing with it the most convenient course is to formulate the exact questions which have been raised in the course of the argument at the Bar. These questions seem to be the following:—

1. Was the trial of this "*suit*" either by the Court of first instance or by the lower appellate Court, barred by s. 12 of the Code of Civil Procedure, in consequence of the circumstance that the previous litigation between the parties was then pending in this Court as second appeal No. 973 of 1886, decided on the 4th July 1887?

2. Does this Court's judgment of the 4th July, 1887, operate as *res judicata*, barring either the trial of this "*suit*" or of the "*issue*" as to whether the plaintiff is entitled to the *malikana* allowance which he failed to recover for the previous years in the litigation which ended in this Court's judgment of the 4th July, 1887?

So far as the first of these questions is concerned, it is scarcely necessary to say that the rule contained in s. 12 of the Code of Civil

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(1) S.A. No. 51 of 1887, decided on 6th April, 1888 not reported.
(2) F.A. No. 24 of 1887, decided on 9th May, 1888, not reported.
(3) 8 A. 324. (4) 9 B. 75. (5) 6 B. 110.

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Procedure forms no part of the rule of *res judicata*, though the reason upon which it is based is in some respects similar in principle to the doctrine of *res judicata*. The distinction between the two rules, however, is vast. The rule in s. 12 relates to matters *sub judice*, whilst the rule in s. 13 relates to matters which have passed into *rem judicatam*. The one bars only a "*suit*" the other bars both the trial of a "*suit*" and of an "*issue*" subject to their respective conditions. Those conditions are not all the same in s. 12 as they are in s. 13, and the wording of the two sections as to the distinction is so clear that it is not easy to confound the two rules. Now, in s. 12 before the plea can operate as a bar, the second suit must not only raise the same issue as that in the former suit still pending, but it must be for "*the same relief*."

The former litigation sought recovery of the *malikana* allowance for the years 1290, 1291 and 1292 fasli. In the present case the relief prayed for is the recovery of *malikana* for the year 1293 fasli. [155] The "*issue*" as to the right of *malikana* is no doubt the same as that in the former litigation; but the relief is not the same, for the cause of action is different and the subject-matter is the *malikana* for the year 1293 fasli which accrued after the institution of the former suit. The object of the rule contained in s. 12 of the Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts in respect of "*the same relief*." For instance, if, in the present case, the earlier litigation had related to the *malikana* for 1293 fasli, the present "*suit*" would have been barred by s. 12 of the Code on account of the *pendency* of the earlier litigation. I use the word *pendency* as distinguished from that state of things when matters in controversy have passed the stage of *lis pendens* and have become *res judicata* by final adjudication.

Under this view of the law it is clear that the present "suit," which was instituted on the 8th June, 1886, for recovery of the *malikana* for 1293 fasli, was not barred under s. 12 of the Code, in consequence of the previous suit which related to the *malikana* for the earlier three years, the relief prayed for not being the same. This view seems to me to be somewhat similar to the conclusions, if not also the principles of the ruling of the Calcutta High Court in *Bissessur Singh* v. *Gunput Singh* (1). And I may add that it would be a most unsatisfactory rule of law to hold that the *pendency* of a litigation connected with the rent, *malikana* or any other demand for one year should bar a suit for a subsequent year; for if such were the rule, the prolongation of the earlier litigation might result in barring the latter suit by lapse of the limitation period.

The distinction which I have explained between the rule contained in s. 12 and the rule of *res judicata* as enunciated in s. 13 of the Code leads me to the second question as formulated by me, namely, whether the trial of the *issue* as to the plaintiff's right of *malikana* [156] is barred as *res judicata* in consequence of this Court's judgment of 4th July, 1887, which terminated the earlier litigation (S. A. No. 973 of 1886).

It was not disputed at the Bar that the judgment has become "*final*" within the meaning of s. 13 of the Code. The effect of that judgment was to reverse the lower appellate Court's decree of the 10th March, 1886, and to dismiss the plaintiff's suit for the *malikana* of the previous years, to-

(1) 8 C.L.R. 113.

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which that litigation related, upon the ground that the plaintiff had failed to prove his title to recover any *malikana* allowance.

Now, there can be no doubt that for purposes of *res judicata* it is *not* essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea, which plea, as I have already said, is extensive enough to bar a suit as well as the re-trial of an *issue*. The distinction between the two aspects of the plea must not be lost sight of, for it is of special significance in cases of recurring liabilities such as the present. The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. The rule is recognised both in England and in America, and is well illustrated by the American writers. Mr. Bigelow, in his well-known work on the law of estoppels (p. 45) referring to cases in which there has been no supervenient change in the relative position of the parties, goes on to say :—"Judgment based solely upon the validity of the demand and not upon facts in avoidance, such as payment or compromise, would doubtless operate as a bar. In the case of an action on a debt due by instalments, as for example on a promissory note, judgment against the validity of the main obligation itself would preclude the obligee from suing upon any of the instalments ; but an adverse judgment [157] based upon grounds relating merely to a particular instalment sued upon could not in principle bar an action on another of them."

The same is the rule approved in Indian cases by the highest tribunals when such questions usually arise as to the amount of rent payable by the tenant, rent being of course a recurring liability. Perhaps the most important case enunciating the principle that identity of the subject-matter of a suit is not an essential condition precedent to the applicability of the rule of *res judicata*, is the case of *The Rajah of Pittapur* v. *Sri Rajah Rau Bushi Sittaya Garu* (1), where their Lordships of the Privy Council, held, that, although the subsequent suit related to different property, a previous adjudication as to adoption, such adoption being a necessary element of the plaintiff's title, operated as *res judicata* barring the re-agitation and re-trial of the same issue in the subsequent litigation.

The principle seems to me to be fully applicable to the point argued in the present case, and I hold that if in the previous litigation any final adjudication as to the plaintiff's absence of title to receive *malikana* has been arrived at, the mere circumstance that that adjudication related to a claim of *malikana* for the earlier years will not prevent the application of the rule of *res judicata*.

This then is the first step leading to the real difficulty in the case. What has been argued for the plaintiff-respondent in this case is that on the 8th June, 1886, when the present suit was instituted, there did not exist any such *final* adjudication as would bar the trial of the *suit* or the issue, for the lower appellate Court's decree of the 10th March, 1886, in the former litigation was then still liable to second appeal, which appeal was indeed preferred on the 21st June, 1886, that is, about a fortnight

(1) 12 I. A. 16.

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after the institution of the suits. It has been contended on the basis of this circumstance that the last sentence of Explanation IV of s. 13 of the Civil Procedure Code requires us to hold that the rule of *res judicata* is wholly inapplicable to this litigation, because the previous adjudication *at the date of the action* was not *final* for the purpose of the plea. At the same time it has been contended on behalf of the plaintiff-respondent, as [158] an alternative argument, that if at the date of the institution of this suit the rule of *res judicata* was applicable thereto, the lower appellate Court's judgment in the previous litigation, namely the judgment of the 10th March, 1886, which decreed the plaintiff's suit, stood unreversed and was therefore *final* for the purpose of *res judicata*; and that therefore both the Courts below acted rightly in dealing with that adjudication as *final* in favour of the plaintiff's right to *malikana* and in decreeing this suit irrespective of this Court's judgment of the 4th July, 1887, which at the time of the institution of the present suit, or at the time when the Courts below were dealing with this case, had not come into existence.

Upon these alternative arguments it has been contended that one of two courses is open to us, either to uphold the lower Court's decrees decreeing this suit or to set aside those decrees and remand the case for trial *de novo* on the merits under s. 562 of the Code of Civil Procedure, since both the Courts below having dealt with the judgment of the 10th March, 1886, as conclusive, have declined to try this suit upon the merits.

This argument raises two points for determination as matters of legal principle.

The first is, whether a judgment liable to appeal and which has not yet been appealed from, or an appeal from which is actually pending, can operate as *res judicata* during the interval preceding the appeal and the period during which the appeal is pending in a higher tribunal. This question distinctly arises in this case, because on the 8th June, 1886, when this suit was instituted, Babu Promoda Charan's decree of the 10th March, 1886, was liable to appeal, and was actually appealed on the 21st June, 1886.

I am of opinion that under such circumstances the decision of the 10th March, 1886, on which both the Courts below have relied for applying the rule of *res judicata* as barring the trial of the *issue* as to the plaintiff's right of *malikana*, cannot be regarded as "*final*" within the meaning of s. 13 of the Code of Civil Pro-[159]cedure. The latter part of the Explanation IV of that section has been framed in somewhat unspecific language, and runs as follows:—

"A decision liable to appeal may be final within the meaning of this section until the appeal is made."

The language of the section is silent as to what happens when an appeal has been preferred; and no doubt much depends upon the interpretation of two vague words "*may*" and "*until*" as they occur in the sentence which I have just quoted. I may perhaps say that more has been aimed at by that sentence than the few words of which that sentence consists could convey. What has been left unsettled by that sentence is the difficulty pointed out by a juristic Judge of such eminence as Mr. Justice Holloway of Madras in *Sri Raja Kakarlapudi Suriyanarayanarazu Garu* v. *Chellamkuri Chellamma* (1) when that learned Judge said:—

"In the lower Court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was

(1) 5 M. H. C. R. 176.

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pending. This is not in accordance with English law, as the judgment on the rejoinder in *Doe* v. *Wright* (1) shows. It would, however, be perfectly sound doctrine in the view of other jurists (*Unger Oct. Priv. Recht*, II, 603, *Sav. Syst.*, 297. *Seq. Waihter*, II, 549). As an Englishman I should be sorry to invite a comparison between the reasons given by these great jurists for their and those embodied in the English cases for the contrary doctrine."

Not happening to be an Englishman myself, I may, though a member of the English Bar, respectfully regret that the learned Judge in delivering his judgment refrained from stating the comparison which he indicated. Such a comparison might have been useful in obviating the vagueness of the latter part of Explanation IV of s. 13 of the Civil Procedure Code, which vagueness has given rise to one of the difficulties in this case. And it is because of that difficulty that I feel myself free to put the best interpretation I can upon that sentence, so as to bring it in accord with what I regard as proper juristic reasons.

[160] I held, so far as my knowledge of English law is concerned, that the point now under consideration is not settled by any long course of decision in England or India. Nor, as I have already indicated, has the Legislature in framing Explanation IV of s. 13 of the Code of Civil Procedure removed the doubt. As Mr. Justice Holloway has pointed out, the view of continental jurists is that judgments still liable to appeal and those that have actually been appealed from, the appeal being still pending, cannot operate as furnishing basis for the rule of *res judicata*. Pothier has devoted a whole chapter to the discussion of the subject (Law of Obligations, translated by Mr. D. Evans, vol. I, p 534), and he points out that "a judgment to have the authority, or even the name of *res judicata*, must be a definitive judgment of condemnational or dismissal. A provisional condemnation then cannot have either the name or the authority of *res judicata*, for, although it gives the party obtaining it a right to compel the opposite party to pay or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris et de jure* that what is ordered to be paid or delivered is due, since the party condemned, after satisfying the sentence, may be admitted in the principal cause to prove that what he was ordered to pay is not due," and consequently to obtain a revocation of the judgment. He then points out that judgments still liable to appeal stand, for the purpose of *res judicata*, on the same footing as provisional judgments and that the effects of such judgments "are only momentary and cease as soon as an appeal is made. This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgments, which, as we have already mentioned, have not the authority of *res judicata*."

I hold that the views thus expressed by Pothier and, as Mr. Justice Holloway has indicated, adopted, by other continental jurists as to the doctrine of *res judicata*, are consistent with the interpretation which I place upon Explanation IV of s. 13 of the Code of Civil Procedure in relation to the authority of judgments still liable **[161]** to appeal. Such judgments are not *definitive* adjudications. They are only *provisional*, and not being *final* cannot operate as *res judicata*. Such indeed seems to be the view adopted by the learned Judges of the Bombay High Court when they said, in *Nilvaru* v. *Nilvaru* (2). "We consider that when the

(1) 10 A. & E. 763. (2) 6 B. 110.

judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res subjudice*."

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In this case therefore, both the Courts below were wrong in law in holding that the previous judgment of the 10th March, 1886, which at the date of the institution of this suit was still liable to appeal, and which at the date of the decision of this suit by the first Court, as also at the date of the decision by the lower appellate Court, was the subject of a second appeal pending in this Court (S. A. No. 973 of 1886) could operate as *res judicata* in favour of the plaintiff in regard to his title as to the *malikana*.

If the difficulty of the case rested here, the proper decision of this appeal would, of course, be to decree this appeal and, setting aside the decrees of both the Courts below, to remand the case to the Court of first instance for trial upon the merits. But the matter requires consideration of the effect of my judgment in the former litigation, dated the 4th July, 1887. That judgment, as I have already said, did not exist when this suit was filed (8th June, 1886); it did not exist when first the Court decreed the plaintiff's claim (21st August, 1886); it did not exist when the appeal was preferred to the lower appellate Court (13th September, 1886); it did not exist when the appeal was dismissed by the lower appellate Court (27th November, 1886), on the ground of Babu Promoda Charan's decree of 10th March, 1886, which was reversed by my judgment. Nor did my judgment exist when this second appeal was preferred (17th May, 1887), the result being that both the appeal (S. A. No. 973 of 1886) in the former litigation and this appeal were pending at the same time in this Court till my judgment in the former case was passed on the 4th July, 1887.

[162] The question then is, what are we to do *now* in this case? Are we to accept my final judgment of the 4th July, 1887, (which terminated the former litigation) as *res judicata*, for purposes of dismissing *this* suit?

The question relates to the scope of the maxim *pendente lite nihil innovetur*. That the maxim governs alienations *pendente lite* cannot be doubted. Does it also relate to adjudications which have taken place during the pendency of one litigation in another litigation which, though commenced *before*, had not *terminated* when the present litigation was begun?

So far as I am aware, this exact question has not been settled by any definitely authoritative decision in England or in India. I am therefore not hampered by any case-law on the subject, and feel myself free to adopt such views as I consider most consonant with legal principles.

It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt*. This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa*, and the broader maxim *interest reipublicæ ut sit finis litium*. This being so, the doctrine, so far as it relates to prohibiting the re-trial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which

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res judicata aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in s. 13 is not **[163]** limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of ss. 582 and 587 respectively, and, indeed even to miscellaneous proceedings by reason of the general provisions of s. 647 of the Code.

Applying these views to the present case, the argument for the plaintiff-respondent, whilst conceding that my judgment of the 4th July, 1887. has become *final*, requires us either to hold, in spite of that judgment, that the plaintiff is entitled to the *malikana* right which that judgment negatived, or to remand the case for trial of an issue which in a litigation between the same parties has already been settled against the plaintiff by a *final* adjudication.

I do not think that either of the alternatives suggested on behalf of the plaintiff-respondent can be adopted. We cannot to-day, when we are callled upon to decide the issue as to the plaintiff's right of *malikana*, ignore my *final* judgment of the 4th July, 1887, which negatived that right in a previous litigation between the parties. Under the exigencies of the case, what the two lower Courts might have done is of no consequence, so far as the disposal of this appeal is concerned. They have acted irregularly in accepting Babu Promoda Charan's decree of 10th March, 1886, as a *final* adjudication, which has already been shown to be wanting in the requisites of a final adjudication within the meaning of Explanation IV of s. 13 of the Code. But so far as we are concerned in this case, we cannot ignore my judgment of the 4th July, 1887, nor can we remand the case for re-trial of the very issue which that judgment *finally* decided against the plaintiff's right of *malikana*.

I do not think that the law contemplates any such results. And after full consideration of the matter, I am glad to agree in the view which I understood the learned Chief Justice and my brother Straight to be inclined to adopt at the hearing, that for the purposes of disposing of this appeal we must regard my judgment of the 4th July, 1887, as conclusive against the plaintiff's right of *malikana* claimed in this suit, and that we should decree this appeal, **[164]** and setting aside the decrees of both the Courts below, dismiss the suit with costs in all the Courts.

I would order accordingly.

EDGE, C.J.—I concur.

STRAIGHT, J.—So do I.

Appeal allowed.

11 A. 164=9 A.W.N. (1889) 48.

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Before Mr. Justice Mahmood.

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AJAIB NATH AND OTHERS (*Defendants*) v. MATHURA PRASAD (*Plaintiff*).* [12th November, 1888.]

Pre-emption—Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806—Suit by mortgagee for possession—Compromise and decree thereon—Mortgage accepting part of the porperty in suit—Suit for pre-emption—Pre-emptor not asserting or proving validity of foreclosure proceedings—Pre-emptor's title referred to date of compromise and decree—Purchase money—Acquiescence of pre-emptor in transfer.

The mortgagee under a deed of conditional sale executed in 1878 took foreclosure proceedings under Regulation XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded on the 18th September, 1882, declaring the mortgage to have been foreclosed. In August, 1885, the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September, 1885, the suit was compromised, the mortgagee accepting a part of the mortgaged property and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September, 1885.

Held that although, upon the expiration of the year of grace, the ownership of mortgaged property vested in a conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual [165] foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September, 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. *Bhadu Mahomed* v. *Radha Churn Bolia* (1), *Sheodeen* v. *Sookit* (2), and *Towakkul Rai* v. *Lachman Rai* (3) distinguished. *Norender Narain Singh* v. *Dwarka Lal Mundur* (4) *Madho Prashad* v. *Gajadhar* (5), *Sitla Bakhsh* v. *Lalta Prasad* (6) and *Jagat Singh* v. *Ram Bakhsh* (7) referred to.

Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute.

[Appl., 14 A. 405 (411, 412); R., 134 P. R. 1889; 48 P. R. 1902.]

THE facts of this case are fully stated in the judgment of the Court.

The Hon. *T. Conlan* and Munshi *Ram Prasad*, for the appellants.

Mr. *C. Dillon* and Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

MAHMOOD, J.—All these appeals are connected together and have arisen out of the same set of facts and litigation.

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* Second Appeal, No. 1288 of 1887, from a decree of C. Mellor, Esq., District Judge of Gorakhpur, dated the 25th June, 1887, modifying a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 23rd March, 1887.

(1) 4 B.L.R.A.C. 219.
(2) S.D.A.N.W.P. 1864, vol. I, p. 624.
(3) 6 A. 344.
(4) 5 I.A. 18.
(5) 11 I.A. 186.
(6) 8 A. 388.
(7) 7 A.W.N. (1887) 233.

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In each of the villages Simra and Mahadewa three persons owned an eight-pies share, and they executed three separate *bai-bil-wafa* mortgages in respect of their respective shares in both of the villages in fauvor of Sheodin Misr, on the 15th June, 1878.

The first mortgagor was Sital (now represented by Bodil, Ramcharit and Bhagmani,) the second was Binda Prasad, and the third was Janki (now represented by Badri).

On the 22nd September, 1880, the mortgagee Sheodin took foreclosure proceedings under s. 8 of Regulation XVII of 1806 in respect of every one of the three mortgages, and the year of grace required by that Regulation having expired, a foreclosure proceeding was recorded on the 18th September 1882, declaring the mortgages by conditional sale to have been foreclosed.

On the 20th August, 1885, the mortgagee Sheodin instituted three distinct suits for possession of the mortgaged properties, each [166] suit relating to each of the three *bai-bil-wafa* mortgages above-mentioned respectively. The suits were, however, compromised on the 19th September, 1885, and the learned Judge of the lower appellate Court has found that "at the time of the compromise the amount of the debt due on the first bond (the original consideration of which was Rs. 782-4-0) had amounted to Rs. 1,051-8-0; similarly the debt due on the second bond (original consideration Rs. 525), amounted to Rs. 1,062, and that of the third bond (original consideration Rs. 461-7-0), amounted to the sum of Rs. 824-11-0. The compromise was to the effect that the vendeee had accepted *in each case* 8 pies in mauza Simra and 4 pies in Mahadewa in full payment, and had agreed to release 4 pies of Mahadewa *in each case*. Decree was given in terms of the compromise.

The transactions above mentioned have resulted in this litigation, initiated by two sets of pre-emptors in respect of each of the three *bai-bil-wafa* mortgages above-mentioned.

The first set of the pre-emptors are (1) Ajaib Nath, (2) Kunjbehari, (3) Brijmohan, who jointly instituted three separate suits in respect of each of the three alienations. These three suits were instituted on the 8th September, 1886, against the heirs of the conditional vendors and Sheodin, the vendee.

Similarly on the 2nd November, 1886, Mathura Prasad instituted three rival suits for enforcement of pre-emption in respect of the same alienation.

There were thus two rival pre-emptive suits in respect of each alienation, and the rival pre-emptors were alternately impleaded as defendants to each other's suits— a procedure which is in conformity with the principles upon which the rulings of this Court in *Kashi Nath* v. *Mukhta Prasad* (1) and *Hulasi* v. *Sheo Prasad* (2) proceed.

The Court of first instance in dealing with the contentions of the parties, held that the right of pre-emption as claimed could not accrue till foreclosure of the mortgage by conditional sale; that [167] "the foroclosure proceedings were in a state of suspense" till the mortgagee Sheodin obtained a decree for foreclosure on the compromise of 19th September, 1885; that since under that compromise foreclosure took place in respect of 8-pies share in Simra and only 4-pies share in mauza Mahadewa to the exclusion of the remaining 4-pies share in the latter village which had been reserved by the compromise from foreclosure, such reserved 4-pies share was not subject to pre-emption. That Court therefore decreed the pre-emptive

(1) 6 A. 370 (2) 6 A. 455.

suit only in respect of 8-pies share in Simra and 4-pies share in Mahadewa, allotting three shares to the three plaintiffs, Ajaib Nath, &c., and one share to their rival pre-emptor Mathura Prasad—a procedure in conformity with the ruling of this Court in *Jai Ram* v. *Mahabir Rai* (1) where it was held that where there are rival suits for pre-emption the rights of the rival pre-emptors are to be taken as equal *per capita* with reference to the number of the pre-emptors and not with reference to the extent of their shares in the village.

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As to the price payable by the pre-emptors, the first Court held that the full amounts due on the three mortgages at the time of the compromise of 19th September, 1885, furnished the proper standard of calculation.

In accordance with these findings the first Court decreed all the six suits, and, taking each couple of rival suits, framed decrees upon the principles explained by this Court in *Kashi Nath* v. *Mukhta Prasad* (2), enabling each set of rival pre-emptors to obtain a proportionate share of the pre-empted property, and in default of either set of pre-emptors, to pre-empt the whole property.

From the first Court's decrees no appeal appears to have been preferred to the lower appellate Court by the rival pre-emptor Mathura or by Sheodin, vendee, or by any of the vendors, and these parties must, therefore, be taken to have accepted the first Court's decree.

The pre-emptors Ajaib-Nath, Kunjbehari and Brijmohan, however, appealed to the lower appellate Court, contending that the [168] first Court had wrongly excluded the 4-pies of Mahadewa which had been reserved from foreclosure under the compromise of 19th September, 1885, from their pre-emptive claim; that the rival pre-emptor Mathura had by acquiescence lost his right of pre-emption: that the price found by the first Court was excessive, since the vendee Sheodin was entitled only to such as was due on the three *bai-bil-wafa* mortgages at the expiry of the year of grace, and not to any sum as interest for the subsequent period. On the other hand, Mathura, the rival pre-emptor, who was impleaded as respondent in all the six appeals, filed objections under s. 561 of the Civil Procedure Code claiming a preferential right of pre-emption, and contending that the first Court should have allotted shares to the pre-emptors not *per capita*, but with reference to the extent of the shares of each pre-emptor in the village.

The lower appellate Court disallowed all these contentions with the exception of that relating to the 4-pies share of Mahadewa in respect of which the first Court had dismissed all the pre-emptive suits. The lower appellate Court held that "as the conditional vendors failed to redeem within the year of the grace, the sales on the expiration of that year became absolute. From that moment the vendee could have claimed to be put in possession of the whole of the party entered in the conditional deed. The pre-emptor was entitled to claim whatever the vendee could claim, and it was out of the power of the vendor and vendee to make any change in the conditions of the contract which could affect the rights of the pre-emptor."

For this opinion the learned Judge relied on a ruling of the Calcutta High Court in *Bhadu Mahomed* v. *Radha Churn Bolia* (3) and an old ruling of the Agra Sadr Court in *Sheodeen* v. *Sookit* (4) which go to show

(1) 7 A. 720. (2) 6 A. 370. (3) 4 B.L.R.A.C. 219.
(4) N.W.P.S.D.A.R. 1864, Vol. I, p. 624.

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that when pre-emption has once accrued, no subsequent dissolution of the sale can affect the pre-emptor's right of pre-emption. Following these rulings, the learned Judge decreed the three appeals of Ajaib and others (Nos. 32, 33 and 34) as far as they related to the reserved 4 pies of Mahadewa, and accordingly [169] modified the first Court's decrees in those three cases by declaring that Ajaib and others were entitled to get possession of three-fourths of 8 pies in Mahadewa and not of 4 pies only as decreed by the first Court.

The three appeals of Ajaib, &c., (Nos. 29, 30 and 31) which had arisen from the suits in which their rival pre-emptor Mathura was plaintiff, were dismissed by the learned Judge with the exeception of a small modification as to costs.

In this Court three sets of appeals have been preferred, each set consisting of three appeals.

Appeals Nos. 1288, 1290 and 1291 have been preferred by Ajaib and others, &c., and relate to the decrees in the three pre-emptive suits in which their rival pre-emptor Mathura was plaintiff. The second set of appeals, namely, Nos. 1286, 1287, 1289, have also been presented by them and relate to the decrees in the suits in which their rival pre-emptor Mathura was a defendant and they themselves were plaintiffs.

The third set of appeals, Nos. 1342, 1343 and 1344, have been preferred by the vendors and are restricted to complaining of so much of the lower appellate Court's decree as allowed pre-emption in respect of the 4-pies share of Mahadewa which had been expressly reserved for them by the compromise of the 19th September, 1885.

Such then being the nature of the entire litigation which these nine connected appeals present to me, and having heard them all, I think it will be convenient to dispose of the six appeals of Ajaib and others together, as they have been preferred upon the same grounds of appeal and raise the same points for decision. They are further connected together because in all of them the rival pre-emptor Mathura, being respondent, has preferred objections under s. 561 of the Civil Procedure Code, contending that his right of pre-emption is preferential to that of Ajaib and others, and suits of the latter should therefore have been dismissed by the lower Courts.

The first and the most important question in the case, however, has been raised by the three appeals of the vendors, namely, appeals [170] Nos. 1342, 1343 and 1344. The question is whether the lower appellate Court was right in holding that under the circumstances of this case the right of pre-emption could be claimed by either set of rival pre-emptors in respect of the 4-pies share in Mahadewa which had been released from the foreclosure by the mortgagee Sheodin under the terms of the compromise of the 19th September, 1885.

Mr. *Jogindro Nath Choudhri* who has appeared on behalf of the appellants-vendors has argued that the original *bai-bil-wafa* mortgages of the 15th June, 1878, having been executed whilst Regulation XVII of 1806 was in force, those mortgages could not be foreclosed without due performance of the preliminary steps required by s. 8 of that Regulation, and a decree of Court rendering such sale absolute, that the foreclosure proceedings were therefore ineffective till the compromise of 19th September, 1885, and the decree passed thereon, and that the compromise being thus conclusive and binding upon the mortgagors and the mortgagee, it also concludes the pre-emptors, and precludes them from claiming

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pre-emption in respect of the 4-pies share of Mahadewa which that compromise released from foreclosure and reserved for the mortgagors.

On the other hand, Mr. *Ram Prasad* who has ably argued these cases on behalf of his clients Ajaib and others, has contended that a foreclosure decree is not a condition precedent to rendering a *bai-bil-wafa* mortgage absolute under Regulation XVII of 1806, and that such conditional sales became absolute *ipso facto* by the mere lapse of year of grace after proceedings have been taken under s. 8 of the Regulation. Upon this contention the learned pleader argues that the foreclosure proceedings taken by the mortgagee Sheodin by his applications of the 22nd September, 1880, and which terminated in the foreclosure *rubkari* of 18th September, 1882, were sufficient to make the sales absolute at the expiry of the year of grace that at that time the right of pre-emption accrued to the pre-emptors in respect of the *whole* of the properties, and such right of pre-emption could not be defeated or restricted by any subsequent act of the mortgagor and mortgagee such as the compromise of 19th Septem-[171]ber, 1885, and that therefore the vendors-appellants are precluded from questioning the propriety of the foreclosure proceedings of 18th September, 1882.

I am of opinion that both these contentions go much too far in the direction at which they aim. In the case of *Tawakkul Rai* v. *Lachman Rai* (1), I stated my reasons and authorities for holding that on the expiration of the year of grace allowed by Regulation XVII of 1806, the ownership of the mortgaged property vests absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right, and that for purposes of pre-emption the date at which the conditional sale thus becomes absolute is the period of the accrual of pre-emption and cannot be effected by any foreclosure proceedings which may subsequent to such accrual be taken by the mortgagee. I still adhere to the same views, and while they, on the one hand, answer Mr. *Chaudhri's* contention as to the necessity of a foreclosure decree; they on the other hand, preclude Mr. *Ram Prasad's* contention that foreclosure proceedings such as the *rubkar* of 18th September, 1882, are conclusive or binding in any sense upon the vendors when the question is litigated whether or not a valid foreclosure has taken place. Such proceedings are of a purely ministerial character, and far from being conclusive are not even *prima facie* evidence of foreclosure having been duly effected. This matter is settled by the ruling of the Privy Council in *Norender Narain Singh* v. *Dwarka Lall Mundur* (2). Again, their Lordships in *Madho Prasad* v. *Gajadhar* (3) have laid down that the provisions of s. 8 of Regulation XVII of 1806, are not merely *directory* but imperative as conditions precedent to the right of foreclosure itself. How strict an observance of those requirements is necessary has been well stated by my brother Straight in *Sitla Bakhsh* v. *Lalta Prasad* (4) in observations with which I so entirely concur that they leave nothing for me to add.

Now such being the law, no attempt has been made by Mr. *Ram Prasad's* clients, Ajaib and others, pre-emptors, either to assert or [172] prove that in the foreclosure proceedings which ended in the *rubkar* of 18th September, 1882, all the requirements of the Regulation were satisfied, so as to result in an actual foreclosure at the expiry of the year of grace. The Court of first instance disregarded those proceedings, holding them to be "in a state of suspense," which phrase I understand to mean that actual foreclosure had not taken place. I cannot help feeling that

(1) 6 A. 344. (2) 5 I. A. 18. (3) 11 I. A. 186. (4) 8 A. 388.

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the learned Judge of the lower appellate Court in dissenting from the first Court's views upon this point had not present to his mind the exact and stringent requirements of the law of foreclosure under the Regulation, and that he took it for granted that because the foreclosure proceedings of the 18th September, 1882, had been recorded, therefore foreclosure necessarily took place and gave birth to the plaintiff's right of pre-emption in respect of the alienations. He assumes that the sale became absolute by the mere expiry of the year of grace.

Not only is this assumption unwarranted by the circumstances of the case, but the fact that notwithstanding the expiry of the year of grace the mortgagee, Sheodin, neither acquired possession nor sued for foreclosure till the 20th August, 1885, points to quite the opposite conclusion. It was on that day that he instituted his regular suits for possession against the vendors, and it was in that litigation that the compromise of the 19th September, 1885, was entered into declaring 8 pies of mauza Simra and 4 pies of Mahadewa to have passed to the mortgagee in full proprietorship, to the exclusion of the remaining 4 pies of Mahadewa which was released by the mortgagee and reserved by the mortgagors.

It has, indeed, been asserted in this litigation that these proceedings were all fraudulent and collusive with the object of defeating the plaintiffs' right of pre-emption. But no circumstances have been proved which would in law even amount to the *indicia* of fraud or collusion. The plaintiffs' right of pre-emption, if their theory of foreclosure proceedings, of 1880, were correct, would have been asserted before, at least, the suit of the 20th August, 1885; but, far from such being the case, it is not shown that any such assertion of pre-emption was made till after the compromise of 19th [173] September, 1885. Indeed even after that compromise the plaintiffs waited more than a year before claiming pre-emption.

I am, therefore, of opinion that till the compromise of 19th September, 1885, no foreclosure of the *bai-bil-wafa* mortgages is shown to have taken place, that the compromise is not shown to be other than a *bona fide* transaction, that the plaintiffs' right of pre-emption must be referred to that date, that since by that compromise foreclosure took place only in respect of 8 pies of Simra and 4 pies of Mahadewa to the exclusion of the remaining 4 pies of the latter village, on right of pre-emption accrued to the plaintiffs in respect of such reserved 4-pies share of Mahadewa. And it follows that the lower appellate Court acted erroneously in interfering with the first Court's decree in this respect, also that the two rulings *Bhadu Mahomed* v. *Radha Charan Bolia* (1), *Sheodin* v. *Sookit* (2) on which the lower appellate Court has relied have no application to the facts of this case. In those cases the sales were absolute, the right of pre-emption had been asserted, and the question was whether subsequent dissolution of the sale could affect the pre-emptor's right. The result of these views will be that I shall decree the three appeals of the vendors-appellants, namely, appeals Nos. 1342, 1343, 1344.

These findings simplify the disposal of the grounds urged in the six appeals of Ajaib Nath, Kunjbehari and Brijmohan, who throughout this litigation have shown themselves unwilling to take a reasonable view of their right of pre-emption. They have been endeavouring not only to prevent their rival pre-emptor Mathura from having his share of the pre-emptive right but also to oust the original proprietors from the 4-pies share

(1) 4 B. L. R. A. C. p. 129. (2) S. D. A. N. W. P. R. 1864. Vol. I, p. 624.

in Mahadewa which even the mortgagee Sheodin saved from forelosure by the compromise of 19th September, 1885.

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The first ground urged in support of their appeals is that inasmuch as their rival pre-emptor Mathura (who is respondent in all the six appeals) was content with the first Court's decree and did not appeal in respect of the 4-pies share of Mahadewa, therefore the [174] entire 4-pies share should have been allotted to them in virtue of their right of pre-emption. After what I have said in respect of the appeals by the vendors in whose favour that 4-pies share was reserved, it is wholly unnecessary for me to discuss the matter any further, beyond saying that since I have held that share to have been rightly excluded by the first Court from these pre-emptive claims, neither Ajaib and others nor Mathura can take any portion of that reserved share. For the same reasons it is unnecessary to discuss the question raised in the second ground common to all these six appeals, where it is contended that Mathura, respondent. having taken no exception to the amount of the sale-consideration adjudicated upon by the first Court, is not entitled to the benefit of any reduction therein upon the appellants' case.

The third ground of appeal, which is also common to all the six appeals, is that the respondent Mathura " having acquiesced in the transfer of the shares sued for cannot pre-empt in respect of the same." This ground of appeal was, indeed, abandoned by Mr. *Ram Prasad*, but I will dispose of it by simply saying that the plea of acquiescence is based entirely upon the circumstance that Mathura was a witness to two out of the three *bai-bil-wafa* mortgages of the 15th June, 1878, and that the lower appellate Court was right in holding that acquiescence in a mortgage by conditional sale does not either imply or involve the foregoing of the right to pre-empt should the conditional sale *eventually* become absolute.

There remains only one more ground of appeal, which is limited to the three appeals (Nos. 1286, 1287, 1289) to which the vendee Sheodin is respondent, and it is against him that the plea aims. In that ground of appeal it is urged that the appellants were entitled to pre-empt the property "on payment of the amount due up to the date when the year of grace expired and could not be charged with any sum accruing since that date". This plea proceeds of course entirely upon the assumption (which I have already refuted), namely, that the *bai-bil-wafa* mortgages became absolute byreason of the foreclosure-proceedings of 1880 and 1882, and by making the conditional sales absolute, gave birth to the plaintiffs' [175] right of pre-emption. The plea also assumes that the compromise of the 19th September, 1885, is of no consequence as determining either the point of time when pre-emption accrued or the amount of price which must be taken to be the consideration in lieu of which the conditional sales became absolute. But I have already said enough to show that there is nothing to vitiate the compromise, and both the Courts below have concurred in finding, that the allegations of fraud as to the amount of consideration were not substantiated. Mr. *Ram Prasad* has relied upon my ruling in *Tawakkul Rai* v. *Lachman Rai* (1) where I held that a person claiming a right of pre-emption in cases of mortgage by conditional sale was bound to pay the entire amount due on such mortgages at the time when they became absolute, and that they became absolute at the expiration of the year of grace required by Regulation XVII of 1806. The

(1) 6 A. 344.

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ruling does not help the appellant's case, because there the due foreclosure of the mortgage according to the requirements of the Regulation was an admitted fact, and therefore naturally the period of the expiry of the year of grace and the amount due on the mortgage regulated both the foreclosure and the accrual of the pre-emption, and indeed would also have regulated the amount of price payable by the pre-emptor, had it not been that the pre-emptors sued not upon the ground of that foreclosure, but upon the ground of a subsequent transfer (*vide* p. 350 of the report). So far as the question of the amount of consideration is concerned, perhaps the case most similar to the present is that of *Jagat Singh* v. *Ram Bakhsh*(1) where pre-emption was claimed in respect of a mortgage by conditional sale, foreclosure-proceedings had been taken, a suit for possession had been instituted by the mortgagee and had ended in a compromise whereby half the property was released by the mortgagee, and the other half was foreclosed, for a price mentioned in the compromise, and the pre-emptive suit related to such latter half. In that case I held, as I have held here, that the price payable by the pre-emptor was the amount mentioned in the compromise.

[176] For these reasons all the six appeals of Ajaib and others must stand dismissed. In every one of them Mathura the rival pre-emptor has filed objections under s. 561 of the Civil Procedure Code, claiming a preferential right of pre-emption. The objections were expressly adandoned by his learned Counsel Mr. *Dillon*, and I need only say that even if they had been pressed they could not have succeeded, because they raise a question of fact, which has been decided against him by the Courts below, the lower appellate Court having clearly found that there was no evidence in support of the pretension of a right of pre-emption superior to that of Ajaib and others. The objections will therefore be dismissed.

This second appeal (No. 1288) is dismissed with costs, and also the objections which Mathura, respondent, has filed under s. 561 of the Code of Civil Procedure.

Appeals dismissed.

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11 A. 176 = 9 A.W.N. (1889) 27 = 13 Ind. Jur. 316.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Brodhurst.

HUSAINI BEGAM (*Plaintiff*) *v.* THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS (*Defendants.*)* [14th February, 1889.]

Practice—Appeal—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Act XV of 1877 (*Limitation Act*), s. 5—*Letters Patent N.W.P*, s. 27—*Civil Procedure Code*, ss 575, 647—*Review of judgment—Civil Procedure Code*, s. 623—*Court-fee—Act VII of* 1870(*Court-fees Act*), sch. I. No. 5—*Fee payable on application to review appellate decree under Letters Patents*, s. 10.

S. 27 of the Letters Patent for the High Court of the N.W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable.

One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High

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* Miscellaneous No. 202 of 1887.

(1) 7 A.W.N. (1887), 233.

Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1887) for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot [177] be said that the Court which by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail.

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APPELLATE CIVIL.

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Appaji Bhivrav v. *Shivlall Khubchand* (1) and *Gossami Sri Sri Gridhariji Maharaj Tikait* v. *Purusholum Goesami* (2) distinguished.

Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment,—*held* that under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree, under s. 623 of the Code.

For the purpose of ascertaining the court-fee to be paid under sch. i, art. 5 of the Court-fees Act (VII of 1870) upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint nor—where the decree sought to be reviewed was passed on appeal under s. 10 of the Letters Patent from an appellate judgment of a Division Bench—the fee which was leviable on the memorandum of the appeal before such Bench.

[D., 25 M. 548 (551).]

[N. B. Read in this connection, 9 A. 11 and 9 A. 655.]

THIS was an application under s. 623 of the Civil Procedure Code for review of a judgment of Edge, C. J., and Straight and Brodhurst, JJ., which will be found reported in I. L. R., 9 All. 655. That judgment was delivered on an appeal under s. 10 of the Letters Patent from a judgment of Mahmood, J., in which his Lordship differed in opinion from Tyrrell, J., Mahmood, J., holding that the appeal before the Division Bench should be dismissed as barred by limitation, and Tyrrell, J., that "sufficient cause" for an extension of time had been shown by the appellant within the meaning of s. 5 of the Limitation Act (XV of 1877) and that the appeal should be heard and determined on the merits. The judgments of Tyrrell and Mahmood, JJ., in which the facts of the case were stated, will be found reported in I. L. R., 9 All. 11.

The Division Bench hearing the appeal thus differing in opinion, the appeal was, with reference to the second paragraph of s. 575 of the Civil Procedure Code, dismissed; and the appeal under s. 10 of [178] the Letters Patent was argued and decided upon the assumption that s. 575 was applicable to the case, and that, in accordance with it, the judgment of Mahmood, J., maintaining that of the Court below, determined the appeal before the Division Bench. In the result, the appeal under s. 10 of the Letters Patent was dismissed, the Court agreeing with Mahmood, J.

The present application was for review of this judgment, upon grounds which are fully explained in the judgment of Edge, C. J., now reported.

(1) 3 B. 204. (2) 10 C. 814.

1889 FEB. 14. — APPELLATE CIVIL. — 11 A. 175 = 9 A.W.N. (1889) 27 = 13 Ind. Jur. 316.

Pandit *Sundar Lal* (at the request of the Court) argued the case for the petitioner.

Mr. *G. E. A. Ross*, and Pandit *Bishambhar Nath*, for the respondents.

JUDGMENT.

EDGE, C. J.—This application for a review of judgment arises in this way. The first appeal in the suit was admitted to the file of first appeals by my brother Tyrrell. When that first appeal came on to be heard by my brother Tyrrell and my brother Mahmood, a preliminary objection on behalf of the respondents to the appeal being heard, that the appeal was time-barred, was taken. My brother Tyrrell was of opinion that the appellant had shown sufficient cause for not presenting the appeal within the prescribed time. My brother Mahmood was of contrary opinion; and applying the provisions of s. 575 of the Code of Civil Procedure and s. 4 of the Indian Limitation Act, 1877, to the case, the appeal was dismissed with costs as being time-barred. By the decree which was drawn up, the appeal was dismissed with costs, and the decree from which that appeal had been brought was affirmed.

From that decree, or rather from the judgment or order of my brother Mahmood, an appeal was brought by the appellant under s. 10 of the Letters Patent which applies to this Court. The last-mentioned appeal, which was a pauper appeal, was heard by my brother Straight, my brother Brodhurst, and me, and we agreeing with the judgment of my brother Mahmood that the appellant had not shown sufficient cause for not presenting the first appeal within [179] time, dismissed the appeal to us. This application to us is to review our decree.

Pandit *Sundar Lal* kindly undertook at our request to assist the Court by arguing the case for the applicant. Pandit *Bishambhar Nath* for some of the respondents took the preliminary objection that the application for review was insufficiently stamped, in that it was not stamped with one-half the fee which was leviable on the first appeal. We overruled that objection, holding that as the application for review had been presented before the ninetieth day from the date of the decree which we were asked to review, art, 5 of sch, i of the court-fees Act applied, and that for the purpose of ascertaining the court-fee to be paid on an application to review a decree passed in appeal, the fee which must be considered was the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint, or, as in this case, on the first appeal.

Pandit *Sundar Lal* contended that the appeal which we had decided must have prevailed if we had not omitted to consider the provisions of s. 27 of the Letters Patent, and that the question which we ought to have decided was not that which we did decide, namely, that the appellant had not shown sufficient cause for not presenting the first appeal within the prescribed time, but the question whether or not my brother Tyrrell and my brother Mahmood should not have proceeded to hear the first appeal on the merits, as my brother Tyrrell, who was the senior Judge, had decided that the appellant had shown sufficient cause for not presenting the first appeal within time. He contended that s. 575 of the Code of Civil Procedure did not apply to a case like the present, and consequently, that s. 27 of our Letters Patent governed the procedure. On the other hand, Mr. *Ross* for some of the respondents and Pandit *Bishambhar Nath* for the others, contended that s. 575 of the Code of Civil Procedure had superseded s. 27 of the Letters Patent so far as our appellate jurisdiction

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is concerned. They relied on *Appaji Bhivrav* v. *Shivlall Khubchand* (1) and *Gossami Sri Sri Gri-*[180] *dhariji Maharaj Tickait* v. *Purushotum Gossami* (2) and s. 647 of the Code of Civil Procedure.

In the Bombay case, the Court held that the corresponding section of their Letters Patent was superseded by s. 575 of Act X of 1877, so far as regards cases to which s. 575 was applicable, and that s. 575 was extended to miscellaneous proceedings of the nature of appeals by s. 647, with which decision I entirely agree. In the Calcutta case, the Court agreed with the view taken by the Bombay High Court in *Appaji Bhivrav* v. *Shivlall Kubchand* (1). I may remark that in each of these cases, s. 575 of the Code of Civil Procedure was applicable.

The material words in s. 27 of our Letters Patent are, "and if such Division Bench is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point, shall be decided according to the opinion of the majority of the Judges if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."

If s. 27 of our Letters Patent applied, my brother Tyrrell and my brother Mahmood should have proceeded to hear the appeal and should not have dismissed the appeal on the ground that it was beyond time.

The real question for us to decide is whether s. 575 of the Code of Civil Procedure applies to this case.

According to the well-established practice of this Court, it is open to a respondent, when an appeal is called on for hearing, to take the preliminary objection to the appeal being heard, that the appeal was time-barred when the memorandum of appeal was presented to the Court for admission on the file, and such preliminary objection is decided upon before the hearing of the appeal is proceeded with. In such cases there is in fact no hearing of the appeal unless and until the Court has overruled such preliminary [181] objection. When such preliminary objection is taken, the question is whether there is before the Court an appeal which can, having exclusive regard to the provisions of the Indian Limitation Act be heard. When the preliminary objection is sustained, it cannot be said that the appeal has been heard or decided. In such a case all that can be decided is that there is no appeal before the Court which the Court can hear or decide.

An examination of s. 575 in my opinion shows that that section cannot apply to a case like the present. The second paragraph of that section provides that "if there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed." In such a case as the present, unless s. 27 of our Letters Patent applies, there could be no judgment at all varying, reversing or affirming the decree. It could not possibly have been the intention of the Legislature that a Court should decree that a decree against which there was by reason of the Indian Limitation Act no appeal for the Court to hear, should be affirmed; in other words, that a Court which, by reason of the Indian Limitation Act, had no jurisdiction to hear the appeal, should nevertheless affirm the decree below.

It was contended on behalf of the respondents that in such a case it would be the duty of the Judges differing to act in accordance with the provisions of the third paragraph of s. 575. I do not see that any such duty is imposed on Judges differing, and if there is any such duty, that

(1) 3 B. 204. (2) 10 C. 814.

1889 FEB. 14. — APPELLATE CIVIL. — 11 A. 176 = 9 A.W.N. (1889) 27 = 13 Ind. Jur. 316.

paragraph applies only to cases in which "the Bench differ in opinion on a point of law," in which case only can the Bench differing in opinion make such a reference.

Assume, for the purposes of argument, that in the present case my brother Tyrrell and my brother Mahmood were agreed that the cause alleged by the appellant was, if proved, sufficient cause for the appellant not presenting the appeal within the prescribed time, but that whilst my brother Tyrrell was of opinion that the cause alleged was proved in fact, my brother Mahmood was of opinion that it was not in fact proved. In that event, no such reference [182] as is provided for by the third paragraph of s. 575 could be made, as the Bench had not differed on a point of law.

There are many cases to which, in my opinion, s. 575 could not apply, even with the aid of s. 647. For example, suppose that an application is made to this Court under the first paragraph of s. 545 of the Code of Civil Procedure, and the two Judges constituting the Bench before which the application is heard differ in opinion as to whether "substantial loss may result to the party applying for stay of execution unless the order is made." What is to happen unless s. 27 of our Letters Patent applies? If s. 27 does not apply, the application could neither be rejected nor granted; there would be no decree or order to affirm; and there would be no power to refer the question under the third paragraph of s. 575; in fact the Court in the exercise of its jurisdiction under s. 545 of the Code of Civil Procedure would be brought to a dead-lock.

Similar difficulties might arise on an application for a certificate to appeal to Her Majesty in Council, and in many other cases.

I am of opinion that s. 27 of our Letters Patent is superseded in those cases only to which s. 575 of the Code of Civil Procedure properly, and without straining language, applies, and that this is not one of those cases. I am consequently of opinion that, on the preliminary objection to the hearing of the first appeal which was taken before my brother Tyrrell and my brother Mahmood, the opinion of my brother Tyrrell should have prevailed, and the hearing of the appeal should have proceeded on the merits according to law. I am also of opinion that, under these circumstances, there is a mistake or error apparent on the face of the record, and that there is sufficient reason for our granting this application for review of our decree, and that we should grant this application.

As the Counsel and vakils in the case do not desire to be further heard on the re-hearing of the appeal to which this order of mine applies, we now proceed to dispose of the appeal.

[183] For the reasons already stated, I am of opinion that the decree appealed against should be set aside, and that the first appeal in this case should be reinstated on the file of pending appeals, and should be heard and decided according to law, and that the costs of this application and of the appeal to us should abide the result of the determination of the first appeal.

STRAIGHT, J.—I agree.

BRODHURST, J.—I concur.

11 A. 183=9 A.W.N. (1889) 65.

1888 Oct. 24. APPELLATE CRIMINAL. 11 A. 183=9 A.W.N. (1889) 65.

APPELLATE CRIMINAL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* LAL SAHAI.* [24th October, 1888.]

Evidence—Witnesses—Competency of persons of tender years—Act I of 1872 (*Evidence Act*), s. 118—*Judicial oath or affirmation—Act X of* 1873 (*Oaths Act*), ss. 6, 13—*Omission to take evidence on oath or affirmation.*

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the exent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.

Having regard to the language of the Oaths Act (X of 1873) a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require, *Queen-Empress* v. *Maru* (1), referred to.

In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation.

[184] *Held* that there was nothing in the law to sanction this procedure on the part of the Judge.

The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred.

[Appr., 16 B. 359 (363, 364, 365); R.. 16 M. 105 (115)=1 Weir 826; 11 C.P.L.R. 16 (17); 10 O.C. 337 (339)=7 Cr. L.J. 89.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

The appellant was not represented.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an appeal from a capital conviction of the Sessions Judge of Cawnpore, and the case also comes before us for confirmation of the sentence of death passed upon the appellant under the provisions of the statute. The appellant was charged with having, upon the 25th July, 1888, at a village called Garahya, in the Cawnpore district, murdered Musammat Mathuria, his wife. The committing Magistrate in sending the case for trial, among the other witnesses whose depositions had been taken, recorded the deposition of a boy of the name of Churia, the son of the appellant, and his evidence, if true, was of the most vital

* Criminal Appeal, No. 676.
(1) 10 A. 207.

1888 OCT. 24. —— APPELLATE CRIMINAL. —— 11 A. 183 = 9 A.W.N. (1889) 65.

importance to the case for the prosecution, establishing as it did the presence of the appellant upon the scene of the murder immediately after it had been committed, and the use of an expression by the appellant towards the boy, which was consistent only with the notion that the person who made use of it was the perpetrator of the crime. When the case came before the learned Sessions Judge, the boy Churia was called, and it was recorded by the Sessions Judge with regard to him that he was the son of Lal Sahai, that his age was twelve, and then the learned Judge's record goes on to say that, without administering any oath, he asked him some questions, to which he answered as follows :—"I worship Debi. I understand the difference between truth and falsehood. I dont' know the consequences here or hereafter of telling lies, but I will tell the truth," and then the learned Judge records, "No oath is administered to this child." Despite this circumstance therefore, and though the learned Judge intentionally omitted either to swear or affirm the child, he proceeded to take from him a lengthened statement as a witness. In my [185] opinion there is nothing in the law to sanction this procedure on the part of the learned Sessions Judge. Either a person is or is not made a witness : if he is made a witness, then the law of this country requires that he should be either sworn or affirmed. The competency of such person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn or affirmed ; the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed and has given his evidence as a witness. As to the competency of witnesses, that is specifically and in terms declared by s. 118 of the Evidence Act, and I find in that section no direction or intimation to a Court which has to deal with the question whether a person should or should not be examined, that it is to enter upon inquires as to his religious belief or open up such a field of speculation as is involved in the query, "What will be the consequences here or hereafter if you will not tell the truth?" What I take the law to say is, and a very sound and sensible law I hold it to be, that a Court is to ascertain in the best way it can whether, from the amount of intellectual capacity and understanding of a young or old person, that person is able to give a rational and intelligent account of what he has seen, or heard, or done on a paticular occasion, and if the Court is satisfied that a child of twelve years or an old man or woman of very advanced age can satisfy those requirements, the competency of the witness is established. I am very clearly of opinion that having regard to the language of the Oaths Act, neither a Judge nor a Magistrate has any option when once he has elected to take the statements of a person as evidence but to administer either the oath or affirmation to such person as the case may require, and I think it well that this should be understood by such tribunals in these Provinces, in order that they in future may guard against a repetition of the delay and inconvenience that has been caused by the learned Judge's defect of procedure in the present case. I need only further remark in this connection that it might happen that a very grave miscarriage of justice should occur in consequence of the omission of which I have spoken. In a former case involving the same question I made reference to a learned [186] ruling of my brother Mahmood in *Queen-Empress* v. *Maru* (1), and my brother Tyrrell and myself having that ruling present to our minds, thought it desirable and proper in a case of the gravity of the present case

(1) 10 A. 207.

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to see that what had been omitted to be done by the learned Judge in regard to the lad Churia was supplied in this Court. Consequently we gave directions for the convict Lal Sahai to be brought before us, and directed the attendance of the boy Churia in order that the latter might, after we had satisfied ourselves of his competency to depose, be put either on oath or affirmation and examined as to his account of the proceedings that took place upon the night on which his mother was most undoubtedly murdered. I was most thoroughly satisfied by his answers to the preliminary questions that were put to the lad by my brother Tyrrell that he was a perfectly intelligent creature, that he was quite capable of giving thoroughly rational answers which, by the way, his reply to my examination of him through the interpreter abundantly showed; and further, when he gave his evidence, that he told a true and untutored story of what actually transpired upon the night of his mother's death. It was strikingly noticeable that instead of trying to avoid giving direct answers to my questions as an Indian witness would, who had had a tale taught him to tell, he carefully waited to hear what my questions were, and when he did not understand them asked to have them explained to him. I may add that I took special pains in conducting his examination, to avoid, as far as possible, putting the questions to him in a shape that would, in anyway, suggest his answers or refresh his memory as to what he had said on former occasions. I have heard and considered the whole of his evidence with very great attention and anxiety, and I am convinced that the little lad is telling absolute and entire truth, and that when he spoke as to the appellant being the person who was "flying" from the shed immediately after the murder, and said that he screamed out and the appellant used the expression he described, he stated the truth. His evidence is corroborated by the evidence of his two uncles Manohar and Himatia, and I do not for one moment believe that these two men have deliberately united [187] in a conspiracy, not only between themselves, but with the police for the purpose of procuring the conviction and execution of an innocent man for their sister's murder. Whatever may have been the motive which led the unfortunate deceased to go from her old house at Lalgaon to her brother's house to Garahya, I cannot pretend to say, for I have no reliable information before me upon the subject. But that the appellant followed her and that he was constantly endeavouring to get her to go back to Lalgaon is a matter about which I entertain no doubt, or that on her refusal to do so he resolved to put her out of the way and did so. The murder was a very cruel and cowardly one perpetrated upon a sleeping and defenceless woman, and there are no circumstances of extenuation whatever which would justify me in mitigating the extreme penalty which the learned Judge, with whom the assessors agreed in convicting, passed upon the appellant. The appeal is dismissed, the sentence confirmed, and I direct that it be carried into execution, and I further direct that the appellant be taken back to the jail from which he came for the purpose of the sentence being carried out.

TYRRELL, J.—I concur.

Appeal dismissed and sentence confirmed

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11 A. 187 (F.B.)=9 A.W.N. (1889) 13.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

SUKH LAL *(Defendants)* v. BHIKHI *(Plaintiff)*.* [15th November, 1888.]

Civil Procedure Code, ss. 13, 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata.

A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—" This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Mussammat Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another [188] suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

Held by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effete; that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. *Kudrat* v. *Dinu* (1), *Ganesh Rai* v. *Kalka Prasad* (2), *Salig Ram Pathak* v. *Tirbhawan Pathak* (3) and *Muhammad Salim* v. *Nabian Bibi* (4), explained.

[R., 6 Bom. L.R. 594 (598, 599); D., 17 C. 398 (409, 410).]

THIS was a reference to the Full Bench of an appeal which originally came for hearing before Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C. J.

Mr. *Niblett*, for the appellant.

Mr. *Simeon*, for the respondent.

JUDGMENTS.

EDGE, C. J.—The plaintiff in this case brought an action to recover certain plots of land. He was met by the defence of *res judicata*. That defence arose in this way. The present plaintiff had previously brought an action against these defendants for 6 bighas odd of land, the title alleged by him being a sale-deed from one Musammat Lachminia. In that action the Munsif had held that the plaintiff had not made out his title to the whole of the land claimed, although he had proved title to a one-third share of the land then in suit. He dismissed the action, but included in his decree an order in these terms:—

" This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale, dated 18th February, 1884."

That decree was not appealed from; and subsequently the present action was brought for that one-third interest of Musammat Lachminia which was referred to in the decree of the Munsif in the previous case. The Subordinate Judge on appeal in this case held [189] that s. 13 of the Code of Civil Procedure did not apply. From his decree the defendants

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* Second Appeal, No. 1266 of 1887.

(1) 9 A. 155. (2) 5 A. 595. (3) 5 A.W.N. (1885), 171. (4) 8 A. 282.

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appealed. It is not contended on behalf of the respondent here, the plaintiff, that this order was one made under s. 373 of the Code of Civil Procedure. Indeed, it could not be contended that s. 373 could not apply, inasmuch as no application was made in the prior suit by the plaintiff for liberty to withdraw from or abandon any portion of his claim. Further, the decree in the prior suit was one of dismissal and not in the nature of an order allowing the plaintiff to withdraw or abandon his claim with leave to bring a fresh action.

It appears to me that the Munsif probably thought that he could pass a decree which would operate as a non-suit did formerly in an English Court. It has been decided by the Privy Council, and we, of course, followed that decision in the case of *Banwari Das* v. *Muhammad Mashiat*(1), that there is no power in any Court in India to pass a decree in the nature of a non-suit.

It has been contended on behalf of the respondent that I have already decided that where a reservation, such as there is here, appears in a decree, that reservation enables the then unsuccessful party to maintain a fresh suit. That contention is based on the following passage in my judgment in *Kudrat* v. *Dinu* (2):—"The Munsif in dismissing the suit did not reserve to the respondents the right to bring a fresh action." It is contended that that passage means that if the Munsif, while dismissing the suit, had reserved to the respondents the right to bring a fresh suit, the respondents would have been entitled to maintain such an action. The passage to which I have referred was an answer to one of the arguments put before us in that case, namely, that the judgment or decree in that case did include such a reservation: and the passage above quoted was merely intended as a negation of that suggestion, and not as throwing out any suggestion that if such a reservation had been made, it would have had any effect in law. The Munsif here had, in the first case, no power to make any such reservation or order as appears in his decree. His including that order in his decree was [190] in excess of any powers which any Judge in India has; and that portion of the decree, although not appealed against, might be treated, in my opinion, as an absolute nullity. The Munsif could not by the insertion of such words in his decree create in India a decree of non-suit which is not provided for by law, and which the Privy Council has expressly ruled does not exist in India.

Consequently, I am opinion that the fact that that decree was not appealed against, does not give that order contained in it any effect.

The only other point raised on behalf of the respondent is, whether this was a case falling within s. 13. In the former case, as I have said, the plaintiff sued for 6 bighas odd of land on the same title as that upon which he comes into Court to-day. In that former suit he could have obtained, if the Munsif had decided rightly in law, a decree for the one-third interest to which he had established his right. So that in fact the relief regarding the one-third interest was a relief which he could have obtained in the former suit, exactly upon the same title upon which he has brought his present suit. Because the Munsif wrongly dismissed his whole claim instead of granting him relief in respect of the one-third interest to which he was entitled, it does not render the decision in the former case any the less a decision coming within s. 13 of the Civil Procedure Code.

I am of opinion, therefore, that this appeal should be allowed with

(1) 9 A. 690.

(2) 9 A. 155.

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costs, and the judgment and the decree of the Court below being reversed the suit should stand dismissed with costs in all Courts.

TYRRELL, J.—I understand that the reason for this reference is to be found in the last paragraph of my brother Mahmood's order of the 30th July, 1888, where he says :—"The earliest ruling is *Ganesh Rai* v. *Kalka Prasad* (1), which was dissented from by Oldfield, J., in *Salig Ram Pathak* v. *Tirbhawan Pathak* (2), and I concurred in his judgment. For the second time that ruling was [191] dissented from by me in *Muhammad Salim* v. *Nabian Bibi* (3) and Olfield, J., concurred with me. The last case is *Kudrat* v. *Dinu* (4) in which the learned Chief Justice made no reference in his judgment to the earlier rulings, but my brother Tyrrell in explaining his ruling in *Ganesh Rai* v. *Kalka Prasad* (1) seemed to think that Oldfield, J., and myself had misunderstood its effect when we dissented from it."

I endeavoured in my judgment in *Kudrat* v. *Dinu* (4) to explain how the case of *Ganesh Rai* v. *Kalka Prasad* (1) differed essentially and also in its particulars from the case of *Salig Ram Pathak* v. *Tirbhawan Pathak* (2) and of *Muhammad Salim* v. *Nebian Bibi* (3). I pointed out that in respect of *Ganseh Rai* v. *Kalka Prasad* (1) the Court in the previous action which was pleaded in bar under s. 13, Civil Procedure Code, had heard the parties, had framed issues, had taken evidence and proceeded to decree under Chapter 17 of the Civil Procedure Code. I said :—"I fully concur, and would only add that this suit is exactly similar to *Ganesh Rai* v. *Kalka Prasad* (1). The ruling in that case has been questioned subsequently by Mr. Justice Mahmood—*Muhammad Salim* v. *Nabian Bibi* (3)—who dissented from the law as laid down therein. But the learned Judge did not discern that the case of *Ganesh Rai* v. *Kalka Prasad* (1) was essentially distinguished from the three cases he had to determine. In *Ganesh Rai* v. *Kalka Prasad* (1) the Court had heard the parties, framed issues after taking evidence and proceeded to judgment. In the cases before Mahmood, J., the plaintiff was non-suited on the preliminary ground of misjoinder."

I may add now that the judgment in *Ganesh Rai* v. *Kalka Prasad* (1) was against the plaintiff on this ground. The Munsif found that his title was contained in a sale-certificate. The Munsif thought that this, being so, the plaintiff was disqualified from proving his title *aliunde* : and holding that the sale-certificate was one of those documents which could not be received in evidence after the filing of the plaint, he dismissed the plaintiff's suit for want of evidence and decreed accordingly under Chapter 17 of the Civil [192] Procedure Code. Now in the case of *Salig Ram Pathak* v. *Tribhawan Pathak* (2) my brother Oldfield in his judgment stated that the previous "suit was dismissed on a preliminary and technical point, and there was no hearing or decision of the matter in issue in that suit, nor indeed was there any intention on the part of the Court to hear and decide it ; the Court, in fact, refused to do so." The report states that the defect was misjoinder for want of all the proper parties.

Again in *Muhammad Salim* v. *Nabian Bibi* (3) my brother Mahmood wrote in his judgment that the previous "suit was dismissed on the ground of misjoinder, and also because the suit was undervalued, and the plaintiff had failed to pay, within the time fixed, additional court-fees

(1) 5 A. 595. (2) 5 A. W.N. (1885) 171. (3) 8 A. 282. (4) 9 A. 155.

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required by the Court." The learned Judge further found that the suit had, in fact, been dismissed under s. 10 of the Court-Fees Act. The case was disposed of in the manner contemplated by the fourth Chapter of the Civil Procedure Code. However, it appears that at the hearng of both those cases the ruling contained in *Ganesh Rai* v. *Kalka Prasad* (1) was cited and relied upon, as if it was on all fours with the two other cases. In the former of the two, *i.e.*, in *Salig Ram Pathak* v. *Tirbhawan Pathak* (2) my brother Oldfield said: "I am unable to concur in the opinion expressed by the learned Judges in the case cited by the Judge, and the view I have taken is supported by numerous decisions." In the other case, that is to say, in the case of *Muhammad Salim* v. *Nabina Bibi* (3) my brother Mahmood at the conclusion of his judgment said: "*Res judicata dicitur quae finem controversiarum pronuntiatione judicis accepit quod vel condemnatione vel absolutione contingit* (Dig. XLII, Tit. I, Sec. I), The case of *Ganesh Rai* v. *Kalka Prasad* (1) already referred to ignores this fundamental principle of law; and this is a not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling, and we did so before in a case—*Salig Ram* v. *Tirbhawan Pathak* (2), in which the point for the determination was very similar to this case."

[193] As I have pointed out above, it has hitherto seemed to me and it still seems to me that there is no similarity between those cases. But it is possible that the learned Judges in question were misled by the reporting of the facts of the case of *Ganesh Rai* v. *Kalka Prasad* (1). The report represents in that case that the Munsif "dismissed it on the 23rd May, 1881, in the form in which it was brought (*ba haisiyat maujuda*), on the ground that the plaintiff had not filed his certificate of sale with the plaint." This is an insufficient, if not an incorrect, description of the case of *Ganesh Rai* v. *Kalka Prasad* (1). I have now endeavoured again to explain why I have thought this last-mentioned case was not on all fours with cases before my brother Mahmood, but essentially distinguishable from them. I have only now to say that I entirely concur with the judgment and the order of the learned Chief Justice.

MAHMOOD, J.—The facts of this case are fully stated in my order of reference of the 30th July, 1888, which I passed after obtaining the learned Chief Justice's permission to refer this case, which I may call a very simple case, to a Bench of more than two Judges. It was by an order of the learned Chief Justice that the case was laid before this Bench. I confess frankly that I should not have passed that order without much greater hesitation than I have had, because throughout the whole argument that was addressed to me by the learned pleaders of the parties, I regarded the question raised as a simple question which was an elementary proposition of law, after the numerous amount of case-authority that existed on the point. That question has been mentioned by the learned Chief Justice, and I have only to add that I agree in the conclusions arrived at by him.

But the only justification which I could have had to take up the time of three Judges, can be best explained by saying that I am glad to find that my brother Tyrrell has now pointed out that the report of the case of *Ganesh Rai* v. *Kalka Prasad* (1) misled not only me for the first time, but our late colleague Oldfield, J., in the case of *Salig Ram* v. *Tirbhawan* (2) and also misled both him and me in a second [194] case. Further

(1) 5 A. 595. (2) 5 A.W.N. (1885), 171. (3) 8 A. 282.

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I may be allowed to observe that similar was the difficulty which arose in the case of *Kudrat* v. *Dinu* (1). If I could have understood those rulings in the sense in which my learned brother has now explained them, I should not have considered it necessary to entertain an apprehension that there was any conflict of opinion in this Court upon the question of law dwelt upon and decided by me in *Muhammad Salim* v. *Nabian Bibi* (2). To those views I still adhere, and if the smallest disagreement existed upon the Bench in this case, I should have considered it my duty to show more clearly that where an issue has been raised and evidence received and adjudication arrived at, the suit does become a *res judicata*, and *Muhammad Salim* v. *Nabian Bibi* (2) is not opposed to that view. It would be simple expenditure of time to consider the matter further, because I concur in the learned Chief Justice's judgment in the case of *Kudrat* v. *Dinu* (1), and I concur in the view which he has expressed in this case.

I may, however, add for the sake of further accuracy and of the importance to be attached to head-notes, that the head-note in *Muhammad Salim* v. *Nabian Bibi* (2) represents me as holding that the words "*ba haisiyat maujuda*" must be taken as amounting to a permission to the plaintiff to bring another suit, within the meaning of s. 373, Civil Procedure Code. The note goes beyond what I said in any portion of my judgment in that case. *Appeal allowed.*

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11 A. 194 (F.B.) 9=A.W.N. (1889) 30=13 Ind. Jur. 347.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Mahmood.

JANKI (*Plaintiff*) v. NAND RAM AND ANOTHER (*Defendants*).*
[7th December, 1888.]

Hindu law—Joint Hindu family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death and therefore before devolution of father's self-acquired estate—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.

In a Hindu family governed by the Mitakshara law, and living joint in food and worship there was no joint or ancestral property, but the father possessed certain [195] separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death, a minor; she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants.

Held (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants hands from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had no coparcenary interest in it, but merely the contingent interest of taking it on their

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* Second Appeal, No. 693 of 1887.

(1) 9 A. 155. (2) 8 A. 282.

father's death intestate, and, in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested. *Adhibai* v. *Cursandas Nathu* (1); dissented from on this point. *Savitribai* v. *Luximibai* (2), referred to. 1888 DEC. 7.

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Held, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai* v. *Cursandas Nathu* (1), *Ganga Bai* v. *Sita Ram* (3) *Kalu* v. *Kashibai* (4), *Khetramani Dasi* v. *Kashinath Das* (5), *Rojjomoney Dossee* v. *Shibchunder Mullick* (6) and *Tulsha* v. *Gopal Rai* (7) referred to.

Per MAHMOOD, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu law regarding the principle that the right of inheritance is based on the spiritual benefits which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs.

[F., 23 B. 608 (609); 22 C. 410 (417); 22 M. 305 (307); 29 C. 557 (568, 569); 5 C.W. N. 549 (557); Appr & F., 17 C. 373 (377); R., 12 A. 558 (564).]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

[196] Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—Musammat Janki, the appellant here and plaintiff in the action, is the widow of one Ghasi Ram, who, whilst yet a minor, died in the lifetime of his father Khiali Ram. The defendants-respondents, here, are Nand Ram, the sole surviving son of Khiali Ram, and Musammat Rukku, Khiali Ram's widow. The plaintiff sought by her action a decree for maintenance and to have that maintenance charged upon immoveable property which she alleged belonged to Khiali Ram in his lifetime and to be now in the hands of the defendants. Several questions were raised by the written statement of the defendants. For the purposes of this second appeal it is only necessary to refer to two of them. It was alleged that the plaintiff had left Khiali Ram's home and had since been supported by her own father. It was also alleged that some of the property in question had been purchased by Khiali Ram and Musammat Rukku out of moneys acquired by trade, and that other portions of it had been acquired by Musammat Rukku with her own moneys. The Munsif of Amroha by his decree of the 26th November, 1886, dismissed the claim with costs. On appeal the Subordinate Judge of Moradabad found that the plaintiff had been married to Ghasi Ram: that Ghasi Ram had died whilst she was yet a minor; that the *gauna* ceremony of the plaintiff had not been performed; that the the plaintiff had always lived in the house of her own father; that she had never gone to the house of her father-in-law Khiali Ram or of Ghasi Ram, her late husband; that the plaintiff had always been supported by her own father; that Khiali Ram had never made her any allowance for maintenance; that the property in question was not ancestral property of

(1) 11, B. 199. (2) 2 B. 573. (3) 1 A. 170. (4) 7 B. 127.
(2) 2 B.L.R.A.C. 15. (6) 2 Hyde 103. (7) 6 A. 632.

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Khiali Ram, but had solely belonged to him, since whose death it has been held by his surviving son Nand Ram. The Subordinate Judge, holding that according to Hindu law the plaintiff could not get her maintenance charged upon or settled out of property in which her late husband Ghasi Ram had no right, by his decree dismissed her appeal with costs and confirmed the decree of the Munsif. From that decree of the Subordinate Judge this second appeal has been brought.

[197] As we read the findings of fact of the Subordinate Judge, the property in question was the self-acquired property of Khiali Ram, who having made no disposition affecting it, it came on his death to the surviving son, the defendant Nand Ram.

It has not been suggested that any property in which Khiali Ram had any interest other than that in suit came to the hand of Nand Ram.

Mr. *Madho Prasad*, who appeared before us for the respondents, did not contend that the fact that the plaintiff had always resided with and been supported by her own father and that no allowance for maintenance had been made to her by her late husband or by Khiali Ram, could under the circumstances of this case of itself disentitle her to maintain this suit.

Under these circumstances the sole question which we have to consider, is whether the plaintiff can maintain the suit, having regard to the fact that the only property which has come to the hands or into the possession of the defendant Nand Ram was property separately or self-acquired by his deceased father Khiali Ram.

Pandit *Sundar Lal* on behalf of the plaintiff contended, firstly, that as Ghasi Ram, Khiali Ram, and the defendant Nand Ram had during their joint lives been members of joint Hindu family, they were co-parceners, and that Ghasi Ram had a co-parcenary right in the self-acquired property of his father, subject, however, to the liability of having that right defeated by a disposition by Khiali Ram of the property, and as no such disposition had taken place, the property in question must be regarded as ancestral property in the hands of Nand Ram; and, secondly, that whether the property in question can be regarded as ancestral property or not, there was a moral obligation of Khiali Ram to maintain and to provide for the future maintenance of his widowed daughter-in-law, the plaintiff, and that that obligation, which, so far as Khiali Ram was concerned, was merely a moral obligation, became a legal obligation on the part of his surviving son Nand Ram by reason of Nand Ram's having on the death of Khiali Ram taken the property in question by inheritance. Mr. *Madho Prasad*, on behalf of the defendants-respond [198] ents, on the other hand, contended that the property in question cannot, so far as the plaintiff is concerned, be considered as ancestral property in the hands of Nand Ram, and that no such legal obligation has arisen. Pandit *Sundar Lal* for the plaintiff mainly relied upon the judgment of Mr. Justice Farran in *Adhibai* v. *Cursandas Nathu* (1), and the cases therein referred to in support of both of his contentions.

As we understand the term ancestral property, the property in question here might as regards the rights of Nand Ram and his sons or descendants if any *inter se* be correctly described and treated as ancestral property, but we think that so far as the plaintiff's rights, if any, are concerned, it would be incorrect to describe it as ancestral property in the hands of Nand Ram. It was the self and separately acquired

(1) 11 B. 199.

property of Khiali Ram over which he had an absolute power of disposition and in which his sons had during his lifetime no interest other than the contingent interest of the right to take it by inheritance on his death in case he had made no disposition of it. During the lifetime of Ghasi Ram and also during the lifetime of Khiali Ram the property in question was not in any sense of the term as we understand it "ancestral property." Nor was it in our opinion property in which there was any coparcenary right, and we fail to see on what principle the plaintiff is entitled to have the property treated, so far as she is concerned, as ancestral property in the hands of her brother-in-law Nand Ram. In our opinion the plaintiff would necessarily fail in the suit if her right to the relief asked for depended soley on the question as to whether the property could be regarded so far as she is concerned as "ancestral property" in the hands of Nand Ram.

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It may, we consider, now be treated as settled law, so far at least as these Provinces are concerned, that a Hindu widow cannot maintain a suit for maintenance against her father-in-law if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son and has not had his rights in any property enlarged by his son's death, that her right [199] under such circumstances as against her father-in-law to maintenance is one of moral and not one of legal obligation enforceable by a suit—see *Ganga Bai* v. *Sita Ram* (1). Such also appears from the judgment of Sir Charles Sargeant, C. J., and Mr. Justice Nanabhai Haridas in *Kalu* v. *Kashibai* (2) to be the law in Bombay. Sir Barnes Peacock, C. J., Mr. Justice Macpherson and Mr. Justice Norman in *Khetramani Dasi* v. *Kashinath Das* (3) apparently considered that such was the law applicable in the High Court at Calcutta.

Under these circumstances it is necessary to consider whether or not the second contention of Pandit *Sundar Lal* is well-founded. Mr. Justice Farran in his judgment in *Adhibai* v. *Cursandas Nathu* (4) seems to have considered that property acquired by inheritance was ancestral property. In the case before him the property which was in the hands of the defendant Cursandas had been the self-acquired property of his father, who was the father-in-law, of the plaintiff Adhibai. Mr. Justice Farran at page 208 is reported to have said, "In considering whether a widowed sister-in-law is entitled to claim maintenance from her brother-in-law, with whom her husband was in his lifetime joint, the only question the Courts ask is, has such brother-in-law ancestral property in his hands," and at page 209 he is further reported to have said, "the authorities justify me, I consider, in holding, as I do, that the defendant in this case is legally bound to provide the plaintiff with maintenance out of the property which he has inherited from his father Nathu Jadowji." With the latter proposition we agree. Undoubtedly in this case, as in that before Mr. Justice Farran, the widow's husband, her father-in-law and mother-in-law the defendant had all been members of a joint Hindu family, but of a Hindu family in which there was during the lifetime of her husband or that of her father-in-law no joint or ancestral property as we understand the terms and no property in which her husband ever had any right or interest expect the bare contingent right of inheritance in case of the father not disposing of the property and of the husband surviving him. We [200] fail to see how that property which during the lifetime of the

(1) 1 A. 170. (2) 7. B. 127. (3) 2 B.L.R.A.C. 15. (4) 11 B. 199.

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plaintiff's husband, or that of her father-in-law never was joint or ancestral property became, so far as the plaintiff was concerned, ancestral property on the death of her father-in-law, which was subsequent to that of her husband. The plaintiff's husband never had any share, nor any vested interest in any share in the property which came to the defendant's hand; he was simply during his lifetime a member of joint Hindu family in which there was no joint or ancestral property; his death prior to that of his father, as the result showed, prevented his obtaining any vested right or interest in the property; he had not been excluded from any share in the property, and at the time of his death had not, nor had the plaintiff, any right of maintenance out of the property.

We do not infer from the judgments referred to in page 208 of the report of Mr. Justice Farran's judgment, that Sir Michael Westropp, C. J., Norman, C. J., or Sir Barnes Peacock, C. J., would have considered that the property in question could, so far as the plaintiff is concerned, be described as "ancestral property."

In the case of *Savitribai* v. *Luxmibai* (1) according to the report of the judgment delivered by Sir Michael Westropp, C. J., that learned Judge in giving his reasons for holding that the plaintiff's suit before him must fail, appeared to have distinguished between ancestral estate and estate of the plaintiff's husband or his father. He stated the second reason why the plaintiff's suit must fail as follows:—"because at the time of the institution of the plaintiff's suit, there was not, in the possession or subject to the disposition of Sadasiv any ancestral estate, or estate of the plaintiff's husband or his father."

We are, however, of opinion that there was a moral obligation on Khiali Ram not only to maintain his widowed daughter-in-law during his lifetime, but also, as he had self-acquired property which he could have made available for a provision for her future maintenance, to make such provision for her maintenance after his death, and that such moral obligation in Khiali Ram became by reason of the [201] self-acquired property of Khiali Lam having come by right of inheritance into the hands of Nand Ram, a legal obligation enforceable by suit against the defendant Nand Ram and the property in question. Chief Justice Norman considered that a Hindu heir takes property subject to legal obligation of maintaining persons "whom the deceased proprietor was morally bound to maintain" (see his judgment in *Rajjomoney Dossee* v. *Shibchunder Mullick* (2). It is true that the passage in his judgment to which we refer was merely obiter, and further that the authorities which he quotes do not, so far as we understand them, go quite so far. In referring to that case Sir Barnes Peacock, C. J., in his judgment in *Khetramani Dasi* v. *Kashinath Das* (3) says, "The rule laid down in *Rajjomoney Dossee* v. *Shibchundur Mullick* (2) namely, that the maintenance of a son's widow is a mere moral duty on the part of her father-in-law and that the case is distinguishable from those in which an heir takes property subject to the obligation of maintaining persons who are excluded from inheritance or those whom the deceased proprietor was morally bound to maintain, appears to me to be correct. The obligation of an heir to provide out of the estate which descends to him, maintenance for certain persons whom the ancestor was legally or morally bound to maintain is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of

(1) 2 B. 573. (2) 2 Hyde. 103. (3) 2 B. L. R. A. C. at p. 34.

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providing such maintenance." This also was apparently, so far as this particular point is concerned, merely an *obitur dictum*, and we infer from the passage in his judgment which we shall immediately quote that Sir Barnes Peacock had some doubt as to whether the proposition had not been too broadly stated by him.

The passage we refer to is to be found at page 35 of the report and is as follows:—"If a son takes his father's estate, or a widow her husband's estate by inheritance, it is only reasonable that they should be held legally liable to do what the father or husband was morally liable to do, and which it is to be presumed he would have done out of the estate if he had lived; but I am not sure that even in such cases the legal liability is carried to that extent."

[202] The reason why Sir Barnes Peacock considered that such legal obligation in the case of a widow arose appears in the following passage which we quote from page 35 of the report of his judgment:—"The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate not for his own benefit but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow." This view of the law seems to us to be equitable and according to good conscience and to be one which we may apply in these Provinces.

In saying this we do not overlook the fact that the Mitakshara is the ruling authority in these Provinces and that "propinquity, according to the Mitakshara, is the ruling law of inheritance. The propinquity is consanguineous, according to Visvesvara Bhatta and Balam Bhatta, two eminent commentators of the Mitakshara, and it is measured, says Mitra Misra, the great expounder of the Benares school, by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefits, he adds, cannot create the heritable right, it is true; but it determines with precision the preferable right of gotrajas and other heirs, where there is more than one claimant to the heritage." The passage which we have just quoted is from the Tagore Law Lectures of 1880 at pages 647 and 648.

The case under consideration appears to us to be analogous to that in which a son who has inherited property from his father is bound to carry out what his father has promised for religious purposes (Katyayana, I Dig. 229, Mayne on Hindu Law and Usage, para. 276, 3rd ed.) and to the liability of a brother who had assets from his father in his hands to provide for the marriage expenses of his sister. We are not aware that it has ever been decided that the obligation of a father to provide for the marriage expenses of his daughter is higher than a moral obligation. On this question of marriage expenses we refer to Colebrooke's Digest, [203] Volume 2, paras. 121, 125 and 420, and to *Tulsha* v. *Goapl Rai* (1). We are of opinion that this appeal should be allowed, the decree of the Subordinate Judge set aside, and the case remanded under s. 562 of the Code of Civil Procedure to the lower appellate Court to be disposed of on the merits according to law. We are also of opinion that the costs should abide the result.

MAHMOOD, J.—I am of the same opinion. The facts of this case, are simple, but the question of law which they raise is important, and not free from difficulty.

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(1) 6 A. 632.

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The following table shows the relative position of the parties :—

Khiali Ram.

Ghasi. — Musst. Rukku. (widow, deft.) — Nand Ram. (Deft.)

Ghasi. → Musst. Janki. (widow, plff.).

The property to which the litigation relates has been found by the Courts below to be the self-acquired property of Khiali Ram, a Hindu of the Vaishya caste, whose inheritance is admittedly governed by the rules of the Mitakshara law. It has further been admitted by the learned pleaders of the parties that the family resided together as a joint Hindu family.

During his nonage Ghasi was married to the plaintiff Musammat Janki, who was herself a minor at the time, and it has been found that "the *gauna* ceremony of the plaintiff was not even performed" when Ghasi died during the lifetime of his father, mother and brother. It must, therefore, be taken as a finding of fact that the plaintiff never cohabited with her husband as man and wife, and that her position is now that of a virgin widow.

Khiali Ram died about nine months before the suit, leaving a son Nand Ram and a widow Mussamat Rukku, both whom are defendants to this action.

The action was brought by Mussammat Janki for recovery of Rs. 8·0 0 per mensem as maintenance from the 1st August, 1886, [204] as a charge upon certain moveable and immoveable properties mentioned in the plaint as forming the estate of the deceased Khiali Ram inherited by the defendant Nand Ram and now in his hands.

The suit was resisted upon various grounds which need not be stated for the purposes of this appeal, beyond the solitary ground upon which the lower appellate Court has concurred with the first Court in dismissing the suit.

That ground is that the plaintiff's husband Ghasi having predeceased his father Khiali, inherited nothing, and the property being the self-acquired property of Khiali, it devolved by inheritance upon his surviving son Nand Ram, unencumbered with any such charge of the plaintiff's maintenance as she claimed in the suit.

In suport of this second appeal it has been argued that the view adopted by the lower Courts proceeds upon a misapprehension of the Hindu law,and that the plaintiff-appellant's claim should have been decreed. In maintaining this proposition Pandit *Sundar Lal* for the appellant has contended that although the property in the hands of Khiali was self-acquired, and as such free from any legal liability to the maintenance of the plaintiff, it became ancestral property upon the death of Khiali, and must be regarded as such in the hands of Nand Ram defendant for purposes of this suit, and that the property is therefore subject to the charge of the plaintiff's maintenance as claimed. In support of this contention the ruling of the Bombay High Court in *Adhibai* v. *Cursandas Nathu* (1) has been cited. In that case Farran, J., relying upon some older rulings, came to the conclusion that where the property was the self-acquired property of the deceased father-in-law, the widow of a predeceased son could claim maintenance from her husband's brother who

(1) 11 B. 199.

had succeeded to the estate of his father, that is, the widow's father-in-law. The learned Judge also held that such property must be dealt with as ancestral property in the hands of the brother-in-law and as such liable to the widow's claim for maintenance. The learned Judge further held that the widow (plaintiff) being legally entitled to claim maintenance from her brother-in-law, [205] the defendant, she was entitled to separate maintenance, and that the defendant could not insist upon her living in his house.

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The ruling, no doubt, goes the whole length of Pandit *Sundar Lal's* contention; but that contention is resisted on behalf of the respondents, on two main grounds. The *first* is that inasmuch as the property was the self-acquired property of Khiali, neither he personally nor the estate in his hands was liable to the plaintiff's claim for maintenance. The *second* is that the property not being ancestral in the hands of Khiali, his son the deceased Ghasi had no vested interest in the property, and having predeceased his father, no kind of interest in the estate of Khiali could devolve upon the plaintiff even in respect of maintenance. In support of this latter part of the argument it has been urged that the maintenance of a widowed daughter-in-law by the father-in-law being a purely moral obligation under the Hindu law, the obligation cannot convert itself into a legal obligation by the mere fact of the father-in-law's death and the devolution of his estate by inheritance on his surviving son. It has also been urged that the solitary text in such cases is the general rule of Hindu law that the obligation to maintain the widow is not absolute, but is conditioned upon the fact of the person against whom maintenance is claimed having inherited the property of her late husband, and that where this condition is not satisfied, the widow's claim for maintenance cannot prevail (Tagore Law Lectures, 1879, p. 446.)

In dealing with this contention, it seems to me advisable to state briefly some propositions of Hindu Law which are settled by authority and form steps of the reasoning upon which my judgment will proceed.

The *first* proposition is that a widowed daughter-in-law has no *legal* right to claim maintenance from her father-in-law who has only self-acquired property in his hands, and that the obligation to maintain her out of such property is merely a *moral* and not a *legal* obligation on the part of the father-in-law. For this proposition *Rajjomoney Dossee* v. *Shibchunder Mullick* (1) *Khetramani* [206] *Dasi* v. *Kashinath Das* (2), *Ganga Rai* v. *Sita Ram* (3) and *Kalu* v. *Kashibai* (4) which followed the earlier Full Bench ruling in *Savitribai* v, *Luximibai* (5) are distinct authorities.

The *second* proposition is that a widowed daughter-in-law is entitled to claim maintenance from her father-in-law who was in possession of the joint ancestral estate of the family of which her deceased husband was a member under the Mitakshara law and had predeceased his father. The Full Bench ruling of this Court in *Mussammat Lalti Kuar* v. *Ganga Bishan* (6) is authority for this proposition, and is in accord with the ruling of the Madras High Court in *Visalatchi Ammal* v. *Annasamy Sastry* (7).

But neither of these two propositions covers the question now before us, *viz.*, whether a widowed daughter-in-law is entitled to claim

(1) 2 Hyde, 103. (2) 2 B.L.R. 15 A.C. = 10 W.R. 89. (F.B.) (3) I.A. 170.
(4) 7 B. 127. (5) 2 B. 573. (6) N.W.P.H.C.R. 1875, p. 261.
(7) 5 M.H.C.R. 150.

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maintenance out of the self-acquired estate of her father-in-law who, dying intestate, has left the property to be inherited by his surviving son.

In considering this question I have felt some difficulty in consequence of the fact that even under the Benares school of the Mitakshara law, the son does not by his birth acquire any vested or even what has been called "*inchoate*" interest in his father's self-acquired property, and that a Hindu widow cannot in respect of the inheritance of such property represent her husband by any such rule as the doctrine of *jus respresentationis.* The result is that (to use the words of Mr. Mayne's work on Hindu Law, s. 452) "she can only succeed to his property or rights, that is, to the property which was actually vested in him, either in title or in possession, at the time of his death. She must take at once at his death or not at all. No fresh right can accrue to her as widow in consequence of the subsequent death of someone to whom he would have been heir if he had lived. Hence no claim as heir can be set up on behalf of the widow of a son, &c."

In the present case therefore it is clear that the plaintiff's husband Ghasi had no vested interest in Khiali's self-acquired pro- [207] perty, and that the plaintiff could not therefore have any interest in the inheritance from Khiali. Her rights must therefore depend upon some principle of the Hindu law other than the rules of inheritance by widows.

It has been argued that since the plaintiff's husband Ghasi never lived long enough to acquire any vested interest in his father Khiali's self-acquired property, therefore the defendant Nand Ram inherited that property by direct succession to Khiali and cannot be regarded as in possession of any portion of the property either as the inheritor or successor by survivorship of his brother Ghasi's share. And on the basis of this contention we are asked to hold that the plaintiff is not entitled to any maintenance out of the estate of Khiali even in the hands of the defendant Nand Ram. In support of this contention the following passage from the *Smriti Chandrika* has been relied upon :—

" In order to maintain the widow, the elder brother or any of the others above-mentioned must have taken the property of the deceased, the duty of maintaining the widow being dependant on taking the property " (Chapter XI, s. 1, s. 34).

This passage as understood by Mr. Mayne (Hindu Law, s. 375, p. 418) and Dr. Trailokyanath Mitra, *Tagore Law Lectures*, 1879, pp. 445-46 no doubt favours the contention for the defendants-respondents ; but having considered the matter, I am of opinion that the rule cannot be understood to be exhaustive in the sense of excluding the widow's right of maintenance when such right may arise from other rules of the Hindu law than the doctrine to which the text refers. Without therefore, questioning the authority of the text or the accuracy of the rule which that text contains, I hold that under the circumstances of this case the plaintiff is entitled to claim maintenance out of the self-acquired property of Khiali Ram when in the hands of his son and heir the defendant Nand Ram.

The steps of reasoning which lead me to the conclusion are :—

(1)—A Hindu father is under a *moral*, if not a *legal* obligation to give his daughter in marriage.

[208] (2) By marriage a Hindu woman ceases to belong to her parental family and becomes a member of her husband's family.

(3) The head of a Hindu family is bound *morally*, if not *legally*, to provide for the maintenance of all the members of the family according to the various rules applicable to the claims of each class of members.

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(4) Although a father-in-law in possession only of self-acquired property is not *legally* compellable to maintain his son's widow, yet the Hindu law imposes a *moral* obligation on him to provide for her maintenance.

(5) An *essential* element of the son's right of inheritance from his father is the spiritual benefit which in the contemplation of the Hindu law the son confers upon the soul of his deceased father.

(6) Therefore the son inheriting the self-acquired property of his father takes that property subject to such *moral* obligations as are conducive to the spiritual benefit of his father, and that such *moral* obligations become *legal* obligations as against the son who holds his father's property by inheritance.

I shall deal with each of these points *seriatim*.

As to the *first* point, I refer to the text of Manu where he says :—" Reprehensible is the father, who gives not his daughter in marriage at the proper time," (Chapter IX, s. 4) ; also to the text of Katyayana, who says : " If a damsel, yet unmarried, arrive at puberty in the house of her father, he is guilty of infanticide by detaining her at a time when she might have been a mother ; and the damsel is held degraded to the servile class." (Colebrooke's Digest of Hindu Law, 3rd ed., vol. II, p. 267). It was no doubt with reference to these precepts of the Hindu law, which are also fortified by the usage of the Hindus, that the father of the plaintiff Musammat Janki gave her in marriage to the deceased Ghasi before she had attained the age of puberty. And I may here say that under the Hindu law, marriage is not a civil contract as it is in some other systems of jurisprudence, but is a sacrament (*vide* Dr. Gurudas Banerjee's Tagore Law Lectures, 1878, p. 30), which so far as the [209] woman is concerned, ranks as high as the ceremony of *Upanayana* or investiture of the sacred thread in the case of males, a ceremony which implies regeneration or second birth in the contemplation of the Hindu law as explained by me in *Ganga Sahai* v. *Lekhraj Singh* (1). " To use the words of Manu, the nuptial ceremony is considered as the complete institution of women, ordained for them in the *Veda*" (Manu, Chap. II, s. 67, see also s. 66).

As to the *second* point I need only repeat the language of Mr. Justice West and Dr. Buhler in their work on Hindu law (3rd ed., p. 129) to the effect that the daughters by their marriage pass into another family or, as the Hindu lawyers say in their expressive language, " are born again in the family of their husbands." I have no doubt that this is an accurate proposition of the Hindu law of marriage, at least so far as the Benares school, which governs this case, is concerned.

Then comes the *third* point as enunciated by me, and in dealing with it I cannot do better than adopt the words of Sir Thomas Strange (Hindu Law, vol. i. p. 67), who says :—

" Maintenance by a man of his dependents is, with the Hindus, a primary duty. They hold that he must be just before he is generous, his charity beginning at home ; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connections, including (it may be) illegitimate offspring. It extends to the outcast, if not to the adulterous wife, not to mention such as are excluded from the inheritance, whether through their fault or their misfortune ; all

(1) 9 A. 253.

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being entitled to be maintained with food and raimant at lea under the severest sanctions."

This passage is supported by the text upon which the learned author has relied; but I am anxious to quote a passage from more recent authority (Dr. Gurudas Banerjee's Tagore Law Lectures, 1878, p. 210):—

[210] "We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property, and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the dependent members of his family. The following are a few of the many texts on the subject:—*Manu*:—'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect; therefore let him maintain his family with the utmost care.' *Narada*:—'Even they who are born, or yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is reprehended.' *Brihaspati*:—'A man may give what remains after the food and clothing of his family; the giver of more who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison.'"

To these texts I may add the following from Manu (Chap. XI, ss. 9 and 10):—

"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit; even what he does for the sake of his future spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next."

All these texts read together in the spirit of the Hindu law, leave no doubt in my mind that at least in point of religious or spiritual and moral obligation, maintenance of the dependants of a family is an obligation resting on the head of a Hindu family.

From this proposition the answer to the *fourth* point follows, for it is a corollary from what has already been said on the preceding point. I may now, however, refer to the text of Sancha:—[211] "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered." (Colebrooke's Digest, vol. ii, p. 538). And I may also say that the *ratio decidendi* of all the rulings of the various High Courts which I have already cited, whilst negativing the legal right of a widowed daughter-in-law, to claim maintenance from her father-in-law who is in possession only of self-acquired property, recognize and proceed upon affirming the proposition that her maintenance, though falling short of a *legal* right is a *moral* obligation resting on the father-in-law. So far all those rulings are unanimous, and I do not think any such argument has been addressed to us as would require me to go behind the *ratio decidendi* of those rulings, or to regard what was said there as to the *moral* obligation of the father-in-law, as mere *obiter dicta*.

In dealing with the *fifth* point, I wish to begin by adopting the language of a well-known Hindu lawyer, Mr. Sarvadhikari, in his work on Hindu Inheritance (Tagore Law Lectures, 1880, p. 12), where after referring to the Roman system of inheritance, the learned author summarizes the principle of the Hindu law as to the right of inheritance:—

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"The Hindu system went further, and laid it down as an imperative rule, that the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased. They cannot be separated. He who is entitled to celebrate these rites is also entitled to inherit the property; and he who gets the property must perform the funeral rites of the last owner. If there are no relatives who are legally competent to perform them, the law of succession does not apply, and the property escheats to the Crown. The king takes the property as an heir, and, as such, is also bound to discharge all the obligations of an heir. He must cause the last rites to be performed for the deceased, and must also see that they are periodically celebrated on the appointed days. The "water" and the "cake" are essentially necessary for the lasting peace of the soul of the deceased, and he [212] who inherits his property must perform ceremonies which would conduce to his spiritual welfare. Hindu law has thus inseparably connected the duty of presenting the "water" and the "cake" with the right of inheritance, and this makes it absolutely nesessary that a clear conception should be gained of the *srâdha* rites which form the basis of the Hindu law of inheritance."

The same is the effect of what Mr. Mayne says (Hindu Law, s. 9):—

"The principle that the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor, has been laid down on the highest judicial authority as an article of the legal creed, which is universally true, and which it would be heresay to doubt." And the learned author re-affirms the doctrine in s. 423 of his work, and cites the authority of certain ruling of the Privy Council.

It has been suggested in the course of the argument at the Bar that this principle is applicable only to the Bengal school and is repudiated by the Mitakshara school of the Hindu law. Some apparent countenance is given to this argument by what Mr. Mayne says in s. 433 of his work: "When we go a stage back to the Mitakshara, and still more to the actual usage of those districts where Brahminical influence was less felt, the whole doctrine of religious efficacy seems to disappear."

I am afraid, and I say this with all respect due to such an eminent author, that the sentence taken by itself is somewhat unguardedly expressed. The Mitakshara and the Bengal school do not differ with each other in the principle that the right of inheritance itself is based on and arises from the contemplation of the Hindu law that the inheritor by taking the inheritance renders spiritual benefits to the soul of the deceased proprietor. The principle is common to all schools of Hindu law, and the difference between the Benares school and the Bengal school on this point is a matter of detail relating to questions of preference where there is competition between various classes of heirs. The matter is well described by Mr. Sarvadhikari (Hindu Law of Inheritance, pp. 647-8): "*Propin*-[213] *quity* according to the Mitakshara, is the ruling principle of the law of inheritance. This propinquity is *consanguineous* according to Visvesvara Bhatta and Balam Bhatta the two eminent commentators of the Mitakshara; and it is measured, says Mitra Misra, the great expounder of the doctrines of the Benares school, by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefit, he adds, cannot create the *heritable right*, it is true, but it determines,

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with precision, the *preferable* right of gotrajas and other heirs, where there is more than one claimant to the heritage."

But whatever may be the difference between the various schools of the Hindu law as to heirs in competition with each other for inheritance, there can be no doubt that there is no difference as to the principle upon which the son's right of inheriting his father's property is concerned. The principle really rests on the religious doctrine inculcated by Manu (Chap. IX, ss. 137-38) : "By a son, a man obtains victory over all people ; by a son's son, he enjoys immortality ; and afterwards, by the son of that grandson, he reaches the solar abode. Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *puttra* by Brahma himself."

This religious precept is indeed the foundation of the law of marriage, which, as I have already said, is a sacrament in Hindu law (Tagore Law Lectures, 1878, pp. 30 and 31), having for its object the procreation of offspring as a means of salvation ; it is also the foundation of the law of adoption, whereby the adopted son acquires the right of inheriting his adoptive father's property, as stated by me in *Ganga Sahai* v. *Lekhraj Singh* (1) ; and it is also the foundation of many other rules of the Hindu law which I need not here specify. The broad result is that a son has the right of inheriting his father's property, because the son is the means of conferring spiritual benefits upon the deceased father by delivering his father's soul from the hell named *put*

[214] The sixth point in the case is in my opinion the necessary outcome of the views which I have expressed upon the preceding five points. Mr. Mayne in his work on Hindu Law (Chap. IX, ss. 272, 276) has explained the origin and extent of the son's obligation to pay his father's moral debts, and the learned author points out that "in the view of Hindu lawyers, a debt is not merely an obligation but a sin, the consequences of which follow the debtor into the next world." He then shows that originally the son's liability to discharge the father's obligation was independent of paternal assets, and he summarizes the present law by saying :—

"The liability to pay the father's debt arises from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts. And this obligation equally compels the son to carry out what the ancestor has promised for religious purposes. It follows, then, that when the debt creates no such moral obligation the son is not bound to repay it, even though he possesses assets. This arises in two cases, *1st*, when the debt is of an immoral character ; *and* when it is of a ready-money character" (s. 276).

This, I think. correctly, represents the present state of the Hindu law as administered by our Courts. I may, however, cite a passage from *Naradiya Dharmasastra* or the Institutes of Narada in Dr. Jolly's translation Chap. III, s. 25) as being pertinent to the present case :—

"Of the successor to the estate, the guardian of the widow, and the son, he who takes the assets becomes liable for the debts ; the son if there be no guardian of the widow, nor successor to the estate ; and the person who took the widow if there be no successor to the estate ; nor son."

I think I may safely say here that in this text as also in other similar original texts of the Hindu law, the word "*debt*" is to be understood in a broad sense so as to include all classes of obligations, such as moral

(1) 9 A. 253.

obligations in respect of maintaining widowed daughters-in-law, and expenses of the marriage of unmarried daughters. [215] I do not consider it necessary for the purposes of this case to enter into a discussion as to the exact nature and extent of the son's liability to pay his father's debts. The question has been settled by the ruling of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) and other subsequent rulings. I may, however, say that the general effect of the *ratio* adopted in these rulings is to emphasize the principle that it is a pious duty on the part of the son to pay his father's debts, and even ancestral property in which the son, as son, acquires an interest by birth, under the Mitakshara law, is liable to the father's debts unless they have been contracted for immoral purposes. I do not wish to pursue the subject further, because a much closer analogy is available for the purposes of this case.

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That analogy is to be found in the liability of a son to pay the marriage expenses of an unmarried sister out of the estate which he has inherited from his father, even if such estate was the self-acquired property of the father. Now in the course of the argument, I asked Mr. *Madho Prasad* for the respondents to point out any authority either of original texts or of decided cases which would go to show that the obligation of a father to give his daughter in marriage rests upon any foundation other than the religious and moral precepts which I have already cited in considering the first point. In other words, I have been anxious to ascertain whether under the Hindu law the obligation of the father in respect of defraying his daughter's marriage expenses was a *legal* obligation, so as to render him compellable by action in a Court of Justice. But the learned pleader has been unable to point out any such authority, and my own efforts in this direction have proved equally fruitless. I think I am therefore justified in laying down the proposition that under the Hindu law a father in possession only of self-acquired property is bound only by religious and moral precepts to give his daughter in marriage and that he is not legally compellable in this respect in a Court of law. To use the words of the Lords of the Privy Council in *Jumoona Dassya Chowdhrani* v. *Bama Soondari Dassya Chowdhrani* (2), "The foundation upon which marriages between [216] infants which so many philosophical Hindus consider one of the most objectionable of their customs rest, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura virgo*, a husband capable of procreating children: the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband."

There being thus no *legal* obligation upon the father to provide a husband for his daughter, or to pay her marriage expenses, I proceed to show that the obligation which was only a *moral* or religious obligation resting upon the father, becomes a legally enforceable obligation as against the son who has inherited the property of his father, even though such property is only self-acquired property of the father. In other words, what was a mere *moral* obligation on the father matures itself into a *legal* obligation against the brother.

I think, I may at once say that there is an unusual paucity of case-law on the subject of Hindu marriage, and I agree in the view of the learned author of the *Hindu Law of Marriage* (Tagore Law Lectures, 1878, pp. 32-3) when he states that the scantiness of the case-law is due to the

(1) 1 I. A. 321, (2) 3 I. A. 72.

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devotional character of the Hindu population, and I may add, probably also to the fact that the law-abiding tendencies of the Hindus of the better classes have precluded brothers from disputing the right of unmarried sisters to obtain their marriage expenses out of the paternal estate when in the hands of the brothers by inheritance. Indeed, the only reported case involving such a question is *Tulsha* v. *Gopal Rai* (1), which my brother Tyrrell has pointed out to me, and which as he noticed was not a dispute between own sisters and brothers, but between unmarried sisters and their half-brother by the second wife of the deceased father. In that case the right of the sisters to claim their marriage expenses from the paternal estate does not seem to have been seriously questioned, and my brethren Straight and Brodhurst concurred in saying:— . .

[217] "At the time the suit was brought, both the girls were of a marriageable age, and it was only in accordance with Hindu law that a sum of money suitable to their condition and the custom of their family should be secured against their marriage taking place."

I am not aware of any other reported case on the subject; and I cannot help feeling that the main reason for the paucity of the case-law is that no Hindu brother in possession of his father's assets would deny his obligation to defray the marriage expenses of his unmarried sisters.

But because there is such paucity of case-law on the subject, I am anxious to cite some original texts of the Hindu law as authorities in support of my opinion. I think I need only refer to the text of *Vishnu*.

"The marriage and other ceremonies of unmarried daughters must be defrayed in proportion to the wealth *inherited*."—(Colebrooke's Digest, vol. ii, p. 295.)

Again there is text of *Devala*: "A nuptial portion shall be given to *unmarried* daughters out of their father's estate." (*Ib*., p. 296, see also p. 543, Text CCCCXX).

I think these texts are quite enough for the purposes of the analogy which I have introduced between the rights of a brother's widow for maintenance and the rights of an unmarried sister to claim marriage expenses from her brother who is in possession of the father's estate. The whole object of the analogy of course is to furnish the necessary step of reasoning upon which my judgment proceeds, namely, that under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property.

That this principle is not entirely an original supposition of my own is shown by what Norman, C.J., said towards the end of his judgment in *Rajjomoney Dossee* v. *Shibchunder Mullick* (2) and by Peacock, C. J., in the case of *Khetramani Dasi* v. *Kashinath Das* (3), both of which *dicta* have been quoted and followed by Farran, J., in [218] the judgment which he delivered in *Adhibai* v. *Cursandas Nathu* (4).

The effect of these authorities can be best represented in the words of Dr. Gurudas Banerjee, (who, I am glad, has recently received a well-merited seat on the Bench of the Calcutta High Court) in his *Hindu Law of Marriage* (Tagore Law Lectures, 1878, p. 214), where the learned author, referring to Sir Barnes Peacock's judgment in *Khetramani Dasi* v. *Kashinath Das* (3), points out "that an important general rule has been laid down regarding a person's liability to provide maintenance for others.

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(1) 6 A. 632. (2) 2 Hyde. 103. (3) 2 B.L.R.A.C. 15. (4) 11 B. 199.

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That rule is this, that the heir of a person taking his estate is legally bound to maintain all those whom the late proprietor was either *legally* or *morally* bound to maintain; for the heir takes the estate of the ancestor for his *spiritual* benefit. Thus in this instance, what was a mere *moral* obligation in the ancestor becomes transformed into a *legal* obligation in his heir."

I fully accept this view of the law, and now proceed to mention some of the early reported cases in the subject. In 1820 the late Sadr Diwani Adalat of Bengal in deciding the case of *Rai Sham Bullubh* v. *Prankishen Ghose* (1), held that the widow of a son who died before his father was entitled to food and raimant only from those who had inherited her father-in-law's estate. The same is the tendency of the ruling in *Musammat Himulta Chowdrayn* v. *Musamat Pudoomunee Chowdrayn* (2), which was decided in 1825, and of anothesr case decided in 1852 and reported at p. 796 of the Calcutta Sadr Diwani Reports for that year. The learned Judges in that case said that "it was unnecessary to call for a *bywasta*, as according to the Hindu law and the established precedents of the Court, the widow is entitled to maintenance from the heir of the family." I have referred to these cases merely incidentally, because the reports are so meagre that they are silent as to whether the property out of which maintenance was claimed was ancestral property or self-acquired property of the father-in-law from whom the defendants had inherited. Those cases therefore do not necessarily cover the whole ground of [219] the point now before us, and I am afraid cannot be regarded as of much value as authorities upon the question which we are called upon to decide in this case.

But I think I have said enough to show that irrespective of these old cases there are enough indications in the original texts of the Hindu law itself and indeed in the whole spirit of that system of jurisprudence to justify the conclusion at which I have arrived in this case, as a pure question of legal decision. But because the case is not altogether free from difficulty, and also because our judgment in this case will go very near the boundary of what is sometimes described as "*judicial legislation*," I am anxious before concluding my judgment to refer to some considerations of good policy from which I confess my mind has not been altogether free in determining the question raised in this case. When I say good policy I do not refer to any political exigencies of the population of the territories under the jurisdiction of this Court. I use the phrase in the sense in which such a phrase should be understood in judicial exposition of the law, that is, in the sense of those broad principles which ordain the basis of the rule of justice, equity, and good conscience upon which we, as Judges of a Court which exercises the combined jurisdiction of a Court of law and a Court of equity, must act in cases where there is no specific legislative provision in the statute law, or the original texts of an ancient system of jurisprudence which we are bound to administer, do not furnish an express authority in specific terms. In regarding the matter in this light, I am fortified by the example of Norman, C.J., in *Ketramani Dasi* v. *Kashinath Das* (3) where that learned Judge clearly indicated that in considering such questions considerations of natural law, equity and good conscience were not to be lost sight of. And in regarding the matter in the same light here, I cannot refrain from pointing out that whilst in fact marriages are almost enjoined by the Hindu law, especially

(1) 3 S.D.A., L.P. 33. (2) 4 S.D.A., L.P. 19. (3) 2 B.L.R.A.C. 15.

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in the case of females, it is far from being certain that the re-marriage of Hindu widows is permitted by the Hindu law texts. To use the words of Manu, the marriage of a widow is not "even named in the laws concerning marriage" (Manu Chapter [220] IX, ss. 64, 65) and the sacred writer goes on to say:—"This practice, fit only for cattle, is reprehended by learned Brahmans," (*ib.*, s. 65).

An exceptional piece of legislation, Act XV of 1856, which legalizes the marriage of Hindu widows, has, indeed, found place in the Statute Book of British India. The history and effect of the legislation are described by Dr. Gurudas Banerjee (*Tagore Law Lectures* for 1878, pp. 264—73); but I do not think it is going too far to say that, notwithstanding that enactment, the re-marriage of widows is still abominable in the eyes of the Hindus of the three higher castes, and that the probable, if not the inevitable, result of such remarriages would be the outcasting of the widow and her second husband, if not also of those who took part in or encouraged such re-marriage. In saying so I refer to matters such as those which the Madras High Court had to consider in *The Queen* v. *Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1). And I consider it entirely within the province of judicial usage to take notice of this circumstance and not lose sight of it in dealing with such questions. I take it as a proposition which neither of the learned pleaders of the parties, both of whom are Hindu gentlemen, would deny, that under the present conditions of the Hindu society in this part of India if the plaintiff Musammat Janki entered into matrimony by marrying a second husband, she would incur all the social and religious penalties of ex-communication which the Hindu society of this part of the country recognises and acts upon. Judges are of course bound to administer the law as they find it, but where the statute law is silent, and the common law not free from doubt, they do not, especially in disputes arising out of the law of marriage, ignore the conditions, sentiments or prejudices, religious or social, which are held sacred by the population to which the law is administered.

It is in view of these legal principles of adjudication, that I wish to quote a passage from an eminent Hindu lawyer, Krishna Kamal Bhattachargya (Tagore Law Lectures, 1885, page 323), who after referring to some rulings goes on to say:—

[221] "To a Hindu mind not penetrated with European notions and still retaining the spirit of ancient Hindu law as propounded by *Rishis* and their earlier commentators, this exposition of the law relating to a widow's maintenance would appear harsh and unsympathetic. The life of a Hindu female is one of seclusion; outside the *zenana*, her knowledge is as limited as that of a tender child; culture, training or education she has absolutely none. If her rights are invaded by the male members of the family, she is utterly helpless; and she falls under the influence of person's whose motives for lending her a help are the furthest from those of philanthropy or disinterested good will. Females belonging to the respectable classes are incapable of earning their own livelihood; if the family property is transferred by the male relations, what can these females do to keep their rights of maintenance secure?"

I asked Mr. *Madho Prasad*, in the course of the argument, to suggest what answer his client Nand Ram would give to these questions. Would he propose that the girl widow Janki should marry a second husband, thus incapacitating herself for conferring any of those spiritual benefits

(1) 6 M. 381.

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upon his brother and her deceased husband, which the ecclesiastical ceremonials of the Hindu law and religion inculcate and ordain? Would he propose that this widowed girl should claim maintenance from her parental family of which she, by reason of her marriage with the deceased Ghasi, has ceased to be a member, and as such entitled to no such legal right? Would he propose that this widowed girl should enter into some profession to earn a livelihood? Would he propose that if she is unfit, by reason of her sex and the condition of Hindu society, to adopt any respectable profession, that she should go begging in the streets for her bare necessaries of life, thus exposing herself in her early month to all those temptations of immorality which the austerities prescribed by the Hindu law for the widow, are intended to obviate and preclude?

The only answer to these questions which Mr. *Mahdho Prasad* for the respondent Nand Ram found it possible to suggest was, that I sitting here as a Judge should ignore all considerations of compassion and dispose of the case entirely upon the technicalities of [222] the law and the rights of the parties. I am aware that such is my duty, but, as I have shown, the conclusions at which I have arrived are well supported by the entire spirit of the texts of the Hindu law itself and the principles of that system of jurisprudence. And if I have referred to the condition of the Hindu society in connection with such questions, it is only because I hold it to be a true proposition of law and judicial method, that in deciding such cases of contested interpretation sought to be placed upon ancient texts of a very ancient system of law, Judges of the present day in enforcing that system should not be oblivious of the requirements of the age and the exigencies, social, moral, and religious, of the population under their jurisdiction.

This view induces me, even at the risk of prolixity, to quote another passage from another Hindu lawyer of eminence upon a cognate subject. Dr. Gurudas Banerjee (Tagore Law Lectures, 1878, p. 213) referring to the case of *Khetramani Dossee* v. *Kashinath Das* (1) quotes the language of Norman, C.J., "upon the question whether a son's widow is entitled to be supported by her father-in-law if she resides in her house;" and the learned author goes on to say:—

"But as the question was not raised before the Court, the other Judges expressed no opinion upon it; so that it still remains an open question. Considering the constitution of Hindu society, considering the extremely helpless condition of the Hindu widow, and considering that the obligation of the father-in-law or other near relation to give her food and raiment if she resides in his house, is not only enjoined by precepts, but is also confirmed by invariable usage, it is hoped that should this question ever arise, it will be decided in favour of the widow."

These passages have been quoted by me not as governing the *exact* question now before us, but as indicating that the tendency of the Hindu jurisprudence, as understood by Hindu lawyers themselves, is in-keeping with the conclusions at which I have arrived in this case. And because this judgment has grown to such length, I am anxious to guard myself against being understood to go behind [223] the rulings which have negatived the widowed daughter-in-law's legal right to claim maintenance from her father-in-law, who is in possession only of self-acquired property. Nor am I to be understood as laying down any rule as to the question whether or not the self-acquired property of a father-in-law in the hands of a

(1) 2 B.L.R. A.C. 15.

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surviving son is to be dealt with as "*ancestral property*" in the sense in which that expression is understood in the Hindu law. What I do lay down is that Khiali was bound by moral and religious precepts to provide for the maintenance of his widowed daughter-in-law, of the plaintiff; that his self-acquired property inherited by his son, the defendant Nand Ram, was so inherited subject to the *moral* obligation of Khiali; that since the inheritance itself in the contemplation of the Hindu law arises for the *spiritual* benefits of the deceased owner, the son inheriting the property, is *legally* bound to discharge those obligations which, so long as the original acquirer of the property was alive, were only moral obligations. I also hold that the plaintiff's maintenance is a legal charge upon the property of Khiali in the hands of Nand Ram, and that the plaintiff, Musammat Janki, was therefore entitled to maintain this action.

It now remains for me to consider the exact terms of the order which should be made in this case. I have already indicated at the outset that the suit was defended also upon some pleas of fact into which the lower appellate Court has not entered, owing to the view of the law which that Court took as to the absence of the plaintiff's right to maintain the action. The case therefore is similar in principle, so far as this point is concerned, to the case of *Muhammad Allahabad Khan* v. *Muhammad Ismail Khan* (1), where the learned Chief Justice and I concurred in decreeing the appeal and remanding the case under s. 562 of the Code of Civil Procedure. For similar reasons the plaintiff's right to maintain the suit being established, I decree this appeal; and, setting aside the decree of the lower appellate Court remand the case to that Court, for adjudication upon the merits of the other pleas set up by the defendants-respondents. Costs to abide the result.

Cause remanded.

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11 A. 224 = 9 A.W.N. (1889) 87.

[224] APPELLATE CIVIL.

Before Mr. Justice Mahmood.

MAHADEO SINGH AND OTHERS (*Plaintiffs*) *v.* BECHU SINGH AND OTHERS (*Defendants*).* [12th November, 1888.]

Jurisdiction—Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahal for declaration of title to receive proportionate share of rent and for recovery thereof—Denial of plaintiffs title by co-sharers defendants—Suit not maintainable—Act XII of 1881 (*North-Western Provinces Rent Act*), ss. 93 (*h*), 106, 148—*Act I of* 1877 (*Specific Relief Act*), s. 42—*Civil Procedure Code*, s. 11.

The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1887), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahal for a declaration of their title to receive a proportionate share of the rent payable by the tenants.

Having regard to s. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been

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* Second Appeal, No. 1950 of 1886, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 2nd August, 1886, confirming a decree of Mauli Imam-ul-Haqq, Munsif of Ballia, dated the 24th December, 1885.

(1) 10 A. 289.

wrongfully received by the defendants, their co-sharers, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (*h*) of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted.

But a suit by some of the co-sharers in a joint and undivided mahal for such declaration and such recovery of a proportionate share of rent as above referred to, is barred by the provisions of s. 106 of North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorizing such suits.

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[R., 11 C.P.L.R. 144 (147).]

THE plaintiffs in this case formed one of three sets of co-sharers of a village, and they instituted a suit against one of the tenants, alleging that although the village was held in joint and undivided shares, each co-sharer of the *taluka* collected rents from the tenants to the extent of his share. The suit was instituted under the N. W. P. Rent Act (XII of 1881) in the Revenue Court, and the tenant defendant in that case pleaded payment of the full amount of rent-[225] to another set of co-sharers in the *taluka*, and thereupon those co-sharers were impleaded as defendants and pleaded that they were entitled to collect the entire rent from the tenant against whom that suit was instituted. That suit was dismissed by the Rent Court upon the ground that the *mahal* being joint and undivided, the plaintiffs were not entitled to sue for their share of rent only, and that their proper remedy was to sue for settlement of account against their co-sharers.

The plaintiffs, dealing with the Rent Court's decision as one under the latter part of s. 148 of the North-Western Provinces Rent Act, instituted this suit in the Civil Court under the proviso to that section, with the object of obtaining a declaration of their title to receive one-third of the rent payable by the tenant, and for recovery of certain sums of money alleged to be their share of the rent paid by the tenant to the other co-sharers, the first set of defendants.

The suit was resisted upon various minor pleas, but the main pleas urged in defence were that such a suit was not maintainable, as the decision of the Rent Court was not such as s. 148 contemplated, and that the plaintiffs had no right to receive any share of the rent from the tenant in question.

The Court of first instance (Munsif of Ballia) dismissed the suit, holding that the Rent Court's decision was based on s. 106 of the North-Western Provinces Rent Act prohibiting separate rent-suits by co-sharers for their respective shares of rent; that the decision was not of the nature contemplated by s. 148 of the Act; and that the Civil Court therefore had no jurisdiction to entertain the suit. The Munsif further held that "no attempt has been made and no evidence has been adduced to prove the existence of any local custom or special custom authorizing the maintenance of such a suit in this particular case.

On appeal, the District Judge of Ghazipur affirmed the Munsif's decree. Upon the question of local custom, he observed :—" Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom and partial [226] admissions of some of the respondents, if embodied in the *wajib-ul-arz*, would not convince me that such monstrous custom prevailed."

The plaintiffs instituted a second appeal from the decrees of the Munsif and the District Judge.

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Munshi *Juala Prasad*, for the appellants.

The Hon. *T. Conlan* and Mr. *J. E. Howard*, for the respondents.

JUDGMENT.

MAHMOOD, J., (after stating the facts, continued) :—Upon appeal by the plaintiffs to the lower appellate Court, the learned Judge of that Court, whilst concurring in the general conclusions of the first Court, has recorded some observations which go beyond the exigencies of the case and with which I am not concerned here. The only point which has been urged before me in second appeal, on behalf of the plaintiffs-appellants, is that the Courts below have erred in law in holding that the suit did not lie, and that they should have decided it on the merits.

I do not think it is necessary for me to decide whether the Rent Court's decision in this case dismissing the plaintiffs' suit for rent was an adjudication such as s. 148 of the Rent Act contemplates, because whether it was so or not, a decision under that section is not in my opinion an essential condition precedent to the maintainability of a declaratory suit in the Civil Court, for such matters are dealt with under s. 42 of the Specific Relief Act (I of 1877). The effect and intention of the proviso to s. 148 of the Rent Act seems to be to preserve the Civil Court's jurisdiction, while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as the section contemplates. But neither the section nor the proviso aims at laying down any rules governing questions of the jurisdiction of the Civil Court in connection with declaratory suits. The suit therefore, so far as it sought a declaration of the plaintiffs' right to collect their one-third share of rents was maintainable as a suit of civil nature, and there was no want of jurisdiction in its strict sense. Nor do I think that the suit, so far as it sought to recover certain sums of money as the plaintiffs' share of the rent alleged to have been wrongfully realized by their [227] co-sharers the first set of defendants, fell beyond the jurisdiction of the Civil Court. To oust such jurisdiction, the provisions of s. 11 of the Civil Procedure Code require the existence of a legislative enactment. In the present case all that has been suggested is that the claim for money, being between two co-sharers, partook of the nature of a suit such as that contemplated by cl. (*h*) of s. 93 of the Rent Act and that it was therefore not cognizable by the Civil Court. But in the present case, the right of the plaintiffs to receive any portion of the rents claimed is denied by their co-sharers the defendants, and the form of the suit itself seeks establishment of title, and consequent recovery of such portions of the rents as the plaintiffs allege themselves entitled to by virtue of their disputed right. In my opinion cl. (*h*) of s. 93 of the Rent Act does not contemplate suits in which such claims of title are made and resisted upon denial of the plaintiffs' right.

For these reasons I am of opinion that both the Courts below were wrong in holding that the Civil Court had no jurisdiction to entertain the suit.

But this view of the preliminary points in the case does not go far to help the plaintiffs-appellants, for their case is bad on the merits. The relief they pray for both in point of declaration of title and recovery of money, cannot be granted to them unless they show that such relief can be granted in accordance with law.

Now, in the first place, it has been found by the Courts below as a matter of fact that the *mahal* of which the plaintiffs are co-sharers is joint

undivided property within the meaning of s. 106 of the Rent Act, which lays down that:— 1888 Nov. 12. — APPELLATE CIVIL. — 11 A. 224= 9 A.W.N. (1889) 87.

"No co-sharer in an undivided property shall, in that character, be entitled separately to sue a tenant under this Act, unless he is authorised to receive from such tenant the whole of the rent payable by such tenant; but nothing in this section shall affect any local custom or any special contract."

The rent law of these Provinces is therefore clearly opposed to the declaration which the plaintiffs seek, namely, that they are [228] entitled to recover from each tenant of the *mahal* their proportionate share of rent, leaving the remainder to be collected by the other co-sharers in proportion to their respective shares in the *mahal*. The section says that such is not to be the case, unless local custom or special contract is established. Now, in the present case the Court of first instance observes:—"No attempt has been made and no evidence has been adduced to prove the existence of any such custom in this case," and the lower appellate Court has used even more emphatic language. The learned Judge of that Court observed:—

"Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom, and partial admissions of some of the respondents if embodied in the *wazib-ul-arz* would not convince me that such monstrous custom prevailed."

Sitting here as a Judge of second appeal I must accept these concurrent findings of fact, and must hold that the plaintiffs have failed to prove any such custom as would entitle them to the declaration that they have a right to realize or claim only their proportionate share of rent from tenants in the *mahal* in opposition to the general rule of the rent law of these Provinces enunciated in s. 106 of the Rent Act. It follows that neither the declaration nor the money which they claim in this suit as the consequence of such declaration can be awarded to the plaintiffs-appellants.

For these reasons the grounds urged in appeal cannot prevail and I dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Mahmood.

MUHAMMAD SULAIMAN (*Judgment-debtor*) v. JHUKKI LAL (*Decree-holder*).* [12th November, 1888.]

Execution of decree—Compromise—Estoppel—Civil Procedure Code, ss. 257-A, 375, 647.

Although a Court executing a decree is bound by the terms thereof, and cannot add to or very or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure [229] Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution-proceedings the word "suit" in s. 375 must, with

* Second Appeal, No. 1408 of 1887, from a decree of R. G. Hardy, Esq., Deputy Commissioner of Jhansi, dated the 12th July, 1887, confirming a decree of Pandit Gopal Rao, Deputy Collector of Jhansi, dated the 30th May, 1887.

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reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257 A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree.

When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position assumed by them in the matter of the compromise.

Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside and until that happens, the parties are bound by it in all proceedings relating to the execution of the decree, and where they have acted upon it, they are estopped thereafter from questioning its validity.

Sita Ram v. *Dasrath Das* (1) followed, *Debi Rai* v. *Gokal Prasad* (2), *Ram Lakhan Rai* v. *Bakhtaur Rai* (3), *Fateh Muhammad* v. *Gopal Das* (4), *Ganga* v. *Murlidhar* (5), *Sheo Golam Lal* v. *Beni Prasad* (6), *Lakshmana* v. *Sukiya Baj* (7), *Yella Chetti* v. *Munisami Reddi* (8), *Pisani Attorney-General of Gibraltar* (9), and *Sadasiva Pillai* v. *Ramalinga Pillai* (10) referred to.

[R., 12 A. 571 (576); 23 P. L. R. 1901; 61 P. L. R. 1907; 71 P. W. R. 1907 = 29 P. R. 1908.]

THE facts of this case are stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

MAHMOOD, J.—The decree-holder-respondent obtained a simple money-decree against the judgment-debtor-appellant on the 24th March, 1884, and applied for execution thereof on the next day and obtained attachment of the judgment-debtor's property. Thereupon the judgment-debtor's brother, Muhammad Ibrahim, made an application on the 14th June, 1884, stating that an agreement had [230] been arrived at to the effect that Rs. 200 cash was to be paid to the decree-holder and the balance was to be paid by instalments of Rs. 100 *per annum*, failing which execution was to be taken out against the judgment-debtor and then from his brother the applicant. The decree-holder-respondent appears to have accepted this arrangement, and on the 4th July, 1884, the Court passed an order sanctioning the agreement and directing that the execution of decree in future should take place according to the terms of the agreement against the original judgment-debtor and his surety Muhammad Ibrahim. The order further directed the attached property to be released and, to use the words of the lower appellate Court, "the signature of the judgment-debtor is appended beneath the order."

The present litigation began with an application made by the decree-holder on the 28th April, 1887, for execution of the decree against the original judgment-debtor and the surety. The original judgment-debtor registerd the execution upon the ground that since Muhammad Ibrahim had stood surety for him, the decree could not be executed, and the Court of first instance dealing with the objection held that "the decree should likewise be executed against Muhammad Sulaiman, and on failure to recover the money from him, the decree-holder might then institute a fresh suit against Muhammad Ibrahim, for be cannot recover the money from him by taking out execution of the present decree."

(1) 5 A. 492. (2) 3 A. 585. (3) 6 A. 623. (4) 7 A. 424. (5) 4 A. 240.
(6) 5 C. 27. (7) 7 M. 400. (8) 6 M. 101. (9) 5 P. C. 516. (10) 2 I.A. 219.

The effect to the first Court's order was to allow execution against the original judgment-debtor, Muhammad Sulaiman, appellant, and to disallow it against the surety, Muhammad Ibrahim.

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Upon appeal by the judgment-debtor, Muhammad Sulaiman, the learned Judge of the lower appellate Court has held that "even if a fresh contract was entered into, the judgment-debtor is estopped, inasmuch as he has acted on the contract by fulfilling some of its conditions, namely, paying Rs. 200 cash and one at all events of the subsequent instalments. He cannot, therefore, repudiate the condition now being enforced against him, namely, the execution of decree against himself on account of the non-payment of the instalments."

[231] Upon these grounds the learned Judge upheld the order of the first Court.

This second appeal has been preferred by the judgment-debtor, Muhammad Sulaiman, and the only ground urged is that the agreement of the 14th June, 1884, and the order of the 4th July, 1884, extinguished the decree, and that the only remedy now available to the decree-holder respondent lies in a regular suit against the surety who undertook liability under the compromise, or rather the arrangement above mentioned.

In support of this contention Mr. *Abdul Majid* has relied upon a Full Bench ruling of this Court in *Debi Rai* v. *Gokal Prasad* (1) which was followed in *Ram Lakhan Rai* v. *Bakhtawar* (2) and *Fateh Muhammad* v. *Gopal Das* (3). On the other hand, Pandit *Sundar Lal* for the respondent in opposing the contention cites a later Full Bench ruling of this Court in *Sita Ram* v. *Dasrath Das* (4) which appears to have been decided without any reference to the earlier Full Bench ruling. Again, I am referred to the case of *Ganga* v. *Murlidhar* (5) in which the learned Judges distinguished the case from the Full Bench ruling in *Debi Rai* v. *Gokal Prasad* (1) and also to a ruling of the Calcutta High Court in *Sheo Golam Lal* v. *Beni Prasad* (6) and a ruling of the Madras High Court in *Lakshmana* v. *Sukiya Bai* (7).

Upon the strength of these various rulings the case has been argued before me at considerable length on both sides, and much has been said as to whether or not the two Full Bench rulings of this Court above mentioned are in conflict with each other, and it has been contended that the later Full Bench ruling in *Sitaram* v. *Dasrath Das* (4) intended to overrule the earlier Full Bench ruling in *Debi Rai* v. *Gokal Prasad* (1) and to adopt the dissentient opinion of Oldfield, J., in the latter case, although nothing to this effect appears in the judgment of the later Full Bench. As to this part of the argument, I need only say that sitting here as a single Judge I am bound by the Full Bench rulings of this Court, and whether or [232] not there is conflict between any two of them, I am bound by the rule laid down in the later ruling. Nor is it necessary for me to enter into an elaborate disquisition as to the reconcilableness or otherwise of the principles upon which these various rulings proceed. I think it is enough for the purposes of this case to say that the point of law which requires determination is of a simple character and need not be complicated with the *ratio decidendi* of the various rulings which have been cited.

I hold it to be a correct proposition of law that a Court executing a decree is bound by the terms of that decree and cannot go behind them. It is equally true as a general proposition that such Court can neither add

(1) 3 A. 385. (2) 6 A. 623. (3) 7 A. 424. (4) 5 A. 492.
(5) 4 A. 240. (6) 5 C. 27. (7) 7 M. 400.

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to such a decree nor vary its terms. But it is also true that when a decree is put into execution the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. This I take to be the effect of s. 375 of the Code of Civil Procedure read with s. 647 of that enactment, and this view is fortified by the principle upon which my brother Straight and myself decided the case of *Sarju Prasad* v. *Sita Ram* (1).

Now, when in execution proceedings any arrangement amounting to a compromise has been arrived at between the decree-holder and the judgment-debtor, the Court executing the decree is bound to give effect to such compromise, subject of course to the limitations indicated by s. 375 of the Code, in which the word *suit* must in execution proceedings be read to mean "*execution of decree*," that is, *mutatis mutandis*, which s. 647 of the Code implies. Further, because such a compromise must be according to law or as s. 375 terms it, *a lawful agreement or compromise*, the provisions of s. 257-A become applicable, and, so long as these requirements are satisfied, the compromise becomes a part of the decree itself and can be given effect to in execution of such a decree, at least as between the decree-holder and the judgment-debtor, as was held by the Madras Court in *Yella Chetti* v. *Munisami Reddi* (2). I hold further, that when such a compromise has been duly arrived at and [233] sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position which they thus deliberately took up in the matter of the compromise. I go even further, and hold that, even if such a compromise is irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect unless the order sanctioning it is set aside by the procedure required by the law for such a purpose. But so long as the order sanctioning the compromise stands, the parties are bound by it in all proceedings relating to the execution of the decree, and where they have acted upon the compromise they are estopped thereafter from questioning its validity.

The general principle upon which this view proceeds was laid down by the Lords of the Privy Council in *Pisani* v. *Attorney-General of Gibraltar* (3) which was applied by their Lordships to Indian cases in *Sadasiva Pillai* v. *Ramalinga Pillai* (4) which, indeed, is the leading case upon the subject, and applicable in principle to the case now before me. This appears from the obsevations made by Oldfield, J., in his dissentient judgment in the earlier Full Bench ruling of this Court in *Debi Rai* v. *Gokal Prasad*, (5) and is consistent with the conclusion at which the later ruling of the Full Bench in *Sita Ram* v. *Dasrath Das* (6) arrived, as also with the Division Bench ruling of this Court in *Ganga* v. *Murlidhar* (7). It is enough for me to say that I am bound by Privy Council rulings, and that for the purposes of this case, I am content with the conclusions at which the two rulings of this Court last cited arrived.

Now, in the present case, the arrangement was contained in the application of the judgment-debtor's brother Muhammad Ibrahim, dated the 14th June, 1884. That arrangement was to the effect that, "should Muhammad Sulaiman fail to pay the amount of the decree, then it may be recovered from Muhammad Ibrahim." The order of the Court, dated the 4th July, 1884, shows that this arrangement was accepted by the

(1) 10 A. 71. (2) 6 M. 101. (3) L. R. 5 P. C. 516. (4) 2 I. A. 219.
(5) 3 A. 385. (6) 5 A. 492. (7) 4 A. 240.

decree-holder-respondent and by [234] the judgment-debtor-appellant; that it was sanctioned by the Court; and that it was in consequence of such compromise that the judgment-debtor's property was released from attachment. It has been found further by the lower appellate Court that this compromise was acted upon, "by paying Rs. 200 cash and one, at all events, of the subsequent instalments." There is nothing in that compromise to show that it was intended either to extinguish the decree, or to create any relation other than that of a decree-holder and judgment-debtor between the parties to this appeal. The decree therefore subsists as against the judgment-debtor-appellant, though, as I have already explained, its execution has been modified by the compromise above-mentioned. It is, indeed, in accordance with the terms of that compromise that the decree-holder-respondent has prayed for execution of his decree, and the Courts below have allowed that execution.

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I hold that under such circumstances the order of the Courts below is correct, for the decree still subsists and is enforcible against the judgment-debtor-appellant according to the above-mentioned compromise.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

CHEDI LAL AND OTHERS (*Defendants*) v. BHAGWAN DAS AND OTHERS (*Plaintiffs*).* [21st November, 1888.]

Mortgage—Decree enforcing hypothecation—Satisfaction of decree by person not subject to legal obligation thereunder—Suit for contribution brought by such person against judgment-debtors—Gratuitous payment—Act IX of 1872 (*Contract Act*), *ss.* 69, 70—"*Lawfully.*"

The widow of *D* a separated Hindu, hypothecated certain immoveable property which had belonged to her husband. The immediate reversioners to *D*'s estate were his nephew *S*, and the three sons of his brother *O*. After the widow's death, the mortgagee put his bond in suit, impleading as defendants *S*, two of *S*'s four sons and the three sons of *O*. Only the three last-mentioned persons resisted the suit; and [235] the mortgagee obtained a decree directing the sale of the mortgaged property in satisfaction of his claim. From the operation of this decree *S* was wholly exempted, and his sons were made liable only to pay their own costs. Before any sale in execution of the decree could take place, the sons of *S* paid the amount of the decree into Court, thus saving the property from sale. They subsequently sued the sons of *O* for contribution in respect of this paymet. It was found that, at the time when the payment was made, *S* was a member of a joint Hindu family with the defendants, and that his sons, the plaintiffs, had, at that time, no interest in the property by transfer from him.

Held that at the time of the payment, the plaintiffs could not properly be regarded as in the position of co-mortgagors with the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiff to make the payment could not be imported into the case, and the plaintiffs were not entitled to contribution.

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* Second Appeal, No. 1118 of 1886, from a decree of W. R. Barry, Esq., District Judge of Ghazipur, dated the 5th April, 1886, reversing a decree of Pandit Ratan Lal, Subordinate Judge of Ghazipur, dated the 12th September, 1885.

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Held also that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money not for the defendants but for themselves, they could not claim the benefits of that section.

The principle of the decision in *Pancham Singh* v. *Ali Ahmad* (1) has been recognized and provided for in the Transfer of Property Act.

By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. *Ram Tuhul Singh* v. *Bisseswar Lal Sahoo* (2) referred to.

[R., 30 A. 167 = A.W.N. (1908) 58 = 5 A.L.J. 163; 2 C.L.J. 311; 12 C.P.L.R. 4 (7); 7 O.C. 146 (149, 150); Disc., 6 Ind. Cas. 341 (342) = 14 C.W.N. 699 (702).]

THE facts of this case are stated in the judgments of the Court.

Mr. *Amiruddin*, for the appellants.

Mr. *Simeon*, for the respondents.

ORDER OF REMAND.

STRAIGHT, J.—This is a second appeal from a decree of the Judge of Ghazipur, dated the 5th April, 1886. The suit out of which it has arisen was brought by the plaintiffs-respondents in the Court of the Subordinate Judge of Ghazipur against three defendants-appellants before us, and one Hira Lal, who is not an [236] appellant in this Court. The claim set up by the plaintiffs was presented under the following circumstances, and in order better to understand the facts, it will be convenient here to give a genealogical tree of the family in which the plaintiffs and the three defendants before us were members:—

Basti Ram.

Orai. — Ganga Prasad. — Debi Prasad.

(Sons of Orai:) Chedi (Deft.) — Bhawani (Deft.) — Kampta (Deft.)

(Son of Ganga Prasad:) Sheobalak. (widow, Musammat Rukminia)

(Widow of Debi Prasad:) Musammat Panno (widow)

(Son of Bhawani:) Bhagwan. (Son of Kampta:) Raghubir. (Sons of Sheobalak:) Kanhya. Mahabir. (plaintiffs.)

From the above tree it will be seen that upon the death of Debi Prasad, who left no children behind him, he admittedly being a separated Hindu brother, his widow, Musammat Panno was entitled to life-possession of the property left by him, and upon her decease on the 12th October, 1879, it is admitted that the immediate reversioners thereto were the present defendants-appellants, the three sons of Orai, and Sheobalak, the son of Ganga Prasad, and the father of the plaintiffs in the present suit. It seems that prior to her death, Mussammat Panno, along with Mussammat Rukminia, the mother of the plaintiffs, on the 17th September, 1877, executed a hypothecation bond in favour of one Mahabir, in respect of an advance of money made, and as security for that advance had hypothecated a portion of the immoveable property of which she was in life-possession as the widow of Debi Prasad. After the death of Mussammat Panno, Mahabir put his hypothecation bond in suit, and he impleaded in that litigation, as I understand it, the three present defendants-appellants,

(1) 4 A. 58. (2) 2 I.A. 131.

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Sheobalak, the father of the three plaintiffs, and Bhagwan and Kanhya, either directly, or some of these persons were brought upon the record as defendants at their own instance. In the result a decree was passed in favour of Mahabir. The three defendants-appellants before us were exempted in person [237] from the execution of the decree, but cast in costs. The defendant Sheobalak was exempted altogether, and as regards the two plaintiffs Bhagwan and Kanhya, it is not very clear what took place with regard to them. But I think this, at least, is certain, that they were in no way made liable under that decree. The effect of that decree was that the property which had been hypothecated by Musammat Panno, was in the ordinary course of things advertised for sale: and the position, looking to the genealogical tree of the parties, at the time was *prima facie* that, on the one hand, Mahabir was the mortgagee entitled under a decree of Court to enforce his mortgage, while, on the other hand, the three appellants and Shoebalak were the reversioners of the mortgagor rights against whom the decree might be enforced to the extent that the mortgaged property could be sold *in invitum* to them, unless they paid up the amount. At that time, so I understand the facts to be, Bhagwan and Kanhya and the other two plaintiffs in the present suit, were minors, and upon the 14th March, 1881, on behalf of Bhagwan and Kanhya a sum of Rs. 808-12-6 was paid into the Court executing Mahabir's decree for the purpose of stopping the sale of the mortgaged property, and the mortgage was thereby paid off, the decree was satisfied and the property saved from execution-sale.

On the 17th July, 1881, the defendants Chedi and his brother sold to Hira Lal, the other defendant, the $2\frac{1}{2}$ annas share that they had inherited from Musammat Panno in the property mortgaged to Mahabir, and it is in this way that Hira Lal the original second defendant in the suit was introduced into the litigation. He, however, is not before us, and no question arises in this appeal for us to determine in respect of him how and under what circumstances he acquired the property from the first set of defendants, or whether any sepcial protection can be afforded to him as a purchaser without notice.

The present suit which was instituted on the 9th May, 1885, by Bhagwan and Kanhya and their other two brothers under the guardianship of their mother, claims a sum of Rs. 404-6-3, the half of Rs.808-12-6 paid into Court on the 14th March, 1881, with a [238] sum of Rs. 242-6-0 interest, in all Rs. 646-12-3 principal and interest, as a contribution from the defendants towards the amount which the plaintiffs say they were constrained to pay in order to save the whole property from sale and in which payment they say the defendants-appellants were jointly interested.

But that is not all the plaintiffs ask. They ask further to enforce the claim for the amount of money by sale of the two 2 annas 8 pies share of the two mauzas mortgaged to Mahabir Rai which came to the hands of the defendants upon the death of Musammat Panno, upon the allegation that upon equitable principles, *ex acquo et bono*, they, having discharged the whole of the obligation in respect of the whole property and so saved it from sale, have an equitable charge or lien upon the property in the hands of the defendants for the amount of money that they were compelled to pay in order to stop the execution of the decree.

Without going into all the defences that were set up by the defendants to this suit, it is enough to say, I think, for the purposes of this appeal, that it was resisted by them upon the ground that at the date of the payment of the Rs. 808-12-6 on the 14th March, 1881, Sheobalak, the

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father of the plaintiff, then being alive, they had no interest in the property, and therefore their payment of the money must be regarded as a gratuitous and voluntary payment, which they are not entitled to recover from the defendants.

The Subordinate Judge who tried this case as a Court of first instance came to the conclusion that this defence was satisfactorily established, and he accordingly dismissed the suit. The learned Judge before whom the case came in appeal, at the instance of the plaintiffs, has taken a different view, and in one portion of his judgment he makes use of the following remarks. He says :—"It is sufficient to remark that Sheobalak was the person who succeeded to the share by inheritance, but he seems to have voluntarily made over his share to his son." Now as far as I have been able to ascertain from the learned pleaders, it is not very easy to understand precisely what the meaning of the learned Judge here is. I do not know where the learned Judge finds any warrant in the evidence [239] for this inference as to a relinquishment by Sheobalak in favour of his sons, though the statement contained in the first plea taken below, that at the time the execution-sale was threatened, the plaintiffs-appellants were recorded in the revenue records as proprietors of half the property mortgaged to Mahabir Rai, a fact which does not appear to be disputed, seems to favour the Judge's view. My brother Mahmood having fully considered this case since the last hearing, desires to have further information, mainly upon matters directed to this point, and is desirous that there should be two or three issues remanded for the pupose of clearing up the questions thus involved in our proper determination of this appeal. Naturally, I should not in the least degree wish, in a case of this description, to prevent further inquiry by the lower appellate Court, which is the proper tribunal for the determination of matters of fact.

At the present, I am not prepared to say that it is quite clear that the plaintiffs were not interested in the property sufficiently to entitle them to call into their aid the rule laid down in s. 69 of the Indian Contract Act. Whether, assuming that section or s. 70 to be applicable to their position the further step can be taken of holding that by their payment they acquired a lien on the share of the defendants saved by such payment, is a matter that requires very full and careful consideration, and need not be discussed or determined until we have received a return, to the issues which my brother Mahmood proposes, which I have had an opportunity of seeing, and which he will state in the observations he has to make in remanding issues to the lower appellate Court for its consideration and finding.

Having stated the facts in order that when the case comes back, we may have them clearly before us, I entirely concur in the order of remand proposed by my brother Mahmood.

MAHMOOD, J.—My learned brother Straight has stated the facts of the case; and, of course, it would be waste of time for me to rapeat them. I only wish to add that without expressing any definite opinion as to the extent or nature of the liability which at least two of the plaintiffs were under, in consequence of the decree of the [240] 30th June, and without expressing any opinion as to the question whether the action of the plaintiffs in praying up the whole of that decree on the 14th March, 1881, did not entitle them to maintain a suit such as the present, either for recovery of possession of what they allege was done by them for the benefit of the defendants, and which benefit has been enjoyed by those defendants; and also without saying anything

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definite as to whether or not such payment to the 14th March, 1881, did entitle the plaintiffs to claim the money due as such compensation by enforcement of a sort of charge on immoveable property; I feel I should not dispose of the case finally upon a purely hypothetical state of facts. The learned Judge of the lower appellate Court in reversing the decree of the Court of first instance, has taken a view of the law as to the accuracy of which I feel myself unable to pass finally any decision without specific information upon the following points of fact. Those points of fact are possibly ascertainable from the record, but we sitting here as Judges of second appeal, are not intended by the Legislature to discharge those functions. Therefore my view is that before passing any judgment upon the legal points raised in the case, which Mr. *Amiruddin* has with so much ability pressed upon us, we should have definite findings on the following issues:—

1. Did the plaintiff on the 14th March, 1881, own any interest in the property left by the deceased Musammat Panno, either by gift or other transfer from Sheobalak or otherwise?

2. Was Sheobalak on the 14th March, 1881, a member of a joint Hindu family with the present plaintiffs?

3. When did Sheobalak die?

4. Where the plaintiffs or any of them judgment-debtors of the decree of the 30th June, 1881, whether jointly with the defendants or otherwise?

For distinct findings upon these issues, I would remand the case, as I have the approval of my brother Straight to the lower appellate Court, and upon receipt of the findings ten days will be allowed for objections under s. 567 of the Code.

[241] [On the return of findings upon the issues remanded, the case again came for hearing before Straight and Mahmood, JJ. The parties were represented as before.]

JUDGMENT.

STRAIGHT, J.—It is not necessary that I should enter at length into the circumstances of this case, as they were very fully stated by me in my former judgment of the 28th October, 1887. The effect of my then order was that, having regard to certain matters which in the opinion of my brother Mahmood were doubtful or unascertained, I assented to certain issues being settled by him for determination by the lower appellate Court, and that Court has now recorded its findings upon those issues. It is as to these issues and in reference to those findings, that it now becomes my duty finally to deal with this appeal and to dispose of it.

In reference to the questions remanded it has now been determined by the learned Judge, that upon the 14th March, 1881, the date of the alleged payment in respect of the decree of Mahabir Prasad, dated the 30th January, 1880, the two plaintiffs had no interest in the property left by Musammat Panno, either by gift or other transfer from Sheobalak. It has further been found that upon the 14th March, 1881, Sheobalak and the plaintiffs his sons, were members of a joint and undivided Hindu family; that Sheobalak died in 1882, and, what is most material in looking at this case in one of its legal aspects, that the present plaintiffs were not judgment-debtors under the decree of Mahabir Prasad, dated the 13th June, 1880, along with the present defendants. It is in reference to those findings that it becomes my duty to consider whether the original judgment of the learned Judge passed in appeal can be sustained either on the footing that the facts found bring the case within the provision of

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s. 69 of the Contract Act or within the principle of s. 70 of the same statute. Much of the learned Judge's judgment proceeded upon the construction to be attached to certain provisions of the Transfer of Property Act, and he also referred to a judgment of my own. (1) That ruling, however, has now become more or less obsolete by reason of the circumstance that the principle enun-[242]ciated in it has been recognized in the Transfer of Property Act, and provided for therein. The applicability of that principle to the present case turns upon this : can it rightly or properly be said that upon the 14th March, 1881, when the 800 and odd rupees were paid by the plaintiffs, they could properly be regarded as mortgagors in the sense that they stood in the shoes of Musammat Panno, and were mortgagors along with the defendants and paid that money as one party of mortgagors for themselves and other mortgagors in such a way as to create an equitable lien upon the property they had saved from sale, which represented the shares of such mortgagors? I may say that the learned Judge's decision rather begs this question, because if it be conceded that these present plaintiffs were mortgagors, much of the difficulty in their way would disappear. But the *crux* of Mr. *Amiruddin's* contention is that they never were mortgagors and never stood in the shoes of the mortgagors at the time of the payment. The state of things then stands thus: that the decree which was obtained by Mahabir Prasad was not a decree under or in respect of which any legal obligation or liability rested upon these present plaintiffs, except in so far as they were called upon to pay their own costs in the Courts below, and that no other legal liability or obligation was imposed by that decree upon them. It is true that as regards these present defendants there was a legal liability or obligation, but for the purpose of applying the provisions of s. 69 of the Contract Act it is essential that there should be first a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly a payment by such last-mentioned person. In this particular case, as far as I am able to gather from the findings, there was no payment of money which the defendants were bound by law to make in which it can be said that these plaintiffs were *interested*. Consequently the fiction of an implied request from the defendants to the plaintiffs to make the payment cannot be properly imported into the case so as to bring it under s. 69 of the Contract Act and the right to reimbursement was not created.

Then arises the question whether s. 70 is applicable or not to the facts of the present case. I pointed out to Mr. *Simeon* that if you [243] could read s. 70 of the Contract Act without the word "lawful" in it, I might go to the full length of the contention set up by him. But I presume that the Legislature intended something when it used the word "lawful," and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done. Here there was in my opinion no such relation between the parties as would create any such right or from which it could be reasonably inferred. If the plaintiffs, as mere volunteers, chose to put their hands into their pockets and to pay a sum of money not for the defendants but for themselves, that was their own look-out and

(1) *Pancham Singh* v. *Ali Ahmad* 4 A. 58.

they cannot now claim the benefits of s. 70. It will be convenient in this connection to refer to what their Lordships of the Privy Council have said in the case of *Ram Tuhul Singh* v. *Bisseswar Lall Sahoo* (1).

"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt. Still less will the action lie when the money has been paid as here, against the will of the party for whose use it is supposed to have been paid. *Stokes* v. *Lewis* (2). Nor can the case of *A* be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one event would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to pay."

Having dealt with those two points above stated, the appeal is disposed of. I think that the first Court was right in dismissing the claim of the plaintiffs, and that the learned Judge was wrong in the view that he took of the law applicable to the facts of this case.

[244] In my opinion the plaintiffs had no legal right upon which to come into Court and claim recoupment or contribution to the extent of one-half the amount paid. I think the appeal should be decreed, that the judgment of the learned Judge should be set aside and that of the first Court restored. The defendants-appellants are entitled to their costs in all Courts.

MAHMOOD, J.—My opinion in this case coincides entirely with the views to which my learned brother has given expression. I need only add that any other view of the law would amount to saying that the effect of s. 70 of the Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor, to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. I do not think that the section could have been intended to invole such results.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

SHIB LAL (*Defendant*) v. BHAGWAN DAS (*Plaintiff*)*
[27th November, 1888.]

Vendor and purchaser—Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession Act IV of 1882 (Transfer of Property Act), s. 54.

Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser: and the latter, notwithstanding such non-payment, can maintain suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the

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* Second Appeal, No. 630 of 1887 from a decree of C.W.P. Watts Esq., District Judge of Moradabad dated the 22nd December, 1886, confirming a decree of Maulvi Zain-ul-abdin Khan, Subordinate Judge of Moradabad, dated the 31st August, 1886.

(1) 2 I.A. 131. (2) 1 Term Rep. 20.

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case may require. *Mohun Singh* v. *Shib Koonwer* (1), *Goor Pershad* v. *Nunda Singh* (2), *Heera Singh* v. *Ragho Nath Sahai* (3), and *Umedmal Motiram* v. *Dava* (4), referred to.

The difference between an executed contract of sale and an executory contract to sell observed on. *Ikbal Begam* v. *Gobind Prasad* (5) dissented from.

A deed of sale of immoveable property having been duly executed and registered, and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property **[235]** Act (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed.

[**F.**, 15 Ind. Cas. 173 ; **Rel.**, 6 N.L.R. 98 (108)=7 Ind. Cas. 541(543); **R.**, 18 A. 69(72); 30 A. 125 (127)=5 A.L.J. 96=A.W.N. (1908), 38; 34 M. 543 (544)=8 Ind. Cas. 364=9 M.L.T. 108=M.W.N. (1910), 637 ; 4 C.L.J. 334 (336); 14 C.P.L.R. 57 (58) ; 1 M.L.T. 432 ; 5 M.L.T. 205 ; 3 O.C. 215 (224) ; 14 P.R. 1911=88 P.L.R. 1911=45 P.W.R. 1911 ; 18 P.R. 1911=9 Ind. Cas. 238 ; **Doubted**, 8 Ind. Cas. 364 ; 8 Ind. Cas. 435=9 M.L.T. 108 (109) ; **D.**, 16 M. 464 ; 4 C L.J. 338 (339, 340).]

THE facts of this case are stated in the judgment of Mahmood, J.

Pandit *Ratan Chand* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Kunwar *Shivanath Sinha* and Mr. *Khuskwakht Rai* for the respondent.

JUDGMENT.

MAHMOOD, J.—In order to explain the points of law which arise in this case, it is necessary to recapitulate the facts and the findings at which the lower Courts have concurrently arrived.

The defendant Sri Ram was the owner of a ten-biswas share in the village, and he executed a usufructuary mortgage thereof in favour of one Chajmal Das on the 1st June, 1861, and placed the mortgagee in possession. It has also been found that the aforesaid Sri Ram borrowed further sums of money from Chajmal Das and hypothecated the above-mentioned property as security for repayment of the loan. These sums are stated in the first Court's judgment to have amounted to about Rs. 2,338, but apparently this sum is not the result of any regular calculation, as no mortgage-account appears to have been taken, Chajmal Das being no party to this litigation.

The Courts below have also concurred in finding that the defendant Sri Ram owed Rs. 406 to one Hargo Lal on a bond dated the 10th June, 1884, and Rs. 900 to one Dalip Singh.

On the 3rd July, 1884, Sri Ram executed a registered sale-deed whereby he conveyed the above-mentioned ten biswas to Bhagwan Das, plaintiff-respondent, in lieu of Rs. 4,800. The sale-deed specifies these sums to be paid in the following manner.

(1) Rs. 406 to be paid to Hargo Lal.

(2) Rs. 900 ,, Dalip Singh.

(3) Rs. 622 ,, Chajmal Das, on his mortgage of 1st June, 1861.

[246] (4) Rs. 2,872, being the balance, to be paid in cash to the vendor Sri Ram, defendant, thus making up the total sum of Rs. 4,800 purchase-money.

It will be observed that the above-mentioned items take no account of the hypothecation charge of Chajmal Das on the property sold, and this circumstance appears to be the main cause of the present litigation.

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(1) N.W.P.H.C.R. 1866, p. 85. (2) N.W.P.H.C.R. 1866, p. 160.
(3) N.W.P.H.C.R. 1868, p. 30. (4) 2 B. 547. (5) 3 A. 77.

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On the 8th July, 1884, Sri Ram executed another sale-deed of the same property in favour of the defendant Shib Lal and registered it the next day. The consideration of that sale is also mentioned in the deed to be Rs. 4,800 made up of various items mentioned therein.

The words of the deed are :—

"That out of the said consideration-money, Rs.622 for payment to Chajmal Das mortgagee, Rs. 134 for payment to Kanhya Lal and Rs. 406 for payment to Hargo Lal *bania* of Jalalabad, in all Rs. 1,162, were left with the vendee, and Rs. 2,438, due by the vendor to the vendee were credited in the account, and the remaining sum of Rs. 1,200 was received in cash from the vendee and was applied to his use by the vendor."

It will be observed that this specification mentions the sum of Rs. 622 due on Chajmal Das' mortgage and also the sum of Rs. 406 due to Hargo Lal, but mentions nothing as to the Rs. 900 specified in the sale-deed of the 3rd July, 1884 to be due to Dalip Singh. Further, it is to be noticed that in this latter sale-deed no specific mention is made of the hypothecation charge of Chajmal Das, and the other items mentioned in the sale-deed are different to those mentioned in the earlier sale-deed of the 3rd July, 1884.

The plaintiff Bhagwan Das relying upon his sale-deed of the 3rd July, 1884, applied to the revenue authorities for mutation of names in his favour, but his application was resisted by the defendant Shib Lal on the ground of the sale-deed which he had obtained from Sri Ram on the 8th July, 1884. The objections prevailed, and Bhagwan Das' application being disallowed, the name of Shib Lal [247] was entered in the Government revenue records on the 24th June, 1885, as the owner of the ten biswas share above-mentioned.

Subsequently, Shib Lal executed a *theka* lease of the property on the 14th July, 1885, in favour of Ram Prasad, who has in consequence been impleaded as a defendant in this suit.

The above-mentioned facts explain the position of the parties in this litigation. The dispute amounts to the question whether the plaintiff Bhagwan Das' sale-deed of the 3rd July, 1884, was a valid and perfected conveyance so as to render the defendant Shib Lal's sale-deed of the 8th July, 1884, null and void.

The plaintiff came into Court alleging that in accordance with the terms of his sale-deed of the 3rd July, 1884, he duly paid Rs. 406 to Hargo Lal and Rs. 900 to Dalip Singh on behalf of the vendor Sri Ram; that immediately alter the execution of the deed the plaintiff discovered that besides the sum of Rs. 622 mentioned in the sale-deed to be paid to Chajmal Das on his mortgage, the latter held further hypothecation charges on the property, to the extent of Rs. 2,200; that therefore the plaintiff instead of paying the sum of Rs. 2,872 which was to be paid in cash to the vendor Sri Ram, only paid Rs. 672 to him in cash and kept the balance of the purchase-money for payment of Rs. 622 due on Chajmal Das' mortgage, and the remainder due to him for his hypothecation charges; that the defendant vendor Sri Ram in collusion with Chajmal Das and Shib Lal executed a fraudulent and nominal sale-deed in favour of the latter on the 8th July 1884, and the latter fraudulently and in collusion with Chajmal Das obtained possession and mutation of names on the 24th June, 1885, and thereafter executed a *theka* lease in favour of the defendant Ram Prasad. Upon these allegations the plaintiff prayed for proprietary possession of the 10-biswas share by establishment of his right

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under the sale-deed of the 3rd July, 1884, and nullification of the sale-deed of the 8th July, 1884.

The suit was resisted by all the three defendants upon similar pleas. They urged that the plaintiff's sale-deed had been fraudulently obtained by him from the defendant Sri Ram; that the plaintiff had [248] paid no portion of the purchase-money to the defendant-vendor; that therefore the sale remained inoperative; and that the plaintiff having thus declined to carry out the terms of the sale, the vendor Sri Ram executed the sale-deed of the 8th July, 1884, in favour of the defendant Shib Lal, who had since redeemed the mortgage of Chajmal Das and had obtained possession.

The Courts below have concurred in finding that the plaintiff's sale-deed of the 3rd July, 1884, was a *bona fide* and valid transaction, that in accordance with its terms the plaintiff had paid on behalf of the vendor Sri Ram Rs. 406 to Hargo Lal and Rs. 900 to Dalip Singh; but that he had failed to prove the payment to Sri Ram of Rs. 672, and that he had not paid the mortgage-money due to Chajmal Das owing to the latter's collusion with the vendor Sri Ram and refusal to accept payment of the money. On the other hand, the Courts below have found that the sale-deed of the 8th July, 1884, in favour of the defendant Shib Lal was an entirely nominal and fraudulent transaction, being the result of collusion between him and Chajmal Das and Sri Ram; that the defendant Shib Lal was a tool in the hands of Chajmal Das and was in reality acting for him; that "Shib Lal did not pay a pice of the purchase-money or the mortgage-money of the disputed property," although he obtained a receipt of the mortgage-money from Chajmal Das, that "although Shib Lal is shown to be in possession of the disputed property, yet in fact the disputed property is up to this time in the mortgagee possession of Chajmal Das."

Upon these findings the Courts below have decreed the plaintiff's claim for proprietary possession against all the three defendants, subject to the condition that the plaintiff should take an account of what is due to Chajmal Das for his mortgage and hypothecation charges and pay the same to him, and after deducting such amount "whatever will remain out of the purchase-money due by the plaintiff to the defendant-vendor shall be formally recovered by the latter from the former."

From this decree the defendants Sri Ram and Shib Lal appealed to the lower appellate Court, and the plaintiff appears to have pre-[249]ferred cross-objections in respect of so much of the decree as subjected the decree for possession to payment of mortgage-money to Chajmal Das.

The lower appellate Court, however, dismissed *both* the appeal and the cross-objections, thus confirming the first Court's decree.

This second appeal has been preferred only by the defendant Shib Lal on four grounds, of which the third which impugns the lower Court's finding that Rs. 900 were due by the vendor Sri Ram to Dalip Singh and were paid to the latter by the plaintiff as part of the purchase-money, cannot be entertained in second appeal, as it is a pure question of fact.

In support of the first and second grounds, it is contended that inasmuch as the lower Courts themselves have found that the plaintiff had not paid the full consideration of the sale-deed of the 3rd July, 1884, that deed could confer no ownership upon him and the suit was therefore unmaintainable. It is further argued that the plaintiff-respondent having refused to pay the vendor the amount due to him as purchase-money, the latter was entitled to execute the second sale of the 8th July, 1884, in favour of the defendant-appellant, Shib Lal.

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In support of this contention the learned pleaders for the appellant rely upon the ruling of this Court in *Ikbal Begam* v. *Gobind Prasad* (1) where, under somewhat similar circumstances, it was held that a purchaser who had only paid a portion of the purchase-money could not maintain a suit for possession of the purchased property, as the contract of sale could not be regarded as complete as there had been "a manifest withholding of the purchase-money." It that case the purchase-money was Rs. 16,000, the sale-deed had been duly executed and registered, and out of the consideration-money Rs. 2,000 had been paid in cash to the vendor and the remaining Rs. 14,000 were to be applied by the plaintiff-purchaser towards the payment and discharge of certain bond-debts due by the vendor and charged upon the purchased property. The plaintiff-vendee had not up to the date of the suit paid off those debts, and [250] it was held that this omission rendered the sale incomplete so as to preclude the plaintiff from claiming possession as owner of the purchased property.

The Courts below have not followed that ruling, holding, as they seem to do, that it was distinguishable from the present case.

I am afraid I cannot take the same view; for if that ruling lays down any rule of law, it goes the length of holding that non-payment of a part of the purchase-money by the vendee prevents the passing of ownership to him and precludes him from suing for possession of the property which he has purchased, although the sale-deed has been duly registered and delivered to him and a portion of the purchase-money has been received by the vendor. If this is a correct interpretation of that ruling, its principle is directly applicable to this case; and here the plaintiff-respondent having distinctly failed to prove the payment of the entire purchase-money, his suit would stand dismissed if the above-mentioned ruling were followed.

I regret, however, with due respect, I am unable to follow that ruling, for it seems to me to proceed upon disregarding the distinction between a *contract of sale* and a *contract to sell*, the former being an executed contract and the latter appertaining to the class of executory contracts. Or, to use the technical language of jurisprudence, sale creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property and does not amount to an interest therein.

This juristic distinction is fully recognised in s. 54 of the Transfer of Property Act (IV of 1882), and forms the basis of many a rule of law and equity, such as the doctrine of notice to *bona fide* transferees in connection with specific performance of contracts. I may say here that I have had the advantage of conferring with my brother Straight, who was one of the learned Judges who decided the case of *Ikbal Begam* v. *Gobind Prasad* (1) with regard to that ruling, and he has authorised me to say that, so far as he is concerned, he has more [251] than once stated from the Bench that the case was always a very doubtful authority and that since s. 54 of the Transfer of Property Act came into force, it can no longer be considered as an authority.

Now, in the present case, the Courts below have found that the sale-deed of the 3rd July, 1884, was duly executed, registered and delivered to the plaintiff-vendee, who has paid a portion of the purchase-money to the vendor's creditors. I hold that these facts in themselves amount to a full transfer of ownership to the plaintiff-vendee, notwithstanding the

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(1) 3 A. 77.

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circumstance of his having either omitted, refused or been unable to pay the balance of the purchase-money to the vendor Sri Ram or the mortgagee Chajmal Das. The plaintiff could therefore maintain this suit, which is in the nature, not of an action for specific performance of contract, but an action for ejectment. Such an action can be maintained by anyone who, like the plaintiff in the present case, has acquired the ownership of immoveable property, though, of course, in a case such as this, in common with some other classes of cases, equities may exist in favour of the defendant, so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case.

In the present case, however, no such equities can exist in favour of the defendant-appellant Shib Lal, who, as I have already said, has been found by the Court below to have obtained the sale-deed of the 8th July, 1884, with knowledge of the plaintiff's earlier sale-deed of the 3rd July, 1884, and to have paid no portion of the purchase-money nor to have obtained possession of the property, but to have acted simply as a nominal vendee in the interests of the mortgagee Chajmal Das, who was in collusion with the vendor Sri Ram defendant.

It follows from what I have said that there is no force in the contention urged in the second ground of appeal, that in consequence of the non-payment by the plaintiff of a portion of the purchase-money of the sale-deed of the 3rd July, 1884, the vendor Sri Ram had any rights in the property to convey to the appellant by the sale-[252] deed of the 8th July, 1884. This view is supported by the principle of the rulings of this Court in *Mohun Singh* v. *Musammat Shib Koonwer* (1), *Goor Prasad* v. *Nunda Singh* (2), and by the ruling of the Bombay High Court in *Umedwal Motiram* v. *Dava* (3), which was a much stronger case than the present, because there the vendee had paid no portion of the purchase-money, and having confessed his inability to pay the same, had returned the sale-deed to the vendor. Those various rulings are not in full accord with each other as to the exact form of the decree which should be passed in such cases, but they are unanimous in laying down the principle that non-payment of a portion of the purchase-money does not prevent the passing of ownership from the vendor to the vendee, and that such vendee can maintain a suit for possession.

The ruling in *Goor Prasad* v. *Nunda Singh* (2), so far as it declares that a decree for possession in favour of a vendee who has paid only a portion of the purchase-money cannot be subjected to a condition of payment of balance of the purchase-money, is as I respectfully think, scarcely consistent with the procedure and rules of the Courts of equity and the rulings which I have cited. But as I have already said, the present appellant Shib Lal is entitled to no equities such as would require any modification of the lower Court's decree, so far as he is concerned, and I need not dwell upon the matter any further.

It now remains only to dispose of the contention urged in the fourth ground of appeal which proceeds upon the assumption that Chajmal Das, the mortgagee, had transferred his rights to the appellant. Upon this assumption it is contended that the appellant was entitled to some kind of lien upon the property in suit.

As to this part of the case it is enough to say that the findings of fact at which the lower Courts have arrived contradict the assumption upon

(1) N.W.P.H.C.R. 1866, p. 85. (2) N.W.P.C.R. 1886, p. 160.
(3) 2 B. 547.

which the plea proceeds. They have found that the appellant paid nothing either to the vendor, Sri Ram, or to the mortgagee, Chajmal Das, and that his position in the matter was [253] merely a nominal one in collusion with Chajmal Das, mortgagee, who was still in possession. The findings therefore indicate no such transfer of mortgagee's rights by subrogation or otherwise as would entitle the appellant Shib Lal to any modification of the lower Court's decree, and since Chajmal Das was no party to this litigation, and the other two defendants, Sri Ram and Ram Prasad have not joined in this appeal, the case requires no further discussion, their rights not being involved in this appeal.

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I dismiss the appeal with costs.

BRODHURST, J.—I concur in dismissing the appeal with costs.

Appeal dismissed.

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11 A. 253 = 9 A.W.N. (1889) 22.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahoomed.

BHUPAL RAM (*Defendant*) v. LACHMA KUAR AND OTHERS (*Plaintiffs*).*
[29th November, 1888.]

Hindu Law—Hindu widow—Alienation by widow to her married daughter—Reversioner—Declaratory suit—Act I of 1877 (*Specific Relief Act*), *s.* 42.

The effect of a gift by a Hindu widow of her deceased husband's estate to her daughther, is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift.

Per MAHMOOD, J., that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son who would be the next reversioner to the full ownership of the estate of the donor's deceased husband.

Indar Kuar v. *Lalta Prasad Singh* (1) *Udhar Singh* v. *Ranee Koonwur* (2), referred to.

[F., 4 A.L.J. 677 = A.W.N. (1907) 269; R., 32 A. 582 (584) = 7 A.L.J. 645 (646); 32 C. 62 66; = 9 C.W.N. 25; 35 C. 1086 (1089, 1090) = 12 C.W.N. 914 = 8 C.L.J. 120; 7 Bom. L.R. 622 (638); 127 Ind. Cas. 80 = 10 M.L.T. 25.]

THE facts of this case are stated in the judgment of Straight, J.

The Hon. *T. Conlan* and Pandit *Ratan Chand* for the appellant.

Maulvi *Abdul Majid*, the Hon. Pandit *Ajudhia Nath*, and Mir *Zahur Husain*, for the respondents.

JUDGMENTS.

STRAIGHT, J.—This appeal relates to a declaratory suit brought by the plaintiff-appellant before us, in the Court of the Subordinate [254] Judge of Saharanpur, on the 10th April, 1886. In order to make the

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* First Appeal, No. 29 of 1887, from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 10th November, 1886.

(1) 4 A. 532. (2) 1 Agra 234.

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grounds upon which I am about to dispose of this appeal intelligible, it will be convenient here to state a genealogical tree :—

Balkishen
(common ancestor).

Bhumi Shankar (died without issue).

Chota Lal.
Angan Lal.
Bhupal Ram, plaintiff.

Ganga Prasad.
Ram Prasad, married Lachma Kuar.
Ganesh Kuar (daughter).
Manna Ram married Tiloki (defendant).

From the above genealogical tree it will be seen that Balkishen had three sons, of whom Bhumi Shankar died without issue. Ganga Prasad had two sons, of whom Manna Ram predeceased Ram Prasad, leaving behind him a widow named Tiloki Kuar. Ram Prasad, therefore, succeeded to the property of Manna Ram, and when he died he left a widow named Lachma Kuar and a daughter Ganesh Kuar. The ground on which the plaintiff comes into Court is that, upon the 20th April, 1883, Lachma Kuar the widow of Ram Prasad, and Tiloki Kuar, the widow of Manna Ram, joined together in executing a deed-of-gift in respect of certain property which had belonged to Ram Prasad and Manna Ram. It is not necessary for the purpose of disposing of this appeal to enter into the question of fact, which arose in the case in the Court below, or to discuss the grounds upon which the learned Subordinate Judge dismissed the plaintiff's suit. It is enough for the purposes of this judgment to deal with the two questions which have been raised here to-day as an answer to the appeal preferred by the plaintiff, the answer being upon grounds of law and law only :—First, that in the presence of Ganesh Kuar, the plaintiff, even admitting him to be the son of Angan Lal, had no *locus standi* to maintain the suit ; and, secondly that, looking to the nature of the transaction of gift and the position of the donee, [255] Ganesh Kuar, no cause of action had accrued to the plaintiff to entitle him to come into Court and maintain this declaratory suit. Upon the first question, as to the *locus standi* of the plaintiff, had any contest taken place in regard to that, it might possibly have brought two rulings of my brother Mahmood and myself, one reported at page 428, and the other at page 431 of the Indian Law Reports, 6 Allahabad, *Madari* v. *Malki* and *Balgobind* v. *Ram Kumar*, into conflict. But fortunately that conflict is avoided, and it becomes unnecessary for us jointly to consider the correctness or otherwise of our respective rulings, because Pandit *Ajudhia Nath*, who represents the respondents here, says that he does not question the *locus standi* of the plaintiff to come into Court and maintain his action. In other words, he is willing to concede that, by the united action of Lachma Kuar and Tiloki Kuar, the plaintiff, as the next reversioner, was entitled to pray for the declaratory relief which he has sought by this suit. Consequently the first contention need not be further dealt with, and it is only necessary for me to consider the second argument addressed to us on behalf of the respondents, namely, that the plaintiff had no cause of action upon which he was entitled to maintain such a suit as that which he has now brought. It is to be observed from the genealogical tree above given that the donee, under this deed-of-gift from Tiloki and Lachma Kuar, was the

daughter of Lachma Kuar. It is clear that the whole of the property which had belonged to Manna Ram had passed into the hand of Ram Prasad, the father of the girl Ganesh Kuar, and that in the ordinary course of succession after the death of Ram Prasad, his widow Lachma Kuar will first take the life-estate, and upon her decease the daughter will take the life-estate, subject of course to any son being born to her. The effect therefore, of the transaction of gift, which took place upon the 28th April, 1883, is nothing more nor less than to use the words of my brother Mahmood, in the case of *Indar Kuar* v. *Lalta Prasad Singh* (1) "to accelerate her succession to the property and to entitle her to immediate succession." In other words, all the effect that this deed-of-gift had, was to put Musammat Lachma Kuar out of possession of her life-estate and to [256] put Ganesh Kuar, her daughter, by anticipation into possession of her life-estate. There is another authority for this view of the matter in *Udhar Singh* v, *Ranee Koonwar* (2), where it was held by Chief Justice Sir Walter Morgan and Mr. Justice Pearson, that a reversioner has no present ground of action to set aside a transfer made by a widow in favour of her daughter, as his reversionary right was not prejudiced thereby. This is also a distinct authority for holding that no cause of action accrued to this plaintiff to come into Court and ask for a decree such as that which he sought in the present suit. Under these circumstances and upon these grounds, without entering into the merits of the learned Subordinate Judge's decision, I am of opinion that this appeal should be, and it is, dismissed with costs.

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MAHMOOD, J.—I am of the same opinion, and as my learned brother has pointed out that in the two cases, *Madari* v. *Malki* (3) and *Balgobind* v. *Ram kumar* (4) the views which my learned brother and I gave expression to are somewhat in conflict, it is unnecessary to explain that conflict, or to arrive at any definite conclusion so far as the question of *locus standi* is concerned, because as the learned Pandit has conceded, in either case, the fact that Ganesh Kuar is the donee from Lachma Kuar, would prevent any such plea being raised against the present plaintiff-appellant as that of absence of *locus standi* if his allegation of the relationship with the deceased Ram Prasad is to be accepted. I must not, therefore, be understood to lay down any rule in this case on that point.

The next thing I wish to say is, that this is admittedly a declaratory suit and, therefore, a suit governed by the provisons of s. 42 of the Specific Relief, Act (I of 1877). That enactment, and that clause in itself, contains the quintessence of the rule of the equity governing such matters and guiding the practice of the Courts of Chancery in England. The words of of that section are clear, and it only affirms the practice of English Court of Chancery when it says that a declartory relief is not a matter of right, and is in the discretion ol the Court. Here the lower Court although it has [257] passed its judgment upon matters of evidence, has practically come to the conclusion that the plaintiff should not be allowed to have declaratory relief. I am afraid that the Court was wrong in thinking that there was a cause of action entitling the plaintiff to maintain such a suit. My opinion is that, if for no other reason, the solitary reason that this lady, Ganesh Kuar (who is admittedly living and a married daughter of the last full proprietor), is the donee, and that she is a married woman, her husband being still living, would be enough to require that a proper exercise of discretionary powers should not include a decree such as as the

(1) 4 A. 532. (2) 1 Agra 234. (3) 6 A. 428. (4) 6 A. 431.

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plaintiff demanded. Therefore the conclusion of the judgment of the Court below is just the result which my learned brother Straight has arrived at, though by a different process of reasoning. It is the same as that at which I have also arrived, for the reason that the donee, Ganesh Kuar, is a married woman, and having the possibility of bearing a son who would be the next reversioner to the full ownership of the estate of Ram Prasad. I agree in the judgment and the decree which my learned brother has made. *Appeal dismissed.*

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11 A. 257=9 A.W.N. (1889) 79.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

KUAR DAT PRASAD SINGH (*Defendant*) v. NAHAR SINGH AND OTHERS (*Plaintiffs*).* [30th November, 1888.]

Pre-emption—Wajib-ul-arz—*Partition of village into separate mahals—New* wajib-ul-arz *for each mahal.*

Cases where, after the division of a village area into separate mahals for which no new *wajib-ul-arz* is drawn up, the old *wajib-ul-arz* for the whole area has been held to apply generally to the new mahals, and such division has been held not to affect covenants existing between the co-sharers under such *wajib-ul-arz*, distinguished from cases where a new *wajib-ul-arz* has after the division been drawn up for each mahal.

Gokal Singh v. *Mannu Lal* (1) and *Jai Ram* v. *Mahabir Rai* (2), referred to.

[R., 17 A. 226 (233); 7 Bom. L.R. 622; Expl., 22 A. 1 (18)=19 A.W.N. 111.]

THE facts of this case are stated in the judgment of Straight, J.

The Hon, *T. Conlan*, Mr. *G. E. A. Ross*, and the Hon. Pandit *Ajudhiá Nath*, for the appellant.

[258] Mr. *C. P. Hill*, Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal* for the respondents.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit for pre-emption, which was instituted by the plaintiffs-respondents before us, in the Court of the Subordinate Judge of Aligarh, upon the 30th June, 1886. The sale-transaction which the plaintiffs assailed was embodied in two sale-deeds of the 30th June, 1885, relating to several properties in which one Joti Prasad, who was defendant No. 7 in the Court below, was the vendor, and Kuar Dat Prasad Singh, minor, was the vendee, such minor through his guardian, Raja Ghansham Singh, being the second defendant in the present suit, and appellant in this Court. I have said that the sale-deed of the 30th June, 1885, comprehended several properties. We, in the present litigation, are alone concerned with the property known as "Jawar Kharga Bahadur," because it is admitted that in respect of the other properties which were comprised in the sale-deeds, the plaintiffs had no right of pre-emption. The plaintiffs' case was that they, being co-sharers in patti Nahar Singh, which was one of the two pattis of mahal "Jawar Kharga Bahadur," had a preferential right to purchase that portion of the property sold to which I have referred, to the defendant, who was co-sharer in one of the pattis of the mahal Kanetpur. The plaintiffs' father alleged that the consideration recited in the sale-deed

* First Appeal No. 33 of 1887, from a decree of Babu Abinash Chander Banerji, Subordinate Judge of Aligarh, dated the 6th December, 1886.

(1) 7 A. 772. (2) 7 A. 720.

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was untruly recited; that the whole consideration paid in respect of the villages passed under those deeds was Rs. 12,000; and that proportionately to the value of other properties sold, the amount that they should be called upon to pay in respect of that portion of the property to which they asserted their right of pre-emption, was Rs. 3,758-10-4.

The learned Subordinate Judge who tried the case has come to the conclusion that the plaintiffs established their rights of pre-emption; and secondly, that looking to the terms of the *wajib-ul-urz* and the relative value of the property in the villages adjacent to that in which the property sought to be pre-empted was situate, the amount the plaintiffs should be called upon by the decree to pay was Rs. 7,000. It is this decision of the Subordinate Judge which is [259] assailed by this first appeal before us. Only two contentions have been put forward by the learned Counsel for the vendee, defendent-appellant "the first of which is that the plaintiffs had no better right in mauza Jawar Kharga Bahadur" than the defendant; secondly, that the findings of fact recorded by the Subordinate Judge upon the question of consideration were unsustainable, and that the vendee, even if the plaintiff's right were established, was entitled to a sum considerably in excess of that which had been declared by the learned Subordinate Judge. The first of these please can readily be disposed of, when I have stated one or two admitted facts in the case and then applied to the state of things connected with the village, the terms of the *wajib-ul-arz* governing the case. It appears that prior to the settlement which took place somewhere about the year 1872, there was a village area known as "Jawar," which at the settlement was divided into two mahals, one of which was called "Jawar Kharga Bahadur" and the other "Kanetpur." Almost synchronously with this division of the village into two mahals, each of those two separated mahals was divided into two pattis, that is to say, "Jawar Kharga Bahadur" was divided into patti "Joti Prashad" and patti "Nahar Singh," while the mahal "Kanetpur" was divided into patti "Raja Tikam Singh" and patti "Tarf Karsan." Such being the divisions first for revenue purposes, and secondly for the convenience of the co-sharers, on the 4th March, 1873, a *wajib-ul-arz* was prepared; that is to say, there was one *wajib-ul-arz* prepared for the mahal "Jawar Kharga Bahadur," and another for the mahal "Kanetpur." With this latter *wajib-ul-arz* we are not concerned, for the determination of the plaintiffs' right of pre-emption rests upon the language of the *wajib-ul-arz* of mahal "Jawar Kharga Bahadur." Now, the terms of that *wajib-ul-arz* are as follows:—"We, the proprietors, are competent to transfer our respective property, but the condition is that in the first instance it shall be transferred to our relatives (*bhaibandee*), who may be the sharers of another patti: if they refuse to purchase, then to the sharers of another patti, and when none of the sharers of the village should agree to take, then to anyone else. In case of dispute about [260] the price against the pre-emptor, the price shall be settled according to the custom prevaling in the adjacent villages." I may at once say that it is unnecessary upon this portion of the case to go further into that *wajib-ul-arz*, because it seems to me that I have stated enough of it to lay a foundation for the view that I have formed as to the pre-emptive right of the plaintiffs. I have already stated that mahal "Jawar Kharga Bahadur" was divided into two pattis, one of which was patti Joti Prasad and the other, patti Nahar Singh. Now Joti Prasad, whose name is mentioned there, is the vendor under the two sale-deeds of the 30th June, 1885, which are impeached by the present suit; and Nahar Singh, who is

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mentioned there, is one of the plaintiffs in the present suit, he having two brothers who are associated with him as plaintiffs. Now, in my opinion, by way of illustration of the mode in which it seems to me that this *wajib-ul-arz* should be applied, I should say that upon its terms, supposing Nahar Singh had proposed to sell any portion of his property, it would have been his duty to offer such portion for sale first to his brothers and then subsequently to Joti Prasad. Consequently, this present case being the converse of that position, it was incumbent upon Joti Prasad to offer the property to the present plaintiffs, and in not doing so he has infringed the pre-emptive right which by that *wajib-ul-arz* was conferred upon the plaintiffs, and the plaintiffs were entitled, as the Subordinate Judge has found, to come into Court and maintain the present suit. It must be distinctly understood that this view of this particular *wajib-ul-arz* in no way ignores any other decision that may have been passed in cases where one *wajib-ul-arz* having existed for the purposes of a common village area, and that village area having been divided into separate revenue areas, and no *wajib-ul-arz* having been drawn up, such *wajib-ul-arz* has been held to apply generally to the new area. The principle upon which that view of the law is based is to be found stated in the case *Gokal Singh* v. *Mannu Lal* (1), and this principle, which is further elaborated in another ruling at page 720 of the same volume (*Jai Prasad* v. *Mahibar Rai*) (2) is, that this pre-emptive right runs **[261]** with the land, and the division of that land for the purposes of the revenue in no way affects any covenant or agreement existing between the co-sharers. So much for the first point. I am of opinion that the Subordinate Judge rightly held that the plaintiffs were entitled to maintain the suit.

Then comes the question as to whether the Subordinate Judge was right or wrong in his view of the consideration which ought to be recouped to the vendee by the plaintiffs upon taking the property. Mr. *Conlan* has called our attention to the terms of the *wajib-ul-arz* as they affect this part of the case, and it may be observed here that the passage as it is translated and printed in the paper-books is not correct. My brother Mahmood tells me that the exact translation is this:—"In cases of dispute about the price against the pre-emptor a price shall be settled according to the price of similar property prevailing in the adjacent villages." That is to say, the determination of the price of a particular property is to be determined according to the ordinary and general value of similar property prevailing in adjacent villages. The Subordinate Judge has found as a fact, in reference to this particular point, that Rs. 7,000 is the fair "market-value" of this particular portion of mahal "Jawar Kharga Bahadur," which was sold by Joti Prasad to Kuar Dat Prasad Singh, the vendee. It appears to me, therefore that it is wholly unnecessary to go into the extremely unpleasant matters with which a part of the learned Subordinate Judge's judgment is concerned, *viz.*, as to whether, aye or no, the total amount of consideration recited in the two sale-deeds of 30th June, 1885, was or was not truly represented, more especially as it has been held by the Full Bench in the case of *Karim Baksh* v. *Pahla Bibi* (3), that these covenants with regard to price are covenants which run with the land. I may also add that, looking at the matter from this point of view, Mr. *Hill*, who had filed applications under s. 561, Civil Procedure Code, has stated that he does not purpose to support those objections.

(1) 7 A. 772. (2) 7 A. 720. (3) 8 A. 102.

Consequently the matter stands thus, that we have nothing before us which would warrant us in coming to a conclusion [262] other than that of the learned Subordinate Judge, namely, that the fair market-value of the property to be pre-empted is Rs. 7,000. Such being the view I take upon the two points raised by Mr. *Conlan* for the appellant, the appeal must be, and it is, dismissed with costs. The objections filed under s. 561 of the Civil Procedure Code are disallowed with costs.

1888 Nov. 30. — APPELLATE CIVIL. — 11 A. 257 = 9 A.W.N. (1889) 79.

MAHMOOD, J.—I have nothing to add to what has fallen from my learned brother, because I agree in all that he has said.

Appeal dismissed.

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11 A. 262 = 9 A.W.N. (1889) 85.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* INDARJIT.* [15th March, 1889.]

Act XIII of 1859, *preamble and s.* 2—*Wilful breach of contract—Construction of statute—Preamble not to be construed as restricting operation of enacting part—Summary trial—Criminal Procedure Code, s.* 260.

Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code.

The offence made punishable by s. 2 of Act XIII of 1859 is the wilful and without lawful and reasonable excuse neglecting or refusing to perform the contract entered into by persons whom the Act concerns. Notwithstanding the preamble of the Act, it is not necessary to prove that a breach of contract is fraudulent in order to sustain a conviction under s. 2. *Taradoss Bhuttacharjee* v. *Bhaloo Sheikh* (1) dissented from.

Where the enacting section of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation, or to cut them down.

[Diss., U.B.R. (1902) 3rd. Qr. Workman's Breach of Contract p. 1; 2 L.B.R. 163 (164); 6 Bom. L.R. 255 (257); R., 16 B. 368 (369); 26 B. 757 (764); 27 C. 131 (132); 16 C.P.L.R. 99 (102); 12 C.L.J. 8 (12) = 6 Ind. Cas. 252 (261).]

THIS was an application for revision of an order of the Sessions Judge of Cawnpore, affirming an order of the Joint-Magistrate convicting and sentencing the petitioner for an offence punishable under s. 2 of Act XIII of 1859 ("Act to provide for the punishment of breaches of contract of artificers, workmen, and labourers in certain cases"). The petitioner was a carding mistri, who, by an agreement in writing, dated the 22nd March, 1888, bound himself to serve the Elgin Mills Company at Cawnpore for three years excepting leave or "on some emergent occasion" of which he should [263] give previous notice. The second clause of the instrument was as follows:—

"I further agree that, with the exception of the circumstances mentioned above, if within the period for which I have engaged to serve, I shall absent myself, or refuse to work, or take up service with some other Mills Company or firm or with some private person at Cawnpore or somewhere else, then I shall pay Rs. 99, the settled and fixed consideration, to the Elgin Mills Company aforesaid, and that sum it will realize from me in the coin current in India, or the Company shall take credit for the

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* Criminal Revision No. 1101 of 1889.

(1) 8 W. R. Cr. 69.

1889 March 15. — Criminal Revisional — 11 A. 262 = 9 A.W.N. (1889) 85.

amount held by them as due to me, by holding me liable for the same, and I shall also be liable for payment of the penalty provided by Act XIII of 1859 on account of making any breach of contract in respect of rendering services entered in this document."

At the time when he signed this instrument, the petitioner received from the managers of the Company an advance of Rs. 3. On the 1st November, 1888, he gave his employers twenty-four hours' notice to quit, which was not accepted. He then applied for eight days' leave to bathe in the Ganges. This application was refused, but a promise was made that it should be reconsidered subsequently. He thereupon threw down his keys, went away, and never returned to his service. At that time Rs. 19-10-9 were due to him for wages, and this sum was not paid to him, as he went away without claiming it.

The petitioner's employers lodged a complaint against him under s. 2 of Act XIII of 1859. The defence was that the petitioner had not understood the agreement of the 22nd March, 1888, and that he left his employment because one of the managers abused him. The case was tried summarily by the Joint-Magistrate of Cawnpore, who convicted the accused in the following terms:—

"It is perfectly clear that Indarjit left his employment without reasonable excuse, and inasmuch as he has contracted with the Elgin Mills Company to serve them for three years, and received Rs. 3 as an advance towards such service, he is liable to the provisions of [264] ss. 1 and 2 of Act XIII of 1859. I therefore order him under s. 2 to return to his service under the pains and penalties mentioned in that section, and complete his contract. Complainant's actual expenses will be defrayed by accused."

An appeal was preferred from this order to the Sessions Judge of Cawnpore; and it was contended, *inter alia*, that the Joint Magistrate ought not to have tried the case summarily, and that he had no jurisdiction to deal with it at all. With reference to these pleas, the Sessions Judge observed that the prisoner's offence was "punishable with imprisonment for less than six months; therefore under s. 260 of the Criminal Procedure Code it has rightly been tried summarily by an officer empowered to try summary cases. Act XIII of 1859 was extended to Cawnpore by Notification No. 926-A of the 22nd December 1862. The question raised in the first plea is whether the Joint Magistrate, Mr. Ferrard, under s. 5 and the Notification, was legally competent to try the case. The appellant had to show me that the Joint Magistrate had no authority. This he has not attempted to do. I accordingly dismiss the appeal."

The present application was for revision of this order. It was based mainly on the contentions (i) that the Joint Magistrate had no power to try the case summarily, and (ii) that with reference to the preamble of Act XIII of 1859, before a conviction could be legally had under the Act, it must be proved that the breach of contract complained of was fraudulent.

Mr. *C. Dillon* and Mr. *J. Simeon*, for the petitioner.

The *Public Prosecutor* (Mr. *G.E.A. Ross*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an application for revision of an order of the District Judge of Cawnpore, dated the 4th December, 1888, confirming an order of the Assistant Magistrate of the same place, dated the 21st

November. Such last-mentioned order was passed under s. 2 of Act XIII of 1859, and by it the petitioner was ordered to return to his service under the pains and penalties mentioned in that section, and to complete his contract and to pay the complainant's costs. The facts found by the Magistrate were as follows :—On the [265] 22nd March, 1889, Indarjit, the petitioner, entered into a contract with the manager of the Elgin Mills Company, Cawnpore, to serve them as a carding mistri for a period of three years, and upon signing that contract an advance of Rs. 3 was paid to him. On the 1st November, 1888, he tendered twenty-four hours' notice of his intention to quit the service. Such notice was not accepted by his employers ; and thereupon having applied for eight days' leave "to bathe in the Ganges," which was refused him, though his application was promised to receive subsequent consideration, he threw down his keys and left his service and did not return. It is admitted by the managers of the Elgin Mills, who are complainants in this case, that at the date of his departure from service a sum of Rs. 19 odd was due to him. Upon these facts the prosecution was instituted, as I have already mentioned, under s. 2 of Act XIII of 1859. Upon a consideration of all these circumstances the Magistrate came to the conclusion that the requirements of the statute were satisfied, and that the petitioner had rendered himself liable to its provisions. That order of the Magistrate was upheld by the Judge, and I am invited by this application for revision to say that both orders are bad in law upon two grounds ; first, that the Magistrate had no jurisdiction to try this complaint by a summary trial ; secondly, that even if he had jurisdiction, the facts found did not bring the case within the provisions of Act XIII of 1859. With regard to the first of these points, I have no doubt that the Magistrate had jurisdiction to try the case summarily, and that under the Criminal Procedure Code full power was given him to do so. The second point is not without difficulty. The argument that has been addressed to me in support of it by Mr. *Dillon* on behalf of the petitioner is to the following effect :—He says, looking to the preamble of Act XIII of 1859, an essential ingredient requried to be proved in order to sustain a conviction under s. 2 of that Act is the ingredient of fraud, for in the preamble it is said that the mischief aimed at is "fraudulent breach of contract" on the part of artificers, workmen, and labourers, and the object of the Act, the punishment of such "fraudulent breaches of contract." In support of this view he has no doubt direct authority, in the case of *Tarados* [266] *Bhattacharjee* v. *Bhaloo Sheikh* (1) and if I could follow that judgment without hesitation, there need be no difficulty in disposing of this case. But with the greatest respect for the learned Judges who decided that case, it seems to me that thay have interpreted this Act mainly, if not entirely, with reference to the language of the preamble, and not in reference to the enacting clauses contained therein, which declare what shall be an offence and what shall be its punishment. There can be no doubt, whether it be the fault of insufficient or ineffective drafting, that the preambles to statutes do not always cover in the wide and general terms in which they are necessarily couched, all the specific offences which are to be found provided for within the enacting portions of the statute itself. I understand it to be an undoubted rule of construction that where the language of the enacting sections of a statute is clear, the terms of a preamble cannot be called in aid to restrict their operation, or to cut them down. The purpose for which a preample is framed to

1889 MARCH 15. —— CRIMINAL REVISIONAL. —— 11 A. 262 = 9 A.W.N. (1889) 85.

(1) 8 W.R, Cr. 69.

1889 March 15. — Criminal Revisional. — 11 A. 262 = 9 A.W.N. (1889) 85.

a statute is to indicate what in general terms was the object of the Legislature in passing the Act, but it may well happen that these general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for. For example, a striking illustration is referred to by Sir Peter Maxwell in his work on the Interpretation of Statutes, in which he refers to the Statutes 4 and 5 Ph. and M. c. 8 in which the preamble spoke only of the Act being directed to the abduction of heiresses and other girls with fortunes, yet the body of the Act was applicable to and made penal the abduction of all girls under sixteen years of age. Many other illustrations are given by Sir Peter Maxwell in his book at page 58 *et seq.*, which go to support the principle I have stated. It is true that in this Act XIII of 1859 the preamble does speak of fraudulent breaches of contract and punishment therefor; but when I come to look into the section which invests a Magistrate with powers under the Act to deal with the persons brought before him, I find that the element he is to look for as going to constitute the offence under s. 2, is the wilful and **[267]** without lawful and reasonable excuse, neglecting or refusing to perform the contract entered into by the persons whom the Act concerns. There is no mention in that section of the word "fraudulent," and in my opinion it is legislating and not interpreting an Act of the Legislature to read that word into the section. Consequently, I am of opinion that this conviction was a right one, because upon the facts found there was most undoubtedly a wilful, and without lawful and reasonable excuse, neglect and refusal to perform the contract of service which the petitioner had entered into. I need not point out the importance of statutory provisions of this kind, and their being enforced in large commercial centres like Cawnpore, where, by combined action on the part of persons employed in large commercial establishments there, the proprietors of those establishments might be placed not only at very grave and sudden inconvenience but very serious pecuniary loss. This application is refused.

Application rejected.

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11 A. 261 (F.B.) = 9 A.W.N. (1889) 55 = 13 Ind. Jur. 427.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

MUHAMMAD SULAIMAN KHAN AND OTHERS (*Petitioners*) *v.* MUHAMMAD YAR KHAN AND ANOTHER (*Respondents*).* [11th August, 1888].

Practice—Amendment of decree—Decree affirmed on appeal—Jurisdiction—Civil Procedure Code, ss. 206, 579, 623, 624—Limitation—Review of judgment—Res judicata.

The effect of s. 579 of the Civil Procedure Code is to cause the decree of the appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree and does not reverse or modify it.

Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree.

The only Court which has jurisdiction to amend the appellate decree is the Court of appeal.

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* Civil Revision No. 243 of 1885.

[268] So *held* by the Full Bench, MAHMOOD, J., dissenting. *Shohrat Singh* v. *Bridgman* (1) explained and followed. *Kistokinkur Roy* v. *Raja Burrodacaunt Roy* (2), discussed. 1888 AUG. 11.

The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh Bridgman* (1) was a clerical error. FULL BENCH.

Per MAHMOOD, J.—Where a decree has been simply affirmed on appeal s. 579 of the Code does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624. 11 A. 267 (F.B.) = 9 A.W.N. (1889) 55 = 13 Ind. Jur. 427.

A decree awarding the plaintiffs possession of immoveable property did not comply with s. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused, and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree.

Held by the Full Bench (MAHMOOD, J., dissenting) that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree.

Held by MAHMOOD, J., *contra.*, that the Court below had jurisdiction to make such amendment, and could make it at any time, that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*, that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended.

[F.—18 M. 214 (F.B.); 11 C.L.J. 155 (157) = 5 Ind. Cas. 723; 5 Ind. Cas. 261 (262); Ap.—18 B 203; R.—13 A. 394 (395); 18 B. 542 (545); 19 B. 258 (260); 22 B. 500 (508); 15 M. 170 (172); 15 M. 403 (404); 11 C.P.L.R. 115 (116); L.B.R. (1893—1900) 449; 4 O. C. 333 (338); 33 P.L.R. 1904 = 8 P.R. 1903; 6 C.L.J. 542; 17 C.W.N. 133 (136) = 15 C.L.J. 432 = 12 Ind. Cas. 669. D.—20 A. 493 (495) = 18 A.W.N. 121; 15 B. 370 (375); 48 P.R. 1906 = 104 P.L.R. 1906.]

[N. B. Read this case along with 6 A. 30, 9 A. = 6 A.W.N. (1886) 309; and 11 A. 314.]

THE facts of this case were as follows. On the 26th June, 1887, a suit was instituted in the Court of the Subordinate Judge of Aligarh for establishment of right and possession of certain immoveable property, by Muhammad Ali Khan and others against Muhammad Sulaiman Khan and others. In the plaint the villages of which possession was claimed were not named, but were generally referred to as "detailed below." No deatils were given in the [269] plaint itself, but a separate paper containing a list of villages was filed with the plaint. On the 22nd June, 1878, the plaintiffs obtained a decree for possession of "all the villages claimed," but the decree contained no indication as to what those villages were. The defendents appealed from the decree to the High Court, which, on the 18th February, 1882, passed a decree in the following terms:—"That the decree of the Subordinate Judge of Aligarh be confirmed, and this appeal be and it hereby is dismissed."

The decree-holders subsequently applied for execution of the decree in the Court of the Subordinate Judge. The judgment-debtors then, for

(1) 4 A. 376. (2) 14 M.I.A. 465.

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the first time, objected that the decree was incapable of execution because it did not, as required by s. 206 of the Civil Procedure Code, specify the shares of the names of the villages decreed in favour of the plaintiffs. The Subordinate Judge disallowed the objection. On appeal the High Court set aside the Subordinate Judge's order, holding that the Court executing the decree was not justified in reading into the decree the contents of the list of villages attached to the plaint and in awarding the decree-holders possession of the villages named in such list. The Court added :—"It is plain that the decree was defective, in that it did not contain 'the particulars of the claim,' and failed to 'specify clearly the relief granted.' The proper and only course open to the decree-holders was to procure the remedy of these defects according to law." The judgment of the High Court was reported in *Muhammad Sulaiman* v. *Muhammad Yar* (1).

On the 6th March, 1884, the decree-holders filed a petition praying for amendment of the High Court's decree. On the 8th May, 1884, the petition was disposed of by Oldfield, J., in the following terms :—"There is no case made out for correcting the decree of this Court, which is correct.

On the 6th February, 1885, the decree-holders filed an application in the Court of the Subordinate Judge praying for amendment of his decree of the 22nd June, 1878. The judgment-debtors opposed this application on the ground that the Subordinate Judge had no [270] jurisdiction to grant it, and also that it was barred by limitation under art. 178 of sch. ii, of the Limitation Act (XV of 1877), with reference to *Gaya Prasad* v. *Sikri* (2). The Subordinate Judge on the 20th July, 1885, overruled, both objections, holding, in regard to the first, that he had power, under s. 205 of the Civil Procedure Code, to make the decree conformable to the judgment, and, in regard to the second, that the right to make the application should be treated as having accrued on the 16th August, 1883, when the High Court decided that the decree was not capable of execution, and that the proper remedy of the decree-holders was to apply for amendment.

The judgment-debtors applied to the High Court, under s. 622 of the Civil Procedure Code, for revision of the Subordinate Judge's order. The grounds stated in the petition for revision were as follows :—

"1. Because the application of the respondents was barred by limitation.

"2. Because s. 206 of the Code of Civil Procedure is not applicable to this case, and the decree could not be amemded.

"3. Because the Subordinate Judge could not amend the decree of his predecessor.

"4 Because the decree could not be amended at the state at which it was amended.

"5. Because there was no valid reason for amending the decree in the manner in which it was amended."

The application came for hearing before Straight and Brodhurst, JJ., who referred it to the Full Bench upon a preliminary question, the judgment upon which is reported in I. L. R. 9 All. 104. When the case again came before the Division Bench, their Lordships made a further reference of the case to the Full Bench, stating the following as the main questions which required determination :

(1) 6 A. 80.

(2) 4 A. 23.

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"1. When the decree of a Subordinate Court has been confirmed or modified in appeal, what Court has jurisdiction to enterain an application for amendment under s. 206 of the Civil Procedure Code?

[271] "2. What, if any, article of the limitation law governs such applications?

"3. If it is determined that the application of the 6th March, 1884, was properly made to this Court, is the question of amendment of decree concluded, on the principle of *res judicata* by the order of Oldfield, J., of the 8th May, 1884?

Their Lordships added that they stated these points "without prejudice to the pleaders on either side urging any other questions that properly arise upon the grounds stated in the petition of revision."

The Hon. Pandit *Ajudhia Nath* and Munshi *Harkishen Das*, for the petitioners.

Mr. *C.H. Hill*, Mr. *Dwarka Nath Banerji* and Pandit *Sundar Lal* for the respondents.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

EDGE, C. J.—It appears to me that the question as to whether this application under s. 622 of the Code of Civil Procedure can be maintained, must depend upon the question as to whether the decree to be amended was the decree of the 22nd June, 1878, of the former Subordinate Judge of Aligarh, or the decree of this Court of the 8th February, 1882. If the decree to be amended is the decree of this Court of the 8th February, 1882, it could not, I think, be contended that the Subordinate Judge could have had any jurisdiction to amend or interfere with the decree of this Court, which is the decree of the Court of appeal. Similarly, if the decree to be amended was the decree of this Court, I fail to see what object could have been attained by amending or what jurisdiction the Subordinate Judge had to amend the decree of the Court below, after that decree had been affirmed by a decree of this Court. The question as to which of these decrees was the decree to be amended, if any amendment could have been made, must, in my opinion, depend on the further question as to whether the decree of an appellate Court affirming the decree of a Court below, is the decree to be amended, or whether in such case the decree to be amended is the [272] decree of the Court below. This latter question is decided by the judgment of a Full Bench of this Court in *Shorat Singh* v. *Bridgman* (1), where it was decided that "the appellate decree is the final decree and the only decree capable of being executed after it has been passed, whether the same reverses, modifies or confirms the decree of the Court from which the appeal was made." The facts of the case before the Full Bench and the question submitted for the opinion of the Full Bench show that by "the appellate decree" the Full Bench meant the ultimate decree, as in that case the decree of this Court, and not the decree of the Court below which had been given by the Subordinate Judge of Gorakhpur in the appeal from the decree of the Munsif of Bansi. The judgment of the Full Bench in that case has been to some extent open to misconception by reason of a clerical error, by which the word "*not*" in the last line but one of the reported judgment was allowed to remain. The insertion of the word "*not*" must have been due to a clerical error. That word being omitted, the judgment is clear and consistent, and is, in my

(1) 4 A. 376.

1888 AUG. 11. — FULL BENCH. — 11 A. 267 (F.B.) = 9 A.W.N. (1889) 55 = 13 Ind. Jur. 427.

opinion, right in law. It has been contended that that judgment is at variance with the judgment of the Privy Council in *Kristokinkur Roy* v. *Raja Burrodacaunt Roy* (1). I do not so read the judgment of their Lordships of the Privy Council. At page 492 their Lordships say, "It is clear that, under that Code, whatever decree is executed, is to be executed by the lower Court, in which the record remains, or to which it is to be returned. But ss. 363, 361 and 362, which prescribe the form of the decree of the Appellate Court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the lower Court to pass and execute a certain decree."

The sections referred to by their Lordships correspond with ss. 579, 581 and 583 of the present Code of Civil Procedure. Again, their Lordships say at page 492, in reference to decrees of affirmance. "Their Lordships may further suggest that in all cases it may be expedient expressly to embody in the decree of affirmance so much [273] of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree," clearly indicating that in their Lordships' opinion a decree affirmed on appeal is superseded by the decree of affirmance. I fail to see how a decree which had been superseded can be executed. Even apart from authority, it appears to me that the decree to be executed is the decree of the appellate Court, whether that decree reverses, modifies or affirms a decree below. By s. 235 of the Code the application for execution of a decree of a Court of first instance must, amongst other particulars, contain the following:—

" (c) The date of the decree ;

" (d) Whether any appeal has been preferred from the decree,

" (g) The amount of the debt or compensation with the interest, if any, due upon the decree, or other relief granted thereby :

(h) The amount of costs, if any, awarded."

Some of these particulars in an application made to the Court which first passed the decree would apply only to the decree of that Court and not to the decree of the appellate Court, and the particular (d) " whether any appeal has been preferred from the decree," presupposes that if any appeal had been preferred, it had not been determined.

S. 579 of the Code amongst other things grants that the decree of an appellate Court " shall specify clearly the relief granted or other determination of the appeal," and further enacts that the decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportion such costs and *the costs in the suit are to be paid.*" That section relates to decrees in first appeals, and is by s. 587 made applicable to decrees in second appeals.

It is clear from s. 579 that in any case the decree to be executed not only for the costs of the appeal, but for *the costs of the suit* is the decree of the appellate Court and of that Court only. In my opinion the effect of s. 579 of the Code is to cause the decree of the [274] appellate Court to supersede the decree of the Court below even when the decree of the appellate Court is one which merely affirms that decree below and does not reverse it or modify it. In my opinion the only decree that can be amended is the decree to be executed, and the decree to be executed is the decree of the appellate Court, and not the decree of the Court below. To take a case which might arise if we were to hold otherwise ; assume

(1) 14 M.I.A. 465.

that a decree of a Court of first instance is not in conformity with the judgment of that Court, but such decree has on appeal been affirmed in general terms or by specifically complying with the provisions of s. 579. If in such case the Court of first instance were to alter its decree which had been already affirmed on appeal by bringing it into accordance with its judgment the result would be that the decree so amended would not be the decree which had been affirmed on appeal, and might be a decree absolutely at variance with the decree which the appellate Court had made and had decided was the decree which the successful party on appeal was entitled to. If a decree in a case like this can be amended, it must, in my opinion, be for the appellate Court, which can say what was the decree which it intended to make by affirmance or otherwise, and not for the subordinate Court, to amend the decree of the appellate Court. It would, as it appears to me, be useless to amend the decree of the Court below, which was superseded, by the decree in appeal. As this application under s. 622 relates to the order of the Court below and is not an application to this Court to amend the decree of this Court of the 8th February, 1882, it is not, I think, necessary to express any opinion as to the judgment of Straight and Tyrrerll, JJ., of the 16th August, 1883, or as to the effect of the order of Oldfield, J., of the 8th May, 1884. As I am cleraly of opinion for the reasons which I have stated that the Subordinate Judge had no jurisdiction to make the order to which this application refers, it is not, I think, necessary to express any opinion as to the article of the Limitation Act which may govern such applications, or to express any opinion as to whether a Judge who was no party to the making of a decree could amend such decree in the manner desired by the decree-holders in this case.

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[275] In my opinion this application should be allowed and the order below set aside. Under the circumstances of this case I think each party should bear their own costs here and below.

STRAIGHT, J.—I am of the same opinion.

In the view I take of this reference, after having heard the arguments on both sides, the determination of it and the case turns upon the single question, whether the Subordinate Judge had jurisdiction to make the order of the 20th July, 1885. If he had, then the application to this Court under s. 622 of the Code was rightly preferred, and the other points arising, upon which revision is sought, must be considered and decided; if he had not, then there is obviously an end of the matter. It seems to me that the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (1) practically concludes that question. It was there held that " the decree of the Court of last instance is the only decree susceptible of execution, and that when the decree of the lower Court with all its specifications is simply affirmed by and adopted in the decree of the last appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents. But no question of the correctness of the contents could be entertained or given effect to by the executing Court. Objections to the decree of the lower Court which has become that of the last appellate Court could be attended to by the latter Court alone." This is what appears from the body of the judgment, and it is clear that the head-note to the case is erroneous, though this is probably due to the presence of the word "*not*" in the last sentence of the judgment, which

(1) 4 A. 376.

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upon the face of it is a mistake, as the context with which it is irreconcileable plainly shows. That this is so is placed beyond doubt by a subsequent judgment of Tyrrell, J., who wrote the Full Bench judgment, and myself also a party to it, in *Behari Lal* v. *Khub Chand* (1), where we held that the Court executing an appellate decree might execute it for the costs of the original Court, looking to the decree of that Court to ascertain the amount thereof, and Oldfield, J., expressed himself to the same effect in another case [276] *Gobardhan Das* v. *Gopal Ram* (2) though, in my opinion, while rightly interpreting the meaning of the Full Bench ruling, he misapplied it. The question therefore which is before us seems to me to be settled by the Full Bench ruling, and if on no other principle than that of *stare decisis* we ought, in my opinion, not to reconsider it. But I desire to add that, according to my view, that decision is not only a perfectly sound one, but upon grounds of simplicity and convenience of procedure is unassailable. Much stress was laid in the course of the argument for the respondents on the judgment of their Lordships of the Privy Council (3). It is to be observed that the real point then arising for determination was, whether, under the limitation law then in force, namely, Act XIV of 1859, a period of three or twelve years was applicable to the execution of a decree passed by the High Court in appeal from a District Court, and it was held in accordance with a Full Bench ruling of the Calcutta Court reported in the 16th volume of Sutherland's Weekly Reporter that three years was the period. No doubt their Lordships do make some remarks with regard to a part of that decision of the Full Bench, which held that the decree of a District Court affirmed on appeal by a High Court becomes the decree of a High Court; but with profound respect it seems to me that they can only be regarded as *obiter*, and though I concur in the interpretation placed upon them by the learned Chief Justice and not that of my brother Mahmood, they can, in my opinion, have no bearing on questions arising in reference to the existing limitation law, which expressly provides that where an appeal has been preferred, time runs from the date of the final decree or order of the appellate Court, or to the present Code, by which the procedure of the Courts is now governed. By s. 579 of Act XIV of 1882 it is declared what a decree in appeal shall contain, by s. 581 such decree along with the judgment is to be sent to the Court which passed the decree appealed against, and by s. 583 it is specifically provided that a party desiring to obtain execution of an appellate decree shall apply to the Court which passed the decree appealed against, and "such Court shall proceed to execute the decree passed [277] in appeal according to the rules hereinbefore prescribed for the execution of decree in suits." In this connection I may conveniently refer to the judgment of a Division Bench of the Calcutta Court *Noor Ali Chowdhari* v. *Koni Meah* (4). It may also be noted that the provisions of the Code relating to appellate decrees are much the same as those which in Chapter XLV deal with the orders of Her Majesty in Council, as to which there can be no doubt that it is Her Majesty's order and nothing else which the Courts in India have to execute, and so a Full Bench of the Calcutta Court has specifically said in *Luchmun Persad Singh* v. *Kishun Persad Singh* (5). For these reasons not only do I think the Full Bench ruling of this Court, *Shohrat Singh* v. *Bridgman* (6), binds us, but that it is perfectly good law. Applied to the facts of the present case, the matter

(1) 6 A. 48. (2) 7 A. 366. (3) 14 M. I. A. 465.
(4) 13 C. 13. (5) 8 C. 218. (6) 4 A. 376.

therefore stands thus, that the judgment and decree of Stuart, C.J., and Oldfield, J., of the 8th February, 1882, by adopting the judgment and decree of the Subordinate Judge, superseded such judgment and decree, and that it was the decree of this Court only that was capable of execution, assisted so far as was necessary for that purpose by reference to the Subordinate Judge's decree which it incorporated. It follows therefore that the Court and the only Court to which application could be made under s. 206 of the Civil Procedure Code was this Court, and that whatever may be the correctness or the effect of the order of Oldfield, J., on the application of the 6th March, 1884, about which I express no opinion, such application was rightly made to him and he alone had jurisdiction to deal with the matter. I regret that this view should be at variance with that expressed by my brother Mahmood in *Ram Saran* v. *Persidhar Rai* (1), but it seems to me to be the necessary consequence of the Full Bench ruling of this Court, and is in accordance with the opinion expressed by Couch, C.J., no doubt when Act VIII of 1859 was in force, in *Onraet* v. *Sankar Dutt Singh* (2), and of my brother Mahmood himself at one time in *Tarsi Ram* v. *Man Singh* (3). The only other **[278]** authority to the contrary is a ruling of Collins, C. J., and Muthusami Ayyar, J., in *Sundara* v. *Subbanna* (4) but as no reasons are given for that decision, and as no argument was addressed to those learned Judges in support of the Munsif's order in that case, I am unable to accept it as a safe guide. I am of opinion that the preliminary objection of the petitioner for revision to the jurisdiction of the Subordinate Judge to make the order of the 20th July, 1885, must prevail, and that this petition being allowed, such order must be set aside. Looking, however, to all the circumstances, I think the parties should pay their own costs in all Courts.

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MAHMOOD, J.—The facts of the case and the points of law which arise from those facts are so clearly stated in the order of reference that I need not repeat them, and I shall express my views upon the points of law in the order in which they have been stated. But before doing so, I may premise that the Full Bench rulings of this Court in *Surta* v. *Ganga* (5) and *Raghunath Das* v. *Rajkumar* (6), which approved of my judgments in those same cases (7), when they were disposed of by Mr. Justice Oldfield and myself in two dissentient judgments, leave no doubt that the order of the learned Subordinate Judge, dated 20th July, 1885, having been passed for amending a decree under s. 206 of the Code of Civil Procedure, amounts to a separate adjudication and as such might be made the subject of revision under s. 622 of the Code of Civil Procedure.

This being so, the first question referred to the Full Bench is, "when the decree of a Subordinate Court has been confirmed or modified in appeal, what Court has jurisdiction to entertain an application for amendment under s. 206 of the Civil Procedure Code?"

In considering the question I cannot help feeling that the first step of reasoning is the rule unanimously laid down by a Full Bench of this Court in *Shohrat Singh* v. *Bridgman* (8). The head-note **[279]** of that ruling, as appears in the report of the case, represents that this Court unanimously held "that the decree of the Court of last instance is the only decree susceptible of execution, and the specification of the decrees of the lower Court or Courts as such many not be referred to and applied by the Court

(1) 10 A. 51. (2) 5 B.L.R. A. p. 60, (3) 8 A. 492=6 A.W.N. (1886). 156.
(4) 9 M. 354. (5) 7 A. 875. (6) 7 A. 876. (7) 7 A. 276, 411.
(8) 4 A. 376.

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executing such decree." This head-note is a reproduction *verbatim* of the last sentence of my brother Tyrrell's judgment in that case which the rest of the Court adopted. It was principally in consequence of the existence of the word "*not*" in that sentence that in delivering my judgment in *Gobardhan Dass* v. *Gopal Ram* (1) I stated that I had on several occasions sitting as a Judge in Oudh declined to follow that ruling. But in the course of hearing this case, the learned Chief Justice, having sent for the original record of the judgment, has come to the conclusion that the word "*not*" which occurs in the last sentence of the judgment, was due to a *lapsus calami*, because it would render the sentence inconsistent with an earlier passage in the same judgment. In this view I understand my brother Straight, who was a party to the Full Bench ruling, concurs; and I am also very glad to adopt the same explanation because it materially reduces the rigour of the ruling as represented in the head-note. Reading the ruling then, omitting the word "*not*," I understand it to hold "that the decree of the Court of last instance is the only decree susceptible of execution, and that the specifications of the decrees of the lower Court or Courts as such may be referred to and applied by the Court executing the decree." The interpretation of the Full Bench ruling is in full accord with the explanation of that judgment by Oldfield, J., in *Gobardhan Das* v. *Gopal Ram* (1), where that learned Judge distinctly stated that the Full Bench ruling was not intended to go beyond the ruling of their Lordships of the Privy Council in *Kristokinkur Roy* v. *Raja Burrodacaunt Roy* (2). I had in that case the honour of being associated with Oldfield, J., and willingly concurred in his explanation, because it went the length of permitting, what was actually done in that case, namely, that when the first Court's decree had been simply affirmed by the High Court as the Court of last instance, the [280] decree-holder was allowed to execute the decree of the Court of first instance, which decree had in no manner been altered either by the lower appellate Court or by this Court.

I have no desire to re-open the question settled by the Full Bench ruling in *Shohrat Singh* v. *Bridgman* (3) as now explained. Nor do I think it necessary, for the purposes of this case, to enter into the broad question, how far the Full Bench ruling would affect the question of amendment of a decree which has been either *reversed or modified* by a Court of appeal. In this case the decree of the Subordinate Judge was *simply affirmed* by this Court, and the question as to the power of amendment is therefore limited to the case of a decree which has been affirmed.

Dealing with the question in this strictly limited form, I am of opinion that the rule laid down by Oldfield, J., in *Gobardhan Das* v. *Gopal Ram* (1) with my concurrence represents the correct view of the law. That view is in full accord with the observations made by the Lords of the Privy Council in *Kristokinkur Roy* v. *Rajah Burrodacaunt Roy* (2). Those observations may be quoted by me here because I shall presently rely upon them for the view of the law which I have taken in this case. Their Lordships, after referring to the state of the case-law as represented by *Chowdhry Wahid Ali* v. *Mullick Inayat Ali* (4), *Arunachella Thudayan* v. *Veludayan* (5), and a Full Bench ruling of the Calcutta High Court in *Ram Charan Bysak* v. *Lakhi Kant Bannik* (6), went on to say:—" The function of an appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse

(1) 7 A. 366, p. 370. (2) 14 M.I.A. 465. (3) 4 A. 376.
(4) 6 B.L.R. 52. (5) 5 M.H.C.R. 215. (6) 7 B.L.R. 704.

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or vary the decree under appeal. In the first case, *it leaves the original decree standing*, superadding, it may be, an order for the payment of the costs of the appeal, or for the interest on the amount originally decreed. In the other two cases *it substitutes* other relief for the relief originally given. In all these cases the decree of the appellate Court may be regarded either as a direction to the lower Court to make and execute a decree of its own accordingly, or as an independent decree, [281] whether it is to be executed by the appellate Court or by the lower Court. In the latter case a further question arises, namely, whether the original decree, if wholly affirmed, (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the appellate Court as the sole decree capable of execution, or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other."

Having thus explained the general principles applicable to such questions, their Lordships referred to the law and practice of English tribunals, and then, after considering the provisions of the old Code of Civil Procedure (Act VIII of 1859) and referring to the effect of the Calcutta and Madras rulings, made the following observations:—

"If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, namely, *that the execution ought to proceed on a decree of which the mandatory part expressly declares the right sought to be enforced.* Considering, however, that for the reasons already given, *the question is not of much practical importance*, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dimissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

Now, in the first place, I am of opinion that the passages which I have quoted from the judgment of the Lords of the Privy Council are not to be regarded as mere *obiter dicta*, because those passages [282] form an essential part of the *ratio decidendi* upon which their Lordships' judgment proceeded. In the second place, I hold that their effect is to modify the views expressed by Mitter, J., in the Calcutta Full Bench case, and by Scotland, C. J., in the Madras case, both of which have already been cited. In the third place, their Lordships drew a clear distinction between a decree which has simply been *affirmed* in appeal and a decree which has either been *reversed* or *modified* by the appellate Court.

Such distinction is to my mind clearly borne out by clause (*d*) of s.574, which, whilst requiring that the judgment of the appellate Court should specify "the relief to which the appellant is entitled," limits the direction to cases in which "the decree appealed against is *reversed* or *varied*," and say nothing as to cases in which the appellate Court *simply affirms* the lower Court's decree. The same distinction is apparent from the second paragraph of s. 579, which directs that the appellate decree "shall specify clearly the relief granted or other determination of the appeal," but says nothing as to cases in which no relief is granted to the appellant by such

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appellate decree, and the only "*determination*" of the appeal amounts to saying that the appeal should never have been preferred. The section certainly does not require that in such cases the appellate decree should supersede the first Court's decree so as to render that decree ineffective for purposes of éxecution. On the contray, the provisions of s. 583, which relate to the execution of the decrees of the appellate Court, distincly imply that the appellate Court's decree, when it *simply affirms* the first Court's decree, is to be distinguished from cases in which the first Court's decree has been interfered with. I say this, because the section limits the execution of the appellate Court's decree to cases in which a party is "entitled to any benefit byway of restitution or otherwise under a decree passed in appeal." It follows that where, as in this case, the original decree was simply affirmed even without any order as to costs of the appeal which was dismissed, s. 583 of the Code would have no application, because no question of restitution or any other benefit would arise out of the appellate Court's decree, [283] and the mandatory part of the original decree which has not been interfered with at all, would stand, though the fact of the ineffective appeal would have to be mentioned as required by clause (*d*) of s. 235 of the Code of Civil Procedure. In such cases, at least, the *dictum* of the Lords of the Privy Council which I have quoted would apply, because to use their Lordships' words, "*the question is not of much practical importance*," by which sentence I understand that, in such a case as this, it does not matter very much whether the original decree or the decree of the appellate Court is put into execution, so long as the decree which contains the *mandatory* order granting the relief is the decree which is sought to be enforced, whether as a decree in itself or as a decree incorporated in the appellate Court's decree of affirmance.

The matter therefore stands thus: that according to the Privy Council ruling, as also the Full Bench ruling of this Court as explained by Oldfield, J., in the case of *Gobardhan Das* and as now understood by us, the decree of the first Court when affirmed by the appellate Court's decree may be referred to in executing the appellate decree.

In the present case the first Court's decree was passed on the 22nd June, 1878, and it was simply confirmed in appeal by Stuart, C.J., and Oldfield, J., on the 8th February, 1882, there being then no objection that the first Court's decree was incapable of execution by reason of its omitting to specify the shares or the *mauzas* decreed in favour of the plaintiffs. The objection that the decree was incapable of execution was taken for the first time when the decree was sought to be executed, and those objections having been disallowed by the first Court, my brethren Straight and Tyrrell, on the 16th August, 1883, held in appeal that the decree was incapable of execution by reason of the want of specification above mentioned. The case is reported at page 30 of the Indian Law Reports, vol. 6, Allahabad series, and the judgment in that case ends by saying that "the proper and only course open to the decree-holders was to procure the remedy of these defects according to law."

[284] The decree-holders accordingly made an application to this Court on the 6th March, 1884, praying that this Court's decree of affirmance, dated the 8th February, 1882, might be so amended, under s. 206 of the Code of Civil Procedure, as to render it capable of execution. In other words, the decree-holders prayed that the defects which were pointed out by Straight and Tyrrell, JJ., in their judgment of the 16th August 1883, (1)

(1) 6 A. 30.

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might be remedied, as those learned Judges had suggested. The application was probably made to this Court in consequence of the Full Bench ruling in *Shohrat Singh* v. *Bridgman* (1), for otherwise the application would naturally have been made to the Court of first instance, since the decree of this Court was simply a decree of affirmance. The application came on for hearing before Oldfield, J., and it was probably in consequence of the literal interpretation which that learned Judge placed on the Full Bench ruling in *Shohrat Singh's* case that he rejected the application on the 18th May, 1884, by simply saying "there is no case made out for correcting the decree of this Court, which is correct."

It is not for me to doubt the accuracy either of the ruling of my brethren Straight and Tyrrell, dated the 16th August, 1883 (2), or of the order of Oldfield, J., which I have first quoted. Both these judgments must be read in the light of the Full Bench ruling in the case of *Shohrat Singh*, and so read, I confess I find it difficult to reconcile them. The one judgment holds that the decree was vague and required amendment; the other judgment says that the decree needed no such amendment and was correct.

It is easy to conceive how these unfortunate decree-holders, finding themselves in this predicament entertained the hope of obtaining the enforcement of the decree which they had obtained, by resorting to a third method. They accordingly went on the 6th February, 1885, to the first Court with an application praying that Court to render its decree intelligible and capable of execution by amending it under the provisions of s. 206 of the Civil Procedure Code. That Court granted the application and amended the [285] decree by its order of the 20th July, 1885, which is the subject of this application for revision.

The object of the application for revision is to render the first Court's decree of the 22nd June, 1878, and this Court's decree of the 8th February, 1882, wholly nugatory; and it has been contended that under the circumstances of this case, the law requires us to render futile the effects of two solemn adjudications whereby the decree-holders were decreed their shares of inheritance under the Muhammadan Law in ancestral property.

Does the law require us to accede to such a request? As to the justice of the case upon the merits, there is absolutely no doubt, and the only question is, whether the technicalities of our law are such as constrain us to accede to the request. The learned Pandit who appeared in support of this application has frankly accepted this position in the able argument which he addressed to us, and has reminded us of the well-known adage that hard cases often make bad law. I have to consider whether the justice of this case does require us to make bad law.

I must confess at once that I do not regard the question raised here as intrinsically difficult, and respectfully say that if any complications and difficulties have arisen, they are due to the unsatisfactory condition of the provisions of the last paragraph of s. 206 of the Civil Procedure Code (Act XIV of 1882) and to the orders which have already been passed in this case by this Court. Indeed, this case furnishes a very good illustration of the complications and difficulties which I pointed out in *Tarsi Ram* v. *Man Singh* (3) as arising out of the provisions of that section. In making my observations there, I went on to say, "If a decree has already become the subject of appeal, I do not think the first Court

(1) 4 A. 376. (2) 6 A. 30. (3) 8 A. 492, p. 494.

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should amend it under s. 206; for the Full Bench of this Court in *Shorat Singh* v. *Bridgman* (1) has held that the decree of the appellate Court is the only decree susceptible of execution, and the specifications of the decrees of the lower Courts, as such, may *not* be referred to and applied by the Court executing such decree."

[286] I have quoted this passage in order to point out that the suggestion therein contained proceeds entirely upon the interpretation of the Full Bench ruling as represented by the head-note and the last sentence in the judgment in which the word "*not*" occurs, which word according to our present interpretation must be omitted, as I have already stated. This being so, it follows that I should have not given expression to that *dictum* if I had understood the Full Bench ruling at that time in the manner in which it is now interpreted, and that that *dictum* is no authority against the view which I now hold on the first question in the case.

I am of opinion that when the decree of a Subordinate Court has been simply confirmed, as in this case, the Subordinate Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Civil Procedure Code. This view is supported by the ruling of the Madras High Court in *Sundara* v. *Subbana* (2) and by the unreported ruling of this Court in *Mohan Lal* v. *Lachmi Prasad*, (Misc. No. 213 of 1886, decided on the 22nd December, 1886), in which Oldfield and Brodhurst, JJ., after formulating the exact question as to the power of amendment by the first Court when the decree has been *affirmed*, went on to say, "we know of no reason why the Court has not such a power" and they concurred in following the Madras ruling. Both these rulings were considered by me in *Ram Saran* v. *Persidhar Rai* (3) and I followed them for reasons which I therein stated, and still adhere to. It is clear from these cases that the Madras Court, as also this Court, so far as the case-law stands, is agreed in holding that a decree which has been *affirmed* by an appellate Court may be amended by the Court which passed the original decree. There is, however, an old ruling of Couch, C. J., and Kemp, J. in *Onraet* v. *Sankar Dutt Singh* (4), where Couch, C. J., as Chief Justice of the Calcutta High Court, followed an earlier ruling of his own in *Bhanushankar Gopal Ram* v. *Raghunath Ram Mangal Ram* (5) which was given when he was puisne Judge of the Bombay High [287] Court. The effect of these two rulings is to lay down the broad rule that after a decree has been confirmed on appeal, the subordinate Court has no power of making any alteration in it. I have respectfully considered both these rulings, and I think, for the purposes of this case, it is enough to say that they were passed under the old Civil Procedure Code (Act VIII of 1859) of which s. 189, which corresponds to s. 206 of the present Code, contained no such power as to amendment of decrees as the last paragraph of the latter section contemplates; that these rulings were given before the observations made by the Lords of Privy Council in *Kristokinkur Roy* v. *Rajah Burrodacaunt Roy* (6), and that, therefore, those rulings cannot govern the interpretation of the second paragraph of s. 206 of the present Code which did not then exist in the statute book but with which we are concerned in this case. And I may add, before proceeding further, that not a single ruling has been cited at the Bar which would contradict the view of the second paragraph of s. 206 taken by Collins, C. J., and Muthusamy Ayyar, J., in Madras, and by Oldfield and

(1) 4 A. 376. (2) 9 M. 354. (3) 10 A. 51. (4) 5 B. L. R. 60. App.
(5) 2 B. H. C R. 101 A. C. (6) 14 M.I.A. 465.

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Brodhurst, JJ., and myself here in the cases which I have already referred to.

Such then is the state of the case-law upon the subject of the amendment of decree by the Court which passed it, after such decree has been *affirmed* by a Court of appeal, and if the matter rested entirely upon the case-law since the enactment of the last paragraph of s. 206 of the Code, I should have considered it unnecessary to deal with the subject any further. But since serious doubts have been suggested in the course of the argument, I must proceed to consider the question more fully than I did in *Ram Saran* v. *Persidhar Rai* (1) especially as that case was disposed of by me sitting as a single Judge and without the advantage of conferring with any of my brother Judges.

Now, I take it as an undobuted principle of law that everything is to be taken as permissible unless there is some prohibition against it. The principle is of such a comprehensive nature that it applies equally to substantive and adjective law, and has been recognised [288] as one of the fundamental principles of interpreting statutes. It is, indeed, true that in interpreting consolidatory statutes, such as the preamble of our Civil Procedure Code represents that enactment to be, we must consult the statute itself in order to find authority or prohibition.

If I am right so far, where is the authority or prohibition in that Code for holding that the jurisdiction which a Court passing a decree undoubtedly possessed to amend that decree, under the last paragraph of s. 206 of the Code, is taken away from that Court by the simple fact of an appeal having been preferred from that decree? Clearly no such express provision exists in the Code. On the contrary, there are indications in the very opening sentence of s. 545 of that Code to show that the mere fact of an appeal having been preferred from a decree shall be no reason for staying the execution of that decree. Let us suppose then, in the first place, that a decree is amended before it has been appealed from. In such a case I should have no hesitation in holding that the Court passing the decree could amend the decree, for any other view would necessitate the conclusion that the last paragraph of s. 206 need not have been enacted at all. Let us then, in the next place, suppose a case in which an appeal has already been preferred from the decree, but the appeal is *still pending*. In such a case, where is the authority in the Code to justify the view that the power and jurisdiction to amend the decree has come to an end by the mere fact of the appeal having been filed? I am not aware of any provision of the Code to warrant our holding that the pendency of an appeal operates as extinguishing the lower Court's power of amending its own decree under s. 206 of the Code. No principle such as the doctrine of *lis pendens*, would, of course, apply to such a matter, for the matter is one of procedure and must be governed by the provisions of the Code.

Then comes the third stage, which relates to the immediate question now before us, namely, whether there is any authority in the Code to warrant the conclusion that when a decree has been *affirmed* in appeal (and I limit the points to cases in which the decree has been upheld, excluding those in which the decree has been interfered [289] with by the appellate Court) the Court of first instance ceases to possess the power of amending its own decree, which power up to the moment of the disposal of the appeal it undoubtedly possessed. It has

(1) 10 A. 51.

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been contended that the Full Bench ruling in *Shohrat Singh's* case necessitates the conclusion that the power of amendment does so come to an end. But as that ruling has now been explained, it permits, at least in cases where the original decree is *affirmed* in appeal, reference to such decree. And if this is so, it seems to me that the decree which requires reference is the decree which would be in accord with the judgment of which it is the result, and not a decree which on the face of it contains clerical or arithmetical errors or is obviously at variance with the judgment, that is, contains such defects as can be properly removed by amendment under s. 206 of the Code.

It is perfectly true that a clerical or arithmetical error or any matter in the decree at variance with the judgment may be rectified by the Court of appeal, but in such a case I should not regard the decree of the appellate Court to be a decree of *simple affirmance*, but one of modification, and different considerations, which I do not intend to discuss here, would be applicable. But where the appellate decree simply *affirms* the original decree, which decree may be referred to in executing the appellate decree, I see no reason why such original decree should not be brought into accord with the judgment of which it is the result. It may, indeed, be, as has been suggested in the course of the argument, that the original Court, by amending its decree, may make that decree different to what was intended to be upheld by the appellate Court. But such a course would be an improper exercise of jurisdiction under s. 206 of the Code, and, as such, would form a fit subject of interference in revision by this Court. In other words, a clear remedy exists for an improper exercise of the power of amending decree, and, it seems to mo that there is no force in the argument that because such power may be improperly exercised in some cases, therefore, even in cases where such power has been *properly* exercised, the amendment of the decree is to be dealt with as a *nullity*, although it brought the [290] decree in full accord with the judgment, and although the amended decree represents the proper decree which the appellate Court upheld. In such cases I am of opinion that the proper Court to which an application for amendment of the decree under s. 206 of the Civil Procedure Code should be made is the Court which passed the decree "of which the mandatory part expressly declares the right sought to be enforced," and that, in a case such as this, where the original decree was simply *affirmed* in appeal, the Subordinate Judge's Court had jurisdiction to enertain the application for amendment.

This, then, is my answer to the first question as propounded in the order of reference, and it may be illustrated by cases in which an appeal is dismissed in default or barred by limitation.

The second question, as stated in that order, is, "What, if any, article of the Limitation Act governs applications" for amendment of decrees, under s. 206 of Civil Procedure Code ?" This question is the subject of a Division Bench ruling of this Court in *Gaya Prasad* v. *Sikri Prasad* (1), in which it was held, for reasons which do not appear in the report of the case, that the general provisions of art. 178 of the Limitation Act (XV of 1877), prescribing a period of three years' limitation, applied to such applications. In delivering my judgment in *Raghunath Das* v. *Rajkumar* (2) I expressed my dissent from that ruling by saying—

"The Limitation Act relates to the action of parties but not to the

(1) 4 A. 23. (2) 7 A. 276.

action of the Court. If the Court should be of opinion that by reason of any clerical or arithmetical error, its decree does not carry the judgment into complete effect, it may take up the decree and amend it even after three years or more. Under the provisions of the law as to revision, a decree cannot be revised if an appeal from it is possible. By s. 206, as I understand it, the Court has power to amend its decree, even if an appeal would lie therefrom, to this Court or to their Lordships of the Privy Council, and the time for the appeal had expired."

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[291] Again, I expressed my dissent from that ruling in delivering my judgment in *Tarsi Ram* v. *Man Singh* (1), though in the latter case my views form part of *obiter dicta*. I, however, referred to the authority of the principle on which the rulings of the other High Courts in *Roberts* v. *Harrison* (2); *Kylasa Goundan* v. *Ramasami Ayyan* (3), and *Vithal Janardan* v. *Vithojirav Putlajirav* (4), proceed (5). I still adhere to the same opinion, and hold that a vast distinction exists between cases in which a Court of its own motion takes any particular action or is enjoined by law to take such action, and cases where that Court possesses no such power without an application being made by a party. The reason is that in such cases it is, *ex necessitate rei*, impossible to decide when a Court takes action of its own accord and when it acts on the application of a party. The Madras and Bombay cases to which I have referred relate to the grant of sale certificates to the auction-purchaser, and those Courts have held that because it is the duty of the Court to grant such certificates, the mere fact of an application being made for obtaining such certificate would not be governed by the limitation law. I may perhaps also employ the illustration of an application made by a decree-holder to obtain the money held in deposit for him by the Court.

The same principle applies to cases in which the Court is required to take action, *suo motu*, such as amending decrees under s. 206 of the Code of Civil Procedure. There is, of course, no period provided by the limitation law for the exercise of such power by the Court of its own motion, and it would be introducing an anomaly to hold that what a Court may do of its own motion without any limitation of time, cannot be done by that Court when asked to do so by an application reminding the Court to do that which it should have done of its own motion. My answer to the second question therefore is that no period of limitation, and no article of the Limitation Act (XV of 1877) is applicable to such applications or mo-[292]tions as s. 206 of the Civil Procedure Code contemplates. I may repeat here what I have more than once said before, that, judging by the preamble of that Act, it is not to be regarded as a consolidatory enactment so far as "*applications*" are concerned, because the preamble mentions only "*certain applications*," and not all classes of applications.

Upon the third question as enunciated in the order of reference, I am of opinion that the order of Oldfield, J., dated the 8th May, 1884, which might have been appealed from under s. 10 of our Letters Patent, not having been so appealed, has become final and concludes the parties from praying for the same relief, that is, seeking amendment of the decree of this Court, which was declared by that order to be "*correct*." The matter is therefore *res judicata* and cannot be interfered with by us in this case. But whilst I held this, I am of opinion that that order benefits the case of

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(1) 8 A. 492. (2) 7 C. 333. (3) 4 M. 172. (4) 6 B. 586.

(5) See also *Darto* v. *Kesho Rai*, 9 A. 364, *Shivappa* v. *Shivapanch Lingappa*, 11 B. 284, and *Jivarji* v. *Pragji*, 10 M. 51.

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the decree-holders-respondents; because it precludes us from holding that the decree of this Court, which the decree-holders unsuccessfully sought to amend, is in need of any amendment or is incapable of execution. The decree was simply a decree of affirmance and contained no mandatory part expressly declaring the right sought to be enforced, and Oldfield, J., no doubt, therefore, thought that, since the decree gave full effect to the judgment of this Court, it was a sufficiently accurate decree so long as it dismissed the appeal with which it dealt.

Having so far dealt with the specific questions enunciated in the order of reference, I will deal briefly with the remaining part of the argument addressed by the learned Pandit in support of the application for revision. I understood the learned pleader to argue that because in s. 624 of the Code reference is made to "*some clerical error apparent on the face of the decree*," and such clerical error is also mentioned in s. 206, therefore the application for amendment granted by the Subordinate Judge must be taken to be an application for review of judgment, such as could not be entertained by a Judge other than the one who passed the original decree, and that, therefore, the order of the Subordinate Judge must be set aside in [293] revision. Now, in the first place, if the argument is to be accepted, this application for revision which has been made under s. 622, would require dismissal, because under the second paragraph of s. 629 an appeal would lie to this Court, and no such application for revision could therefore be made. In the next place, I think Mr. *Dwarka Nath Banerji* was right in his contention that there is no rule of law relating to the interpretation of statutes, or even to the rules of common law, which lays down that where more than one remedy for the same purpose is provided, the person entitled to such remedy is restricted to any particular mode, or that any particular remedy bars the other remedies. I have already said that clerical or arithmetical errors may be corrected by a Court of appeal, and I hold the same view as to review of judgment. But so long as the errors fall within the purview of s. 206, I cannot hold that that section is not available to a party simply because the errors of which he complains might also have been rectified by appeal or review of judgment. The application to the Subordinate Judge in this case was clearly an application under s. 206 of the Code, and, therefore, although the learned Subordinate Judge who passed the order now under consideration was not the same as the one who passed the original decree, I hold that the prohibition contained in s. 624 has no application to the case.

I think I have now dealt with all the arguments in the case which were addressed to us at the Bar. But in support of the general effect of the view of the law which I have taken, I wish to refer to the bearing which the maxim *ubi jus ibi remedium* has upon this case. That maxim represents such a fundamental principle of jurisprudence that it is not limited to *ante litem motam*, but applies equally to rights which have been decreed by competent adjudication. This being so, it seems to me that it would be simply nullifying the decrees of the first Court and of this Court which decreed the decree-holders' claim, if we were to hold that, although those decrees are standing mandates of judicial tribunals, yet those standing mandates are futile and cannot enable the decree-holders to obtain that which was decreed to them as their inheritance in their [294] ancestral estate. In other words, to hold that those decrees, even under the singular circumstances of this case, are incapable of execution, would amount to saying that the doors of the Courts of justice in British India are open to litigants, yet the decrees obtained by them, though confirmed

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by the highest tribunal in the land, may end in *nothing*, not on account of any fault or negligence on the part of the decree-holders, but on account of the manner in which these decrees are dealt with by the very tribunals which have passed them. And I fully approve the observations of the learned Subordinate Judge when, referring to the technical defects of the plaint in the original litigation, he said:—All the proceedings that took place in the case, the whole trial and the decision, cannot now be set aside on account of that defect now pointed out by the defendants for the first time. Those proceedings were legal and proper notwithstanding that defect. To hold them null and void on account of that defect would be a denial of justice to the plaintiffs." It may be true, as the learned Pandit said, that hard cases make bad law, but I hope that it is equally true that the technicalities of the law are not to be so employed as to override the obvious ends of justice, and instead of being ancillary to such ends, defeat them.

Upon the merits of the amendment made by the learned Subordinate Judge no argument has been pressed upon us, beyond the suggestion that since the decree did not specify the shares and villages which were decreed to the decree-holders, therefore the amendment which furnished such specification in the decree was improperly made. It has not been contended that the properties now specified in the decree by dint of the amendment are properties other than those which were actually (that is, *as a matter of fact*), the properties which formed the subject of litigation in the first Court, such properties being clearly specified in the list attached to the plaint. Nor is it doubted that the decree of the first Court in decreeing the claim referred to those properties, and that the subject-matter of the appeal in this Court also consisted of those properties. This, indeed, is an obvious inference from the fact that **[295]** the judgment-debtors themselves never took any objection as to the vagueness of the decree-holders' plaint or of the decree in the regular litigation, either in the Court of Subordinate Judge or on appeal in this Court.

What other objection can there be to the amendment made by the Subordinate Judge? *Certum est quod certum reddi potest*, and in this case the application of the maxim creates no difficulty, because the record of the case clearly shows what the actual properties were to which the litigation, which ended in the decree of the first Court and the affirmance of that decree by this Court, related.

The case is. thus, so far, on all fours with my ruling in *Ram Saran* v. *Persidhar Rai* (1) and following the same view here, I hold that there was no want of jurisdiction in the Subordinate Judge who amended the decree, and that such amendment was not open to the objection of illegality or material irregularity, and, having caused no injustice, is not open to interference in revision under s. 622 of the Civil Procedure Code. This view is in accord with the Privy Council ruling in *Amir Hasan Khan* v. *Sheo Baksh Singh* (2) and with the Full Bench rulings of this Court in *Magni Ram* v. *Jiwa Lal* (3) and *Badami Kuar* v. *Dinu Rai* (4), and is consistent even with my explanation of those rulings and others in the judgment which I delivered in *Dhan Singh* v. *Basant Singh* (5), which only adopted the views which I had before expressed in *Har Prasad* v. *Jafar Ali* (6).

For these reasons the learned Subordinate Judge's order of the 20th July, 1885 now under consideration, is subject to no objection of want of

(1) 10 A. 51. (2) 11 C. 6. (3) 7 A. 336. (4) 8 A. 111. (5) 8 A. 519. (6) 7 A. 345.

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jurisdiction or any illegality or material irregularity, such as s. 622 of the Code contemplates, and since, as I have already said, the order far from having caused an injustice, has done justice to the rights of the decree-holders-respondents, I hold that the discretionary powers of interference conferred upon us by s. 622 of [296] the Code of Civil Procedure, should not be so exercised in this case as to interfere with the order of the learned Subordinate Judge.

I would dismiss this application with costs.

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11 A. 296 = 9 A.W.N. (1889) 111 = 13 Ind. Jur. 396.

APPELLATE CIVIL.

Before Mr. Justice Stright and Mr. Justice Mahmood.

GANPAT RAO (*Defendant*) *v.* RAM CHANDAR (*Plaintiff*).*
[26th November, 1888.]

Hindu Law—Joint Hindu family—Maintenance—Gift to widow by member of joint family—Construction—Gift presumed to be of life-estate only.

Disputes having arisen between the sole surviving member of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possessioon of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house, that she had been put in possession of the house and was in sole proprietary possession thereof, and that he had no connection whatever with it. Subsequently, the widow executed a deed-of-gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed-of-gift could not convey to him more than the life-interest of the widow donor.

Held that the deed of gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (1) and *Dinonath Mukerji* v. *Gopal Churn Mukerji* (2), referred to.

Held also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance, and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed-of-gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate.

Held further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property; and that her estate therefore could at best be regarded as a life-estate, and the deed-of-gift as binding upon the plaintiff during her lifetime, but not further.

[R., 17 M.L.J. 243 = 2 M.L.T. 316 = 30 M. 356; 61 P.R. 1911 = 147 P.W.R. 11 = 11 Ind. Cas. 846; D., 24 A. 67 (69,80); 147 P.L.R. 1911.]

[297] THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Munshi *Madho Prasad*, for the appellant.

Munshi *Juala Prasad*, for the respondent.

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* First Appeal, No. 3 of 1887, form a decree of Babu Mirtunjoy Mukerji, Subordinate Judge of Benares, dated the 13th December, 1886.

(1) 6 M.I.A. 1. (2) 8 C.L.R. 57.

JUDGMENT.

1888 Nov. 26.

APPELLATE CIVIL.

11 A. 296 = 9 A.W.N. (1889) 111 = 13 Ind. Jur. 396.

MAHMOOD, J.—This is a first appeal from the decree of the learned Subordinate Judge of Benares, and in order to explain the facts which require determination in the case it is convenient to bear in mind the following genealogical table:—

Sheoram

Pandoba Naik.	Ganoba Naik.
Ram Chandar (plaintiff).	Musammat Lachmi Bai (widow).

Sheoram died many years ago, leaving Ganoba and Pandoba, the sons above-mentioned. Pandoba died about 1849, leaving his son Ram Chundar, and thereafter Ganoba also died about the year 1852, leaving a childless widow Musammat Lachmi Bai, whose name appears in the pedigree.

It is admitted in the case by the parties that the family of Sheoram and his sons was a joint Hindu family, both in point of worship and food and also of residence and estate, so that upon the death of Sheoram his two sons would be the joint co-parceners of the joint family property, and upon the death of Pandoba in 1849, the remaining two members, Ganoba and Ram Chandar, the present plaintiff, would be the members of the joint co-parcenary.

It appears, however, that upon the death of Ganoba, Ram Chandar, plaintiff, claiming to be the sole surviving heir to the property of the joint Hindu family, took steps to assume the management and exercise the proprietary functions in respect of the entire family property, and this led to a complaint by Musammat Lachmi Bai, the widow of Ganoba above-mentioned. The complaint was preferred in the criminal Court on the 7th October, 1854, by the widow lady, in which she complained of various acts of the [298] plaintiff Ram Chandar and prayed for the interference of the Court under the provisions of Act IV of 1840, which then related to such disputes as to possessory titles. The matter, however, does not appear to have gone further in the Court. We find, as is admitted in the present case, that an amicable arrangement was come to by the parties, and they, in the first place, executed two deeds, one called the deed of arrangement or *ikrarnama* executed by Ram Chandar on the 31st October, 1854, and another executed by the same person on the same date called a deed of partition. On the same date a third deed was also executed both by the lady, Musammat Lachmi Bai, and the present plaintiff, Ram Chandar, in the form of a deed of compromise, which was filed in Court and verified, and in which, after referring to the other two deeds, the parties stated the conditions upon which they had arrived at an amicable settlement, and effect was given to the compromise by the Court's order of that date whereby it was decided that the compromise be accepted and the case be struck off the file.

Matters stood thus when, under the compromise, that lady Musammat Lachmi Bai was placed in the possession of the house now in dispute, namely, the house which, in the deed of partition and also in the other deeds of the 31st October, 1854, is described as the *haveli* situate in Mohalla Dudh Binayak, and similarly under the conditions of the other deeds the plaintiff was placed in possession of another *haveli* or house situate in

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muhalla Gobindji Naik. This arrangement is best represented in the words of the deed of partition executed by the plaintiff Ram Chandar. It goes on to say :—

"With reference to it, it has been agreed in this way between me and the said lady, with a view of permanently settling the dispute, and one having no connection with the other, that I have received Rs. 3,475 as the value of my half share in the house from the aforesaid lady, and have made over the deed appertaining to the said house *haveli*, to the lady, and have put her in possession of my half share of the house. Now the whole of the house is in the sole proprietary possession of the said Musammat, and I, the executant, have no connection whatever with it. Again, out of the house in [299] muhalla Gobindji Naik, the one-third share of the Musammat has been annexed to my share, and I have in the same way paid Rs. 830 to the Musammat, and have taken possession and occupancy of the entire house, and the said Musammat has made over the deed of the house to me. In short, I have been put in proprietary possession of the entire house, and the said Musammat has no objection to it, nor shall she have any hereafter."

It appears that effect was given to this arrangement, and matters, thus stood when on the 23rd November, 1882, Musammat Lachmi Bai, the widow of Ganoba, executed a deed-of-gift in favour of her brother's son, Ganpat Rao, who is the defendant-appellant in the cause. The deed assumes that the donor had an absolute, full and unqualified right in the ownership of the house in mohalla Dudh Binayak, and it purports to convey to the donee full proprietorship in the house. The deed does not appear to have been disputed during the lifetime of the widow, but the lady, Musammat Lachmi Bai, died on the 28th May, 1885, and it was soon after her death, namely, the 12th February, 1886, that the present suit was instituted with the object of recovery of possession of the property, upon the ground that the deed-of-gift, dated the 23rd November, 1882, could not convey to the defendant-donee any rights higher than the life-interest of the donor, namely, the widow.

From the facts which I have stated, it is clear that, if matters stood and rested entirely upon the propositions of the Hindu Law of Inheritance, the family of Sheoram and his sons being joint, the death of Ganoba in 1852 would result in entitling the lady, Musammat Lachmi Bai, only to a right of maintenance out of the joint family property, and not to any right either to obtain partition of the property, or to institute any proceedings beyond the exigencies and requirements of her right of maintenance. I take this to be a settled principle of Hindu Law, and if we omit to consider the exact nature of the general rights of Musammat Lachmi Bai at the time when the deed of the 31st October, 1854, was executed, we should scarcely be in a position to understand the aims, objects and intentions of the arrangements into which the [300] parties had entered. It seems to me that there was no reason why the lady, Musammat Lachmi Bai, should have assigned any share in the ancestral property. Such an arrangement must be referred to some legal right which would form the consideration passing from one party to the other. That consideration could only be the right of maintenance, and Ram Chandar need not have allowed the lady any more than the right to reside in the joint ancestral property and not any money allowance for maintenance. In this way of regarding the deed I think I am fortified by the manner in which their Lordships of the Privy Council disposed of the case

of *Sreemutty Rabutty Dossee* v. *Sibchander Mullick* (1) when a deed somewhat similar in its nature was the subject of consideration, and also by the ruling of the learned Judges of the Calcutta High Court in *Dinonath Mukerji* v. *Gopal Churn Mukerji* (2) where the learned Judges held, in construing documents such as the arrangement and partition deeds of 1854, that the situation of the parties and their rights at the time of execution must be looked at, and indeed for this view they relied upon the ruling which I have already referred to.

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Such then being the manner in which the deed should be regarded and construed, and keeping in view also the rules of the Hindu Law, whereby widows are placed in possession of the joint family property and also the general experience of the tribunals in connection with such matters, I am of opinion that it was for the defendant-appellant, Ganpat Rao, to establish in clear specific terms that the lady Musammat Lachmi Bai, when she executed the deed of gift of the 23rd November, 1882, in his favour, possessed any such absolute right of ownership as would entitle her to alienate and deal with it in any manner which would go beyond her life-interest. This of course would depend upon something contained in either of the deeds of the 31st October, 1854, but having carefully read through those deeds, I asked Mr. *Madho Prasad* to point out any expression used in the deeds that placed beyond doubt the intention of the parties that Musammat Lachmi Bai [301] was entitled to have under them full ownership, and possessing such full ownership, was exercising the power of alienation which would be sufficient to confer an absolute and inalienable proprietary title. It is therefore clear that the estate of Musammat Lachmi Bai, putting the matter in its highest form, and looking to the time when the deeds were executed, could at best be said to be analogous to the position of a Hindu widow of a deceased brother, in other words, a life-interest and nothing more. But the deed of gift in favour of the defendant-appellant might be held to be good during her lifetime and could not bind the plaintiff under the Hindu Law when her interest in the property had ceased.

This arrangement, as I have understood it, is all the more conceivable, because it is perfectly possible, and indeed probable, that this sort of exchange of houses which took place under the partition deed of the 31st October 1854, was entered into to prevent such disputes as would arise on account of the widow Mussummat Lachmi Bai having a right to live in a portion of the house in muhalla Dudh Binayak and the plaintiff having a similar right to live in another house. The exchange of money, namely, Rs. 3,475, paid to the plaintiff and Rs. 830 paid by the plaintiff to the widow, is fully explainable as a desire on the part of both the parties to have peace and secure comfort, and is not necessarily a reason for supposing that the transaction amounted to a sale absolute either by one party or the other.

I think that the learned Judge of the lower Court rightly decreed the claim and no case has been made out for interference by us. I would therefore dismiss the appeal with costs.

STRAIGHT, J.—I am entirely of the same opinion.

Appeal dismissed.

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(1) 6 M. I. A. 1. (2) 8 C.L.R. 57.

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APPELLATE CIVIL.

11 A. 302=9 A.W.N. (1889) 81.

11 A. 302=9 A.W.N. (1889) 81.

[302] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

JAGANNATH PRASAD (*Defendant*) v. SITA RAM (*Plaintiff.*)*
[19th December, 1888.]

Hindu Law—Joint Hindu family—Money-decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed.

The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree, the interest which the judgment-debtor had in the joint family property. *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), *Rai Balkishen* v. *Rai Sita Ram* (2) and *Balbhadar* v. *Bisheshar* (3) referred to.

[R., 16 A. 449 (463) ; 34 C. 642=11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207 ; D., 16 C.P.L.R. 19 (26,27) ; 5 C.L.J. 80=11 C.W.N. 163 (168).]

THIS was a suit brought under the following circumstances. The plaintiff, Rai Sita Ram, was the father of one Rai Manohar Das, who died on the 11th September, 1874. The plaintiff and his son were members of a joint Hindu family, and no partition took place until some time after the death of Rai Manohar Das. The defendant Jagannath Prasad held a simple money-decree which he had obtained on the 24th August, 1874, in the Court of the Subordinate Judge of Benares, against Rai Manohar Das alone. After the judgment-debtor's death, the decree-holder for the first time applied for execution of his decree against the joint family property. Execution was resisted by the plaintiff, but his objections were disallowed, and ultimately he brought the present suit for a declaration that the property in question was not liable to attachment and sale in execution of the defendant's decree.

The Court of first instance (Subordinate Judge of Meerut) decreed the suit, referring to the cases of *Balbhadar* v. *Bisheshar* (3), *Suraj Bunshi Koer* v. *Sheo Pershad Singh* (1), *Debi Pershad* v. *Thakur Dial* (4), and *Goor Pershad* v, *Sheodeen* (5). The defendants appealed to the High Court.

Mr. *G. T. Spankie*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

[303] EDGE, C. J., and TYRRELL, J.—The plaintiff in this suit was the father of one Rai Manohar Das, against whom the defendant had obtained a simple money-decree on the 24th August, 1874. The plaintiff and his son were members of a joint Hindu family. The defendant here has entirely failed to prove that the son had separated from the family. Rai Manohar Das died on the 11th September, 1874. After the death of Rai Manohar Das there was a partition of the family property between the plaintiff and another son or member of the family. No steps had been taken in

* First Appeal No. 60 of 1887, from a decree of Babu Mirtonjoy Mukarji, Subordinate Judge of Benares, dated the 21st March, 1887.

(1) 5 C. 148 (2) 7 A. 731. (3) 8 A. 495.
(4) 1 A. 105. (5) N.W.P.H.C.R. 1872, p. 137.

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the lifetime of Rai Manohar Das to obtain attachment under an execution of the decree. The defendant has sought, since the death of Rai Manohar Das, to have his decree executed against the family property. This suit was brought to have it declared that no part of the family property in the hands of the plaintiff was liable in execution of the decree of the 24th August, 1874. It is contended by Mr. *Spankie* for the appellant, defendant below, that the mere fact of the defendant having obtained a money-decree against Rai Manohar Das in his lifetime entitled him to bring to sale the interest which Manohar Das had during his life in the family property. It appears to us that there is no authority to support that contention. In the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) their Lordships of the Privy Council, at page 174 of the report, decided that execution-proceedings, which had gone as far as an attachment and an order for sale under a money-decree, did create a charge which entitled the judgment-creditor to proceed against the interest which the judgment-debtor had in his lifetime in the property which was attached. It appears to us that that judgment was based on the ruling that an attachment and order for sale did create a charge. If the obtainment of a mere money-decree would have entitled the judgment-creditor in that case to bring the property then in dispute to sale, it would not have been necessary for their Lordships to have based their judgment on the fact that the attachment had taken place, and the order for sale had been made. The judgment in that case by implication shows that in a **[304]** case such as this the judgment-creditor could not bring to sale after the death of the judgment-debtor the interest which the judgment-debtor had in the joint property of the Hindu family. The same principle is to be found in the judgment in the case of *Rai Bal Kishen* v. *Rai Sita Ram* (2), and in the case of *Balbhadar* v. *Bisheshar* (3). Under these circumstances the appeal must be dismissed, and the decree below confirmed with costs. *Appeal dismissed.*

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11 A. 304=9 A.W.N. (1889) 75.

SMALL CAUSE REFERENCE.

Before Mr. Justice Straight and Mr. Justice Mahmood.

MADAN GOPAL (*Plaintiff*) *v.* BHAGWAN DAS (*Defendant*).*
[21st December, 1888.]

Civil Procedure Code, s. 646 B—Reference by District Judge of proceedings in Small Cause Court attacked for want of jurisdiction.

Before a District Court can make a reference under s. 646 B of the Civil Procedure Code, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court shoild be sought.

The word "shall" in s. 646 B, clause (1) is not mandatory but directory

[R.—13 C.L.J. 558 (564).]

THIS was a suit which was brought in the Court of Small Causes at Mirzapur for recovery of a sum of Rs. 114, alleged to be the balance due upon a partnership account. The defence was that the partnership

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* Reference under Civil Procedure Code, s. 646 B by W. T. Martin, Esq., Judge of the Court of Small Causes, Mirzapur, Miscellaneous No. 204 of 1888.

(1) 5 C. 148. (2) 7 A. 731. (3) 8 A. 495.

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accounts had not yet been adjusted, and that the suit would not lie. The Court decreed the claim in part, and held that the debt which the plaintiff sought to recover was one which had "nothing to do with the partnership account."

An application was then presented on behalf of the defendant to the District Judge of Mirzapur, purporting to be made under s. 646 B of the Civil Procedure Code, and praying that the record of the case might be submitted to the High Court for orders. The application was based upon the contention that the suit was not cognizable by the Court of Small Causes. The District Judge thereupon passed the following order:—

[305] "Under s. 646 B, let the record be submitted. The Subordinate Judge holds that the debt in suit was a separate affair altogether from the partnership account. In that view the suit was cognizable by the Small Cause Court, but is submitted only at request of party."

OPINION.

STRAIGHT, J.—This professes to be a reference made by the District Judge of Mirzapur under s. 646 B of the Civil Procedure Code of 1882, as amended by Act VII of 1888. A suit was tried before the Subordinate Judge of Mirzapur sitting as a Small Cause Court Judge, and was decided by a decree, dated the 5th July, 1888. Upon the 24th July the unsuccessful defendant in that suit applied to the Judge of Mirzapur for revision, so the petition is headed, under s. 646 B of the Civil Procedure Code as amended by s. 60 of Act VII of 1888. It is not necessary for me to enter into the grounds upon which the interference of the learned Judge was sought. It is sufficient to say that by two orders respectively dated the 24th and the 28th July, the Judge professed to refer the application for revision to this Court for disposal. It therefore, as a preliminary matter, becomes necessary to see whether the reference of the learned Judge has been regularly made, that is to say, in the manner contemplated by s. 646 B, clause (1). In my opinion, the reference has been improperly made, as it appears upon the face of it. Section 646-B, as I read it, provides for this state of things. Assuming that a Court subordinate to a District Court has held a suit instituted in that Court either to be cognizable by a Small Cause Court or not to be so cognizable, and has either failed to exercise a jurisdiction vested in it by law, or has exercised a jurisdiction not vested in it by law, and the District Judge is of opinion that such subordinate Court has erroneously held, in either of these alternatives, then the District Court may, of its own motion or at the motion of either of the parties, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

[306] Putting it shortly, my view is that before a District Court can make a reference therein, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and having so erroneously held, that, therefore, the matter is one in which the interference of the Court should be sought. I do not think that any importance is to be attached to the use of the word "shall," after the phrase "if required by a party." That is purely used in its directory sense; because the latter portion of the first clause of the section goes on to say, that where a District Court acts of its own motion it must "state its reasons" for considering the opinion of the Subordinate Judge's Court an erroneous decision.

The learned Judge in this case has neither stated that the decision is an

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erroneous one, nor has he given any reasons for coming to that conclusion. It appears to me, therefore, that the reference cannot be entertained by us, and that it should be returned to the learned Judge for him to take the matter up and deal with it in advertence to the observations that I have made and in accordance with the provisions of s. 646 B of the Civil Procedure Code. If he is of opinion that the decision of the Subordinate Judge acting as a Small Cause Court Judge was right upon the question of jurisdiction, then he should not make a reference. If he thinks that it was wrong, then he may make a reference to this Court, recording his reasons for so doing. Let the papers be returned to the learned Judge with these remarks.

MAHMOOD, J.—I agree so entirely with what my learned brother has said, that it is scarcely necessary for me to add any further remarks. I am however anxious, because this is the first time within my experience as a Judge of this Court that this new s. 646 B, which has been passed so late as this very year, has come under judicial consideration, to say that some doubt did arise in the course of the hearing, in my mind, as to the exact manner in which the word "shall" was to be interpreted, especially as it comes in close proximity to the word "may," with reference to the powers and duties of the District Judge. I think my learned brother's [307] view fully expresses why, with reference to the words that follow the "shall" we must take this "shall" not as strictly mandatory, but only directory; and that if that word can be used in any greater sense, it can be only as qualifying the words relating to the opinion of the Judge as to the erroneous exercise of jurisdiction.

I fully agree with my brother that the references contemplated by s. 646 B are limited to cases where the District Court is of opinion that there has been an error in the exercise of, or in declining the exercise of jurisdiction in, cases of the kind mentioned in the section. The whole policy as indicated by the Legislature of the enactments begun with Act XI of 1865, seems to be that statutes *in pari materia* have aimed at finality of decision in cases of the Small Cause Court type. It is not necessary to refer to the various sections of the various Acts beyond saying that they uniformly uphold the desirability of enforcing finality to adjudications in such cases. That finality has been qualified by two classes of provisions; one conferring on the highest Court of appeal the powers of revision such as s. 622, Civil Procedure Code, contemplates, and in particular with reference to Small Cause Court cases, by a provision such as s. 25 of the Provincial Small Cause Courts Act contemplates. Another manner in which the Legislature has thought fit to mitigate any failure of justice in consequence of the erroneous exercise of jurisdiction is this very section which my brother has interpreted, namely, s. 646 B.

But whilst the Legislature has been so jealously careful to guard against the failure of justice, as my learned brother has put it, these references under s. 646 B are not intended to apply to a case where a Judge has not exercised his mind to consider whether or not the Court below, whose judgment he was dealing with, had or had not jurisdiction. That section is limited only to cases where there has been an error. I fully agree in declining to answer this reference, and in sending back the record to the Judge to be dealt with according to law.

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CRIMINAL REVISIONAL.

11 A. 308 = 9 A.W.N. (1889) 93.

11 A. 308=9 A.W.N. (1889) 93.

[308] CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* SHEODIN.* [5th January, 1889.]

Criminal Procedure Code, s. 395—Imprisonment in lieu of whipping—Court not authorized to inflict fine in lieu of whipping.

A Court has no power under s.395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c.

The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine.

[R.—21 A. 25=18 A.W.N. (1898) 156 ; 1 L.B.R. 202 (203).]

IN this case one Sheodin was convicted by Mr. G. Bower, a Magistrate of Mirzapur, under ss. 457, 380 and 75 of the Penal Code, and sentenced to two years' rigorous imprisonment and to receive thirty stripes. Subsequent to the passing of sentence, the Magistrate recorded the following order :—" The Civil Surgeon reports that Sheodin is unfit to be whipped. I therefore amend the sentence and strike out the whipping, and in its place inflict a fine of Rs. 30, or in default six months' more rigorous imprisonment, in accordance with the provisions of s. 395 of the Criminal Procedure Code."

The District Magistrate reported the case to the High Court, with the following observations :—

" S. 395 of the Criminal Procedure Code allows the Court which inflicted a punishment of whipping, which punishment cannot be executed, to (at its discretion) either remit the sentence of whipping, or sentence the offender in lieu of whipping *to imprisonment* for any term not exceeding twelve months. Nothing, however, in the section authorizes the Court to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Can this section be read as permitting a sentence of *fine* to be inflicted in lieu of the whipping, and then to commute that fine to one of alternative imprisonment?

[309] " Now, Mr. Bower is only competent to inflict a sentence of two years' imprisonment as a Magistrate of the first class (s. 32, Criminal Procedure Code.) This sentence he has already inflicted upon Sheodin. He can also inflict a fine, and, in lieu of fine, he can, under s. 33 of the Criminal Procedure Code, inflict a further maximum term of six months' imprisonment. But if s. 395 be held not to include in the words " to imprisonment " such imprisonment as is inflicted in lieu of fine, then in this case Mr. Bower could not inflict any further imprisonment upon Sheodin, because he had already sentenced him to the full term of imprisonment he was competent to inflict.

" Suppose Sheodin paid up his fine of Rs. 30. Then he would not have undergone any imprisonment in lieu of the original sentence of whipping, but s. 395 only comtemplates remission of the sentence of whipping altogether, or imprisonment in addition to any other punishment inflicted.

* Criminal Revision No. 724.

"At the same time it seems contrary to commonsense that a man who is sentenced to a term of imprisonment and to a whipping in addition, as is allowed by law, should get off the additional sentence of whipping altogether because he is declared unfit to be whipped, and at the same time because the term of imprisonment inflicted upon him happens to be the full term of imprisonment *per se* the Court sentencing him is competent to inflict.

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"I am therefore inclined to read the words 'to imprisonment,' taken along with the concluding paragraph of s. 395, as meaning imprisonment of any kind, whether original or alternative, a Court is competent to inflict, and that for the purposes of this case, Mr. Bower's Court may be held to be competent to inflict a term of two years and six months' imprisonment.

"As I am in doubt, I submit the case."

OPINION.

STRAIGHT, J.—In my opinion the convicting Magistrate had no power under s. 395 of the Criminal Procedure Code to revise his sentence of whipping by inflicting a fine of Rs. 30 on Sheodin in lieu of such whipping. Consequently it follows he had no power to [310] direct any imprisonment for default in payment of such fine. All he could do was—

(1) to remit the whipping altogether,

(2) to sentence the offender in lieu of whipping, or of so much of the sentence of whipping as was not executed, to *imprisonment*, &c.

In my opinion "*imprisonment*" there means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. If the Legislature had intended otherwise it could easily have declared that a Court revising its sentence under s. 395 could substitute a fine for a whipping that could not be inflicted, but it has not done so, and I must presume that having expressed itself clearly as to the power it gives, it intended to exclude every other power. Mr. Bower's order must be quashed to the extent that it ordered a fine of Rs. 30 or, in default, six months' rigorous imprisonment. *Order quashed.*

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11 A. 310=9 A.W.N. (1889) 94.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RADHA AND OTHERS (*Plaintiffs*) v. KINLOCK (*Defendant*).*
[7th January, 1889.]

Pincipal and surety—Omission by creditor to sue principal debtor within period of limitation—Discharge of surety—Act IX of 1872 (*Contract Act*), ss. 134. 137.

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the nons-uing within such period arose from the creditor's forbearance.

Section 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as the meaning of s. 135. It applies

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* Second Appeal No. 826 of 1887, from a decree of A. Sells, Esq. District Judge of Meerut, dated the 18th March, 1887, reversing a decree of Babu Brijpal Das, Subordinate Judge of Meerut, dated the 24th December, 1886.

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only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence.

Hajarimal v. *Krishnarav* (1) and *Krishto Kishori Chowdhrain* v. *Radha Roman Munshi* (2), dissented from. *Hazari* v. *Chunni Lal* (3) referred to.

[R., U.B.R. (1892—1896), Civil, 308; 2 N.L.R. 42 (43).]

[311] THIS was a suit for the recovery of Rs. 1,316-7-6 alleged to be due upon a surety bond executed by the defendants on the 5th January, 1876. One Mangal was indebted to the plaintiff for a sum of Rs. 767-11-6, which he agreed to pay by yearly instalments, and the defendants by their bond engaged to pay any instalments not duly paid by him with interest. The present suit was instituted on the 19th June, 1886, on which date it was admitted that the claim of the plaintiff against the principal debtor, Mangal, was barred by limitation. The Court of first instance (Subordinate Judge of Meerut, dismissed the suit on the ground that the legal effect of the omission of the plaintiff to enforce the claim against the principal debtor Mangal was his discharge, and consequently, under s. 134 of the Contract Act, the discharge of his sureties the defendants.

The plaintiff appealed to the District Judge of Meerut. The District Judge allowed the appeal and reversed the Subordinate Judge's decree, upon grounds which he stated as follows :—

"The simple question now to be decided is, whether, under these circumstances, the plaintiff has any right to recover from the sureties. The lower Court has refused him relief. For the defendants it is contended that the omission to sue the principal within the legal period is, under s. 134, sufficient to discharge the sureties. But there is no legal obligation upon the creditor to sue his debtor, and, under s. 137, forbearance on his part does not necessarily discharge the surety. And this would seem to show that it was intended that the words, 'discharge of the principal debtor' should refer only to such a discharge as would presumably operate also as a discharge of the principal debtor *in regard to his obligation to the surety.* But in the present case the sureties defendants would still have their right of recovery against their principal. They are in fact in no worse position than they were before. The omission of the creditor to sue does not affect them ; that is, it does not in any way affect the contract as entered into by them ; and I am of opinion that the word ' omission ' in s. 134 should be interpreted in the sense of s. 139 ; that it is intended to comprise such omissions only as would **[312]** be omissions of *duty*, a neglect of certain acts which the creditor's duty to the sureties required him to perform. And this seems to be the view taken by the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1). On the other hand, my attention has been drawn by the pleader for the defendants to the case of *Hazari* v. *Chunni Lal* (3) in the Allahabad High Court, which at first sight would seem to militate against the view taken above. But I am of opinion that it does not really do so. In that case the creditor had omitted to perform an act which was actually imposed upon him by the contract for the performance of which the security was given. That omission might seriously have prejudiced the interests of the sureties. In this respect, therefore, the Allahabad case differs materially from the present one and from the Bombay case. For these reasons then, I am of opinion that the lower Court is wrong in holding that the plaintiff's claim against the defendants has been extinguished. The appeal is accordingly decreed with costs."

(1) 5 B. 647. (2) 12 C. 330. (3) 8 A. 259.

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APPELLATE CIVIL.

11 A. 310 = 9 A.W.N. (1889) 94.

The defendants appealed to the High Court.

Kunwar *Shivanath Sinha*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This appeal arises in a suit brought by a creditor against a surety on a contract of guarantee. The surety in his contract of guarantee had hypothecated certain immoveable property, and at the time when the suit was brought the rights of the creditor against the debtor whose debt was guaranteed were barred by limitation.

The Court below held that the surety was liable notwithstanding the fact that the remedies of the creditor against the debtor had been barred before the suit was commenced. The Court below came to the conclusion from a consideration of the case of *Hajarimal* v. *Krishnarav* (1). In this Court Mr. *Abdul Majid* for the respondent has relied upon the Bombay case and on the judgment in *Kristo Kishori Chowdhrain* v. *Radhha Romun Munshi*, (2) in which the ruling of the Bombay case was approved by the Calcutta [313] Court. In the Bombay case Westropp, C. J., in delivering the judgment, we think, put a correct construction on s. 134 of the Contract Act (IX of 1872), that is to say, he held at page 650 of the report that the omission of a creditior to sue the principal debtor within three years from the date of the bond produced the legal consequence of the discharge of the principal debtor, but he also held, and in this we do not agree with that learned Judge, that the effect of s. 137 of the Contract Act is to make s. 134 inapplicable when the non-suing by the creditor on the debt within the period of limitation arose from his own forbearance. This latter view is a view also adopted by the Judges of the Calcutta Court, with which we do not agree. We think, as did Sir Michael Westropp, that it is quite plain that the legal consequence of the omission of a creditor to sue his debtor within the period of limitation would be the discharge of the surety, and it appears to us that s. 137 does not limit the effect of s. 134. In our opinion ss. 135 136 and 137 are founded upon the English law, and s. 137 is more a section by way of explanation and to prevent misconception as to the effect of s. 135 than a variation of the rule of law enunciated in s. 134. In our view s. 137 applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. The view of s. 137, which was adopted in Bombay and followed in Calcutta, is, in our opinion, inconsistent not only with s. 134, but with the policy of ss. 140 and 141. By s. 140 it is provided that when a guaranteed debt has become due, to take the case of a debtor only, the surety upon payment of the debt is invested with all the rights which the creditor had against the principal debtor. If the view adopted at Bombay be correct, that section applied to such a case as the present. The payment by the surety after the statutory period of limitation, so far as the debt was concerned, could not transfer to the surety any rights of the creditor against the principal debtor, for all those rights were barred at the time. Again, to take s. 141, it shows that the intention of the framers of the Act was that the surety should have the benefit of every security which the principal debtor had at the time the contract of surety was entered into. We fail to see what advantage it would [314] be to the surety to have the security which the creditor possessed against the principal debtor at the date when the contract of guarantee was entered into, if the creditor's right to sue upon

(1) 5 B. 647.

(2) 12 C. 330.

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the security had become barred by limitation before payment by the surety. According to the law of England on which the Contract Act is principally framed, at least with regard to the sections in connection with contracts of guarantee, a surety could in an action brought against by the creditor avail himself of any set off arising in the same transaction, of which the debtor might have availed himself if the creditor had brought the action against him. In our opinion the liability of the surety determined as soon as the liability of the principal debtor by the omission of the creditor was discharged. It appears to us that the view which we take is laid down in the judgment of his Court in *Hazari Lal* v. *Chunni Lal* (1). Holding the view which we do as to the law in this case, we allow the appeal and dismiss the action with costs. *Appeal allowed.*

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11 A. 314 (F.B.) = 9 A.W.N. (1889) 107.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

MUHAMMAD SULAIMAN KHAN AND OTHERS (*Judgment-debtors*) *v.* FATIMA (*Decree-holder*).* [18th January, 1889.]

Practice—Execution of decree—Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on appeal.

The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed.

Held by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the appellate Court, and that the decree had been altered by the first Court, which had no power to alter it.

Abdul Hayai Khan v. *Chunia Kuar* (2), referred to.

[315] *Held* by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed, could not be regarded as passed under s. 206 of the Civil Procedure Code but was an order passed in execution of decree and, as such, was appealable.

[R. 17 A. 478 (482) = 15 A.W.N. 109; 14 C.P.L.R. 92 (93); 9 C.W.N. 605 (607); D., 5 C.W.N. 192 (193) = 28 C. 177.]

[N.B. See in this connection, 11 A. 267, *supra*.]

THIS case was connected with *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3). Musammat Fatima obtained a decree against Muhammad Sulaiman Khan and others in the Court of the Subordinate Judge of Aligarh. On appeal, the decree was affirmed by the High Court on the 8th February, 1882. On the 18th July, 1885, an order was passed by the Subordinate Judge, on the application of the decree-holder, amending the original decree, which was defective in not clearly specifying the property to which it related. After the amendment had been made, the decree-holder applied for execution of the decree as amended. The judgment-debtors opposed this application, on the ground that the decree of which execution

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* First Appeal from Order No. 1882 of 1885.

(1) 8 A. 259. (2) 8 A. 377. (3) 11 A. 267.

was prayed was not the decree which could be executed. On the 29th August, 1885, the Subordinate Judge disallowed the objection, and directed execution of the decree as amended.

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FULL BENCH.

11 A. 314 = (F.B.) = 9 A.W.N. (1889) 107.

The judgment-debtors appealed to the High Court from this order, on the ground that the Subordinate Judge had no jurisdiction to amend the decree; and that the decree as amended could not be executed.

A preliminary objection was taken on behalf of the respondent to the hearing of the appeal on the ground that the Subordinate Judge's order was passed under s. 206 of the Civil Procedure Code, dealing with an objection to the amendment of the decree, and was therefore not appealable.

The Hon. Pandit *Ajudhia Nath* and Pandit *Harkishen Das*, for the appellants.

Mr. *Amir-ud-din*, for the respondent.

The Court gave judgment first upon the preliminary objection, as follows:—

STRAIGHT, J.—This has been filed as a first appeal from order in execution of decree, and the appellants are the judgment-debtors, [316] and the respondent the decree-holder. Mr. *Amir-ud-din*, the counsel for the respondent, takes a preliminary objection to the hearing of the appeal, on the ground that the order it assails was an order passed under s. 206 of the Civil Procedure Code, and dealt with an objection to the amendment of the decree. I dissent from that view. It seems to me that the order of the Subordinate Judge, which is the subject-matter of appeal here, was an order passed in execution of decree. An application to execute the decree had been made upon the 24th September, 1878, and subsequently to that application a variety of proceedings had taken place, the result of which was that, somewhere prior to June, 1885, the decree-holder had intimated her intention to obtain amendment of the decree, and ultimately, upon the 18th July, 1885, that decree was amended. On the 29th August, 1885, the matter came before the Subordinate Judge in the shape of an application for the purpose of proceeding with the execution of the amended decree, and it was in reference to that application for execution to proceed, that he determined by his order which is now impeached, the matter that was then before him. I do not, therefore, think that his order can, as Mr. *Amir-ud-din* contends, be regarded as an order passed under s. 206 of the Civil Procedure Code, in which case it would be an unappealable order, and only open to revision under s. 622 of the Code, but I regard it as an order passed in execution of a decree, from which an appeal has been properly preferred. This disposes of the preliminary point, and we shall in due course proceed with the determination of the appeal.

BRODHURST, J.—I am of the same opinion.

The hearing of the appeal was then proceeded with; and ultimately, on the 13th August, 1888, the appeal was referred to a full Bench, by the following order:—

STRAIGHT, J.—This case is connected with a reference which was before the learned Chief Justice, my brother Mahmood and myself, in which the question, to put it broadly, was whether, when once a case has gone in appeal to an appellate Court and been decided by such appellate Court, the lower Court could disturb or [317] amend the decree passed by it, under s. 206 of the Civil Procedure Code. The learned Chief Justice and myself have held that the decree of the appellate Court is the only decree which is capable of amendment under s. 206 of the Civil

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Procedure Code. The question raised by this appeal is in some sense connected with that reference to the learned Chief Justice, my brother Mahmood and myself.

But this raises the further question as to whether, a decree having been erroneously amended by a first Court after there has been an appeal, when such amended decree is sought to be put into execution, the Court asked to execute it can go into the question whether it has been properly or improperly amended.

In my opinion, having regard to a series of decisions of this Court, which have held that a Court executing a decree must take it as it finds it, and not enter into any question as to whether it was made with or without jurisdiction, the present appeal, should fail. But as there is a ruling of my brothers Oldfield and Brodhurst in *Abdul Hayai Khan* v. *Chunia Kuar* (1) taking a contrary view, I think it would be desirable that this case should be determined by a Bench consisting of the learned Chief Justice, my brother Brodhurst, and myself. I accordingly, subject to the learned Chief Justice's approval, direct that it should be so heard and determined.

BRODHURST, J.—I concur in referring the case to a Full Bench. The case again came on for hearing on the 18th January, 1889, when the following judgments were delivered by the Full Bench :—

JUDGMENTS.

EDGE, C. J.—In this case the decree of the late Subordinate Judge of Aligarh was an appeal to this Court confirmed on the 8th February, 1882, and on the 18th July, 1885, another Subordinate Judge altered the decree which had been confirmed, intending, no doubt, to bring it into accordance, from his point of view, with the judgment of the High Court. Whether the decree, as confirmed by the High Court, correctly represented the judgment of the High Court, is absolutely immaterial for present purposes. After the decree had been altered, application was made to execute the decree as altered. Objection was taken that that was not the [318] decree which could be executed. The Subordinate Judge of Aligarh disallowed the objection and ordered the altered decree to be executed. Hence this appeal here.

It has been decided in this Court that the Court executing a decree cannot alter the decree which it receives to execute. But it has been held by Mr. Justice Oldfield and my brother Brodhurst in the case of *Abdul Hayai Khan* v. *Chunia Kuar* (1) that when a decree-holder proceeds to execution it is open to the person against whom execution is prayed, to show that the decree which is sought to be executed is not the decree of the Court to be executed. It has also been decided that when a decree has been confirmed by an appellate Court the Subordinate Court cannot amend the decree. It has also been decided by this Court that when a decree has been confirmed by the appellate Court, the decree to be executed is the decree of the appellate Court. In this particular case there were two good objections to the execution, one was that it was not the decree of the appellate Court, and secondly, that the decree had been altered by the Subordinate Judge, who had no power to alter it. I think the appeal should be allowed and the order of the Subordinate Judge set aside. The appellants to get their costs in all the Courts.

(1) 8 A. 377.

STRAIGHT, J.—I am of the same opinion. It is now established beyond all question that upon the 29th August, 1885, the amended decree of which the Subordinate Judge directed the execution was not worth the paper it was written upon, because that amendment of it had been made by a Court not having power to make it. Consequently any execution upon the basis of that decree took place without authority or legal countenance and cannot be sustained. The plea in appeal is a well-founded plea, and I am of opinion that it should prevail. Therefore the result is that the order of the Subordinate Judge being set aside this appeal succeeds with costs.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight in decreeing the appeal with costs.

Appeal allowed.

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11 A. 319 (F.B.) = 9 A.W.N. (1889) 101.

[319] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Tyrrell.

HARDEI (*Plaintiff*) v. RAM LAL (*Defendant*).* [19th January, 1889.]

Registration—Act III of 1877 (Registration Act) ss. 49, 60—Certificate of Registration—Distinction between act of registering officer and conduct of parties—Certificate not invalidated and document not made inadmissible by erroneous procedure in presenting or admitting execution.

The word "registered" as used in s. 49 of the Registration Act (III of 1877), refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. s. 49, read with s. 60, only means that a document to be admissible in evidence, for the purposes of the former section, must be registered, *i.e.*, the officer must, under s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence; if he has not, or there has been no registration of the document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60, and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49.

Where, therefore, the lower appellate Court rejected as inadmissible in evidence under s. 49, a deed of gift of immoveable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (*a*)—*held* that the Court was wrong in so doing, and ought to have looked at and dealt with the document.

Har Sahai v. *Chunni Kuar* (1), *Ikbal Begam* v. *Sham Sundar* (2), *Bishunath Naik* v. *Kalliani Bai* (3), *Hussaini Begam* v. *Mulo* (4), *Sheo Shunkar Sahoy* v. *Hirdey Narain Sahu* (5), *Muhammad Ewaz* v. *Birj Lal* (6), *Sah Mukhun* v *Lal Panday* v. *Sah Koondan Lal* (7), *Majid Hosain* v. *Fazl-an-nissa* (8) referred to.

[Diss.—6 O. C. 9 (14); R.—20 A. 392, 26 A. 57 (59); 17 B 34. 23 M. 580. D.—18 M. 364 (367).]

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* Second Appeal No. 1382 of 1886

(1) 4 A. 4. (2) 4 A. 384. (3) 2 A.W.N. (1882) 175.
(4) 2 A.W.N. (1882) 183 (5) 6 C. 25. (6) 4 I. A. 166.
(7) 2 I. A. 210. (8) 16 I. A. 19.

1889 JAN. 19. — FULL BENCH. — 11 A. 319 (F.B.) = 9 A.W.N. (1889) 101.

THIS was a reference to the Full Bench by Straight and Brodhurst, JJ., of the determination of a second appeal. The order of reference was as follows :—

"The plaintiff is the widow of Har Narain, son of Bal Kishan, and she sues to enforce a deed of gift of a house, made in her favour by her father-in-law on the 1st December, 1885, upon the allegation that Bal Kishan having died on the 2nd December, 1885, the [320] defendant, a cousin of Bal Kishan, on the 24th February, 1886, wrongfully dispossessed her of the same. The defendant pleaded, among other matters, that he and Bal Kishan were members of a joint Hindu family ; that on the latter's death the property left by him devolved on the defendant ; that the plaintiff is therefore only entitled to maintenance ; that at the time of the alleged gift, Bal Kishan had lost consciousness, and that the deed of gift was not duly registered. The first Court found that the defendant and Bal Kishan were not joint, and that the deed of gift was executed by the latter. Upon the question of registration, the Munsif expressed himself as follows :—

" The facts are, that three days before his death, Bal Kishan, having got the deed written, entrusted it to Pandit Kashi Nath to get it registered. Pandit Kashi Nath explains the transaction as below :—

" 'I know Bal Kishan ; three days before his death he had a deed of gift written by Mannu Lal, which he entrusted to me to get registered, telling me that he could not go himself as he was seriously ill, and had dysentery. After his death, I had the deed registered. The same day when it was written, I went, but the Registrar had risen. Next day I went again, but the Tahsildar was not there, and the Peshkar had gone to look after supplies for the troops. On the third day, Bal Kishan died. Again in cross-examination, 'Bal Kishan handing the gift to me, told me to bring the Registrar to his house, and there and then get the deed registered. Bal Kishan had given me Rs. 10 to be paid to the Tahsildar as commission, which money I returned to Shivji Ram.' Now in these circumstances it was presented to the Registrar by Pandit Kashi Nath a few days after Bal Kishan's death, and was registered under para. 3 of s. 35, Registration Act. It is argued on behalf of the defendant that all that Bal Kishan directed Kashi Nath was to bring down the Registrar to his house, and there get it registered in his presence, and that his directions did not authorize Kashi Nath to have it registered after his death, in the manner Kashi Nath got it registered, so that Kashi Nath could not be an assign of Bal [321] Kishan. I think that the argument does not hold. The object for which the deed was entrusted to Kashi Nath was its registration, and if for the Tahsildar's absence from his office, it could not have been registered in the manner suggested by Bal Kishan, the only way in which it could be registered was the way in which it has been registered. Thus only could the object be accomplished by the only means available to Kashi Nath. I am of opinion that the deed was assigned to Kashi Nath for registration, he had the executant's authority for the purpose, and he was his assign."

" From the decision of the Munsif, the defendant appealed, and the learned Judge reversed his decision, holding that Pandit Kashi Nath was not an assign of the deceased Bal Kishan, within the meaning of s. 32 or s. 35 of the Registration Act, and that consequently the registration of the deed of gift, under which the plaintiff claimed, was void, and thus the deed of gift itself must be held to be void as not having been registered under s. 17, clause (*a*) of the Registration Act.

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"From this decision of the Judge, the plaintiff appealed to this Court, and the two points urged before us were—

"1. That the deed being in fact registered, any defect in the procedure with regard to its registration cannot invalidate such registration.

"2. That the registration was valid.

"It may be convenient to give a translation of the registration endorsement which runs in the following terms:—

"This document was presented for registration in the office of the Sub-Registrar of Khurja, in the district of Bulandshahr, on Tuesday, the 5th January, 1886, between 1 and 2 P.M. with an application under s. 35, Act III of 1877. The execution of this document was acknowledged on behalf of Bal Kishan, son of Budh Sen, Brahman, resident of Khurja, the deceased executant of the deed, who had died after executing and depositing the deed, by Pandit Kashi Nath, son of Shiu Parshad, Brahman, resident of Khurja, aged 45, the assign (*Mufabwazilat*) of the deed, and he [322] was identified by Mannu Lal, son of Jahangir Mal, caste Banya, and Bansidhar, Brahman."

The case came for hearing before a Full Bench consisting of Edge, C, J., and Straight and Tyrrell, JJ. On the 27th July, 1888, their Lordships passed the following order:—

"Before we can dispose of this reference, it is necessary that we should have findings recorded by the lower Court upon the following issues ;—

"1. Was the deed of gift executed by Bal Kishan ?

"2. Was the deed of gift delivered to Kashi Nath by Bal Kishan for the purpose of being registered ?

"3. Did Bal Kishan merely direct Kashi Nath to bring the Registrar to his house so that he, Bal Kishan, might personally effect registration, or did he give the deed to or leave it in the hands of Kashi Nath, so that it might be registered under any circumstances ?

"4. In presenting the deed of gift for registration, did Kashi Nath act *bana fide* and in the honest belief that in doing so he was carrying out the wishes and intentions of Bal Kishan ?

"The lower Court will also dispose of the questions of fact raised by the third, fourth and fifth pleas in the memorandum of appeal in the Court below."

The third, fourth and fifth pleas in the memorandum of appeal in the Court below were as follows :—

"3. The delivery of possession under the deed of gift is not shown, inasmuch as Bal Kishan used to live till his death in the disputed house. Even if the deed of gift be taken as genuine, it is invalid under the Hindu Law.

"4. The documentary evidence proves that the house in which the door and almirah of the appellant's house are fixed is the exclusive property of the appellant and has been all along in his possession. The decree of the lower Court for demolition of the door and window is entirely improper.

[323] "5. The evidence on record shows that the wall in which there is a window and an almirah, belongs to the house of the appellant and is his property. Therefore the plaintiff is not entitled to sue in respect of the constructions and changes therein."

On the remand, the District Judge of Meerut found, with reference to the issues remitted by the High Court, (i) that the deed of gift was executed by Bal Kishan, (ii) that the deed of gift was delivered to Kashi Nath by Bal Kishan for the purpose of being registered, (iii) that Bal

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Kishan intended that the deed should be registered under any circumstances, and (iv) that in presenting the deed for registration Kashi Nath acted *bona fide* and in the honest belief that in doing so he was carrying out Bal Kishan's wishes. In reference to the third, fourth and fifth pleas taken in the memorandum of appeal to the lower Court, the District Judge found (i) that the donee was living with the donor in the house prior to the donor's death, and that the necessity for any formal delivery of possession was therefore obviated, (ii) that the house in which the defendant's door and almirah were fixed had belonged to the donor Bal Kishan and the defendant Ram Lal jointly, and (iii) that the wall in question, since the death of Bal Kishan, belonged exclusively to the defendant.

The case now came before the Full Bench for disposal.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.

Mr. *G. T. Spankie* for the respondent.

JUDGMENT.

STRAIGHT, J.—This reference to the Full Bench which concerns the determination of the second appeal referred, involves three questions.

The first of these questions is, whether the deed of gift of the 1st December, 1885, was admissible in evidence as not being barred by any provision to be found in the Registration Act of 1877.

Secondly, whether any inference from the findings recorded in the Court below, or from any other materials, is warranted that the donee obtained possession under the gift.

[324] And thirdly, whether in regard to the finding of the learned Judge as to the division wall, the decision of the first Court should be modified.

The first of these questions is not *res integra*, as far as this Court is concerned, because a number of rulings more are less bearing upon it have been referred to by Pandit *Sundar Lal* who appeared on behalf of the appellant. Those rulings are *Har Sahai* v. *Chunni Kuar* (1), *Ikbal Begam* v. *Sham Sundar* (2), *Bishunath Naik* v. *Kalliani Bai* (3), *Husaini Begam* v. *Mulo* (4). In those rulings a decision of the Calcutta High Court in *Sheo Shunkar Sahoy* v. *Hirdey Narain Sahu* (5) was referred to, approved and followed, and in one of those rulings reference was also made to a judgment of their Lordships of the Privy Council, *Muhammad Ewaz* v. *Birj Lal* (6). In this connection I may also refer to another ruling of their Lordships of the Privy Council, a portion of which is recited in *Sah Mukhun Lall Panday* v. *Sha Koondun Lall* (7).

The determination of the question as to whether under s. 60, para. 2 of the Registration Act, the deed of gift of the 1st December, 1885, was duly registered, turns upon the meaning to be attached to s. 49 of the same Act, which must be looked at to see whether it in anyway cuts down the operation of the second paragraph of s. 60 as to the effect the certificate endorsed upon a document by a registering officer shall have to show it was duly registered. S. 49 provides that no document required by s. 17 to be registered, shall, among other things, be received as evidence of any transaction affecting such property, "unless it has been registered in accordance with the provisions."

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(1) 4 A. 14 (2) 4 A. 384. (3) 2 A.W.N. (1882), 175. (4) 2 A.W.N. (1882), 183. (5) 6. C. 25. (6) 4 I. A. 166. (7) 2 I. A 210.

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I have given the construction and language of this section the best consideration I can, and in my opinion the word "registered" as used in s. 49 has reference to the act of registration by the registration officer, and is not directed to or concerned with any matter of procedure or conduct of parties seeking registration, which is to [325] be guided and governed by those provisions of the registration law which direct what they should do for the purpose of effecting or bringing about registration of a document. I take s. 49, read in conjunction with s. 60, to mean nothing more than this, that a document to be admissible in evidence for the purposes of s. 49 must be registered, that is to say, the registration officer must under s. 60 have put upon that document the certificate which s. 60 requires him to put, and if he has done so the document bearing such certificate under s. 60 becomes admissible in evidence, but if he does not do so or there has been no registration of such document, then the document cannot be received as evidence because it has not been registered. This view is not without authority because I observe that Sir Barnes Peacock in the course of his judgment in *Sah Makhun Lal Panday* v. *Sah Koondun Lall* (1) observes :—"Again it is not clear that the words 'unless it shall have been registered in accordance with the provisions of this Act' in s. 49, are not especially as regards strangers to the deed, confined to the procedure on admitting to registration without reference to any matters of procedure prior to registration or to the provisions of ss. 19, 21, 36 of the Act or other provisions of a similar nature. In considering the effect to be given to s. 49, that section must be read in conjunction with s. 88, and with the words of the heading of part 10, 'of the effect of registration and non-registration.' Now, considering that registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed shoud be null and void by reason of a non-compliance with the provisions of ss. 19, 21 or 36 or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words, 'defect in procedure' in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through [326] any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register the mistake may be rectified upon appeal under s. 83 or upon petition under s. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights. It is unnecessary, however, to express any opinion on this point, as it has been decided between these parties that, notwithstanding the first registration, the deed must be considered as unregistered. Neither of the parties appealed from the decision, and therefore whether right or wrong in point of law, they are both bound by it in this suit, and it must be assumed as against them in this appeal that the first registration was a nullity."

It is to be remarked that there was no specific decision upon the precise point involved in the present case, but nevertheless their Lordships of the Privy Council do seem to have broadly stated their opinion that

(1) 2 I.A. 210.

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non-compliance with the provisions of s. 36, that is to say, non-attendance of the executant of an instrument before the Registrar, and his registering the instrument under those circumstances, would not on that account render his proceedings invalid.

Again it seems to me that the ruling of their Lordships of the Privy Council in the case of *Majid Hosain* v. *Fazl-un-nissa* (1) favours the view that I have been putting forward. Their Lordships in that case thought that although there had not been a strict compliance with the specific directions of the rules laid down in the Registration Act, a party must go to the office of the Registrar and present the instrument there, nevertheless where the Registrar had gone to the house of the executant and having ascertained all necessary particulars, had then registered the instrument, such a registration was a substantial compliance with the provision of the registration law. Indeed, to use the words of their Lordships, **[327]** "This registration, in fact, took place at the office of the pargana Registrar, though the officer attended to receive the deed to receive its acknowledgment, and to compare the deed with the copy. He brought it all to his own office and the registration is, in fact, the recording of the copy in the office of the pargana Registrar, all the other requisites provided by the rule having been othewise complied with."

That case is an authority for this, that though a direction in the statute to parties seeking registration of a document had not in terms been complied with, nevertheless the certificate of the Registrar was held to be sufficient and satisfactory proof of due and proper registration.

In the present case we have before us a specific certificate from the Registrar to the effect that the particular document, *i.e.*, the deed of gift, was registered. It is not necessary for me to go at length through the reasons that seem to underlie the rulings of their Lordships of the Privy Council, for they are very fully stated in *Muhammad Ewaz* v. *Birj Lal*, (2) and Sir Montague E. Smith has explained in that case how the object of the registration law being to afford notoriety to instruments relating to immoveable property, the circumstance that a document has been, in fact, registered, satisfies the object at which the statute aimed. Here the deed of gift was registered on the 5th of January, 1886, the object of the registration law was satisfied, and there was notice from that time that such instrument was in existence. I am therefore of opinion that this document, bearing as it did a registration certificate, was registered within the meaning of s. 60 of the Registration Act, that under para. 2 of that section it became admissible in evidence, and that there is nothing in s. 49 which militates with that view or interferes to prevent the operation of the second paragraph of s. 60. I think that the learned Judge was wrong in holding that this document was not admissible in evidence, and that the Court below ought to have looked at it and dealt with it to the extent it deserved.

[328] The second question is, are there materials before us which sustain the inference that the donee Musammat Hardei obtained possession under the deed of gift. Looking to the matters detailed by the learned Judge and to all facts stated in the judgment, it seems to me they are consistent with the plaintiff having received possession under the deed of gift, at any rate, there are no facts inconsistent with that view, and I think we may fairly assume that she did have possession.

With regard to the finding as to the wall, that seems to be more or less in accordance with what was found by the first Court. I would

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(1) 16 I. A. 19. (2) 4 I. A. 166.

suggest that the proper order to be made is that the appeal of the plaintiff being allowed and the decree of the learned Judge set aside, that of the first Court should be restored, and the plaintiff appellant will have her costs in all the Courts.

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EDGE, C. J.—I am of the same opinion, and for the same reasons as given by my brother Straight.

TYRRELL, J.—I concur. *Appeal allowed.*

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11 A. 328=9 A.W.N. (1889) 108.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IMTIAZ BANO (*Plaintiff*) v. LATAFAT-UN-NISSA AND OTHERS (*Defendants*).* [28th January, 1889.]

Partition—Question of title—Act XIX of 1873 (*North-Western Provinces Land Revenue Act*), s. 113—*Appeal from order under first part of* s. 113—*Practice—Successful Preliminary objection to appeal—Costs.*

No appeal lies to the High Court from a decision of a Collector or Assistant Collector under the first part of s. 113 of the North-Western Provinces, Land Revenue Act (XIX of 1873), declining to grant an application for partiton until the question in dispute has been determined by a competent Court.

Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection. *Ex-parte Brooks* (1) and *ex-parte Blease* (2) referred to.

[329] THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. *T. Conlan* and Mr. *G. E. A. Ross*, for the appellant.

Mr. *A. H .S. Reid* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This appeal has arisen out of an application in the Revenue Court for partition. The Deputy Collector, having looked into the objections which were filed and the matters to which those objection referred, exercised the discretion that was given to him under the earlier portion of s. 113 of the North-Western Provinces Land Revenue Act (XIX of 1873) and declined to grant the application until the questions in dispute had been decided by a competent Court. He did not adopt the other alternative given him by the section of proceeding to enquire into the merits of the objections, which would have necessitated his recording a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition and any other party or parties who may be affected thereby. The judgment or whatever it may be called of the Deputy Collector is mistranslated in the paper book before us. As a matter of fact, in the vernacular record, the phraseology is that used in the vernacular translation of the earlier portion of s. 113.

A preliminary objection has been taken on behalf of the respondents that the appeal does not lie. We are of opinion that that objection must

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* First Appeal, No. 107 of 1887, from a decree of Munshi Gursaran Das, Deputy Collector of Budaun, dated the 22nd May, 1887.

(1) L.R. 13 Q.B.D. 42. (2) L.R. 14. Q.B.D. 123.

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prevail, there being no appeal to us from a declining to grant the application under the earlier portion of s. 113. We are asked by the appellant to deprive the respondents of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection that has now prevailed. Two English cases in bankruptcy have been cited as authorities, which it is contended that we should follow. The first is *ex-parte Brooks* (1) and the other is *ex-parte Blease* (2). In each of those cases the preliminary objection only required to be stated to succeed. We, however, see no reason to depart from the practice of this Court [330] in these matters. We do not see any reason why we should follow what apparently is the special practice of Courts in England in deciding bankruptcy appeals. The appeal is dismissed with costs.

Appeal dismissed.

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11 A. 330=9 A.W.N. (1889) 77.

APPELLATE CIVIL.

Before Mr. Justice Straight, and Mr. Justice Brodhurst.

HAR SARAN DAS (*Plaintiff*) *v.* NANDI AND ANOTHER (*Defendants*).*
[29th January, 1889.]

Hindu law—Hindu widow—Re-marriage—Act XV of 1856, *s.* 2*—Re-marriage of widow who could have re-married before the Act was passed.*

Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry who could not previously have done so, and s. 2 applies to such persons only.

Held, therefore that a widow belonging to the sweeper caste, in which there is not, and in 1856 was not, any obstacle by law or custom against the re-marriage of widows, did not by marrying again forfeit her interest in the property left by her first husband; and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation.

[Diss., 22 B. 321 (326, 328); 24 B. 89 (92, 94); 8 C.L.J. 542 (545); 22 C. 859 (596); N.F., 16 C.P.L.R. 99; Appl., 20 A. 476 (477); 115 P.R. 1900=29 P.L.R. 1901; R., 29 A. 122=3 A.L.J. 729=A.W.N. (1906) 299; 31 A. 161 (166)=6 A.L.J. 107; 38 C. 862 (871)=13 C.L.J. 558=15 C.W.N. 579=10 Ind. Cas. 69 (73); 9 C.P.L.R. 47 (48); 8 N.L.R. 128.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Pandit *Moti Lal Nehru*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit brought by the plaintiff before us under the following circumstances:—Prior to the year 1884, the defendant Musammant Nandi was married to a man of the name of Kashmiri, who, it is alleged, had monetary transactions with the plaintiff. He died, and on the 14th December, 1884, Musammat Nandi made a hypothecation bond for the consideration of a sum of Rs. 200 in respect of two

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* Second Appeal, No. 1084 of 1887, from a decree of Maulvi Saiyid Muhammad, Subordinate Judge of Saharanpur, dated, the 14th April, 1887, confirming a decree of Babu Ganga Saran, Munsif of Saharanpur, dated the 20th August, 1886.

(1) L.R. 13 Q.B.D. 42. (2) L.R. 14 Q.B.D. 123.

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kothas which had belonged to her deceased husband, Kashmiri. Subsequent to the execution of the bond defendant married a person of the name of Bhujjo, and afterwards the plaintiff brought a suit upon the hypothecation bond of the 14th December, 1884, against the defend-[331]ant, and obtained a decree for enforcement of lien, and in execution of the decree proceeded to attach the two kothas hypothecated to him. Thereupon the two other defendants, Bansi, and Bholu, as brothers of Kashmiri, objected to such attachment upon various grounds, and the Court executing the decree accepted those objections and released the attachment. Thereupon, on the 24th July, 1886, the plaintiff instituted the present suit, by which he seeks to avoid the order releasing the attachment and to be placed in a position to bring the property to sale. It is sufficient, for the purpose of dealing with the appeal, to say that the suit was resisted by the two defendants, Bansi and Bholu, upon the ground that the bond in favour of the plaintiff was not executed by Musammat Nandi in respect of any debt due or owing from Kashmiri; and, secondly, that, by the circumstance that Mussammat Nandi had married a second time, any interest which she acquired upon the death of her husband, Kashmiri, in the two kothas had been forfeited, and had passed to the defendants. As to the first of these two points, both the Courts below have found that the plaintiff has failed to establish that the bond transaction of 1884 was in respect of any debt due or owing from Kashmiri, or that, if it was, the debt was not, in fact, owing; and that, therefore, there was no right as against the immoveable property left by him to recover the amount. Both the Courts have also, held that, under s. 2 of Act XV of 1856, the rights and interests which Musammat Nandi acquired from her deceased husband, Kashmiri, were by her second marriage to Bhujjo forfeited, and upon these grounds the plaintiff's suit was dismissed. From the decision of the Subordinate Judge this appeal has been preferred; and as to the first ground upon which the decision was passed, it cannot be assailed by the pleader on behalf of the plaintiff, because it relates to a finding of fact; and it must, therefore, be taken that the transaction recorded by the bond of 1884 was a transaction purely between Musammat Nandi in respect of an obligation of her own to the plaintiff; and the transaction, therefore, in no way binds any permanent interest in her husband's two kothas.

[332] But the learned Pleader on behalf of the plaintiff says that the Courts below have placed a wrong construction upon s. 2 of Act XV of 1856, and I agree with him. It is admitted that the woman Nandi was of the sweeper caste, and in that caste there is no legal obstacle or hindrance, either by law or custom, or otherwise, nor is any suggested, against remarriage; and it must be taken that this condition of things has been existing in the caste for years past, and was existing in the year 1856. Accordingly, when Musammat Nandi married Bhujjo, she did what in her caste never had been and was not prohibited by the law to which she was subject, and her marriage was a good and valid marriage. I do not think that, looking to the preamble to Act XV of 1856, which refers to Hindu widows, it was ever intended to apply to persons in the position of Mussammat Nandi, or to place under disability or liability persons who could marry a second time before the Act was passed The Act was passed for the purpose of enabling persons to marry who could not remarry before the Act, and s. 2 only applies to such persons. By her second marriage, Mussammat Nandi, in my opinion, did not forfeit her interest in the two kothas. Under these circumstances, the plaintiff is entitled,

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as against his judgment-debtor, to enforce his obligation, and to bring to sale her interest therein, whatever it is. I accordingly decree the appeal, and reversing the decree of the two lower Courts, direct that the plaintiff's suit do stand decreed, and it be directed that he is entitled to bring to sale in execution of his decree against Mussammat Nandi such interest as she had in the two kothas. The plaintiff will receive his costs of the appeal in this Court. In the two lower Courts the parties will pay their own costs.

BRODHURST, J.—I concur. *Appeal allowed.*

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[333] *Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.*

GANGA PRASAD (*Auction-Purchaser*) *v.* JAG LAL RAI AND OTHERS (*Objectors*).* [5th March, 1889.]

Execution of decree—Sale of immoveable property in execution—Sale held before expiration of thirty days from the proclamation—Civil Procedure Code ss. 290, 311. Application by judgment-debtor to set aside sale—"Illegality"—"Material irregularity"—Proof of substantial injury, whether necessary.

Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor,—*held*, by EDGE, C. J., (BRODHURST, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an *illegality*, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury.

Held, by BRODHURST, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury *by reason of such irregularity.*

Olpherts v. *Mahabir Pershad Singh* (1). *Mohunt Megh Lall Pooree* v. *Shib Prashad Madi* (2) *Kalytara Chowdhrain* v. *Ramcoomar Goopta* (3), *Tripura Sundari* v. *Durga Churun Pal* (4), *Bonamali Mozumdar* v. *Womesh Chunder Bundopadhya* (5), *Bandy Ali* v. *Madhub Chunder Nag* (6), *Nathu* v. *Harbhuj* (7), *Jasoda* v. *Mathura Das* (8), and *Bakshi Nand Kishore* v. *Malak Chand* (9) referred to.

[N.F., 21 A. 311=19 A.W.N. 84 ; 14 M. 227 (228); R.,12 A. 96 (98); 12 A. 440 (F.B.)=10 A.W.N. 103 ; 12 A. 510 (518) (F.B.) ; 18 A. 37 (40) ; 21 A. 140 (142) ; 9 A. 196 (200) (P.C.) : 5 C.L.J. 687 (690) ; 5 M.L.J. 70 (73) ; D., 18 C. 422 (426).]

THE facts of this case are sufficiently stated in the judgment of Edge, C. J.

Mr. *G. T. Spankie* for the appellant.

Mr. *Amiruddin*, for the respondents.

JUDGMENT.

EDGE, C. J.—This is an appeal from an order of the Subordinate Judge of Ghazipur of the 25th May, 1888, setting aside an auction-sale.

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* First Appeal, No. 132 of 1888, from an order of Maulvi Syed Akber Husain. Subordinate Judge of Ghazipur, dated the 25th May, 1888.

(1) 10 I.A. 25. (2) 7 C. 34. (3) 7 C. 466. (4) 11 C. 74. (5) 7 C. 730. (6) 8 C. 932. (7) 5 A.W.N. (1885) 304. (8) 9 A. 511. (9) 7 A. 209.

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[334] The property in question was not property of the kind mentioned in the proviso to s. 269 of the Code of Civil Procedure: it was immoveable property.

The copy of the proclamation had been fixed up, on the 3rd December, 1887, in the court-house of the Judge who had ordered the sale. Without the consent in writing of the judgment-debtors, the sale was held on the 20th December, 1887; that is, within thirty days from the 3rd December, 1887.

The judgment-debtors applied to the Subordinate Judge to set aside that sale, on the ground that it had been held before the expiration of thirty days from the date when the proclamation had been fixed up in the court-house of the Judge who had ordered the sale. There were other grounds alleged in support of the application, but they need not be considered now.

The Subordinate Judge set aside the sale on the principal ground to which I have referred. From the order of the Subordinate Judge the auction-purchaser brought this appeal.

There was no evidence that the judgment-debtors had suffered any substantial injury by reason of the sale having taken place within thirty days from the date of the fixing up of the proclamation.

Mr. *Spankie* on behalf of the appellant contended that what had taken place was merely an irregularity within the meaning of s. 311 of the Code of Civil Procedure, and as there was no evidence that the judgment-debtors had sustained any substantial injury, the Subordinate Judge had no power to set aside the sale.

Mr. *Spankie* relied upon *Olpherts* v. *Mahabir Pershad Singh* (1). *Nathu* v. *Harbhuj* (2), *Mahunt Megh Lall Pooree* v. *Shib Pershad Madi* (3) *Kalytara Chowdhrain* v. *Ramcoomar Goopta* (4), *Bonomali Mozumdar* v. *Woomesh Chunder Bundopadhya* (5), *Bandy Ali* v. *Madhub Chunder Nag* (6), and *Tripura Sundari* v. *Durga Churn Pal* (7). Mr. *Amiruddin* for the respondents contended that the [335] holding of a sale in contravention of the provisions of s. 290 of the Code of Civil Procedure was more than irregularity within the meaning of s. 311; that in such a case the sale was an unauthorized and illegal sale, and that it was unnecessary to prove that any substantial loss had been sustained by the judgment-debtors by reason of a sale which had been illegally and not merely irregularly held.

Mr. *Amiruddin* relied upon *Bakhshi Nand Kishore* v. *Malak Chand* (8), *Banke Lal* v. *Muhammad Husain Khan* (9), and *Jasola* v. *Mathura Das* (10).

Before discussing the authorities, it is advisable to consider whether s. 290 is merely directory as to procedure, or does not absolutely prohibit such a sale as was held here. That section is as follows:—" Except in the case of property mentioned in the proviso to s. 269, *no sale under this Chapter shall*, without the consent in writing of the judgment-debtor, *take place* until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in case of moveable property, calculated from the date on which the copy of the proclamation has been fixed up in the court-house of the Judge ordering the sale."

I do not see how the Legislature could have used more precise and

(1) 10 I. A. 25. (2) 5 A.W.N. (1885) p. 304. (3) 7 C. 34.
(4) 7 C. 466. (5) 7 C. 730. (6) 8 C. 932. (7) 11 C. 74.
(8) 7 A. 289. (9) 7 A.W.N. (1887) 32. (10) 9 A. 511.

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apt language than that contained in s. 290 to prohibit absolutely the holding of such a sale as that in question here.

The sale in question was held in direct contravention of the express prohibition enacted in s. 290. It was a sale which not only was not authorized by any section of the Code of Civil Procedure, but was expressly prohibited by s. 290 of that Code, and was, in my opinion, an illegal sale, and not merely a sale in the publishing or conducting of which there was a material irregularity within the meaning of s. 311 of the Code. In my opinion it would be a misapplication of language to describe a sale which was illegal as merely irregular.

In *Olpherts* v. *Mahabir Pershad Singh* (1), *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi* (2), *Kalytara Chowdrain* v. *Ram-*[336]*coomar Goopta* (3), and *Tripura Sundari* v. *Durga Churn Pal* (4), the omissions and acts which were relied on were clearly irregularities in procedure and not illegalities.

In *Bonomali Mozumdar* v. *Woomesh Chunder Bundopadhya* (5) the facts of the case are not very clearly stated in the report, but I infer that one of the objections there was that the sale in that case had been held in contravention of Act X of 1877. In that case Field and Prinsep, JJ., expressed an opinion that the facts, if true, would have amounted to an irregularity within the meaning of s. 311 of that Act.

In *Bandy Ali* v. *Madhab Chunder Nag* (6) Macpherson and White, JJ., held that the judgment-debtor before them had consented to the sale in that case being held within and not after thirty days from the date of the proclamation of the notice; he had in fact purchased the property at the sale. It is not clear from the report whether or not those learned Judges considered that the holding of the sale within the thirty days was an irregularity.

In *Nathu* v. *Harbhuj* (7) my brother Straight certainly described and treated the holding of a sale of immoveable property without the consent in writing of the judgment-debtor within thirty days from the publication in the court-house of the Judge as " a grave irregularity." He found that there had been substantial injury. The case before him was apparently argued on the basis of s. 311 applying to it, and apparently it was not suggested in argument that the sale was prohibited and illegal. My brother Straight's attention does not appear to have been drawn to *Bakshi Nand Kishore* v. *Malak Chand* (8), in which Oldfield, J., and my brother Mahmood had set aside, holding that infringement of the rule in s. 290 vitiated the sale and was an illegality vitiating the sale and something more than a material irregularity in publishing and couducting a sale to which s. 311 refers.

[337] In *Jasoda* v. *Mathura Das* (9) although I expressed myself in rather loose language in coupling an omission to comply with the requirements of s. 287 with an act which was in absolute contravention of s. 290, I then, however, expressed my thorough agreement with the judgment in *Bakshi Nand Kishore* v. *Malak Chand* (8).

It has been contended that unless s. 311 applies to the case of a sale held in contravention of s. 290, there is no other section which would enable a judgment-debtor to raise the objection, and such seems to have

(1) 10 I. A. 25. (2) 7 C. 34. (3) 7 C. 466. (4) 11 C. 74. (5) 7 C. 730. (6) 8 C. 932. (7) 5 A.W.N. (1885), 304. (8) 7 A. 289. (9) 9 A. 511.

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been the opinion of Field and Prinsep, JJ., in *Bonomali Mozumdar* v. *Woomesh Chunder Bundopadhya* (1).

The Legislature may not have contemplated that Judges and officers acting under the powers conferred upon them by the Code of Civil Procedure would, under cloak of such powers, order or permit sales which were expressly prohibited by s. 290, and consequently did not frame a section expressly dealing with sales held in contravention of the provisions of s. 290. Irregularities in procedure must occur as long as men are liable to make mistakes, and such irregularities are expressly provided for.

I think, however, impliedly, although probably not expressly, the Code of Civil Procedure provides for objections like that in this case.

By s. 588 (16) an appeal is given from orders under "the first paragraph of s. 312, or s. 313, for confirming or setting aside or refusing to set aside a sale of immoveable property.

The first paragraph of s. 312 is as follows :—"If no such application as is mentioned in the last preceding section be made or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser."

S. 588 therefore gives an appeal from an order confirming a sale made under the first paragraph of s. 312, whether an application under s. 311 had or had not been made to the Court which confirmed the sale. It consequently contemplates that objections on other [338] grounds than those mentioned in s. 311 may be taken to a sale and may be made grounds of appeal against an order confirming a sale.

S. 588 (16) provides expressly for an appeal against an order made under s.313 consequently I assume that the grounds other than those arising under s. 311 which may be made on appeal against an order under the first paragraph of s. 312 do not include grounds which might otherwise arise under s. 313. It would, to my mind, involve an absurdity and a scandal to the law to hold that a Court which had the carrying out of a sale under the Code must, unless substantial injury be proved, confim a sale which was prohibited by the statute and which consequently was illegal.

In conclusion, I am of opinion that the sale in this case was illegal, that it was open to the judgment-debtor to object to the sale on the ground of such illegality, and that this appeal should be dismissed and the order appealed against be affirmed with costs here and below. The appeal is dismissed and the order below confirmed with costs under s. 575 of the Code of Civil Procedure.

BRODHURST, J.—In this case of execution of decree that was heard by the Subordinate Judge of Ghazipur on the 25th May, 1888, the judgment-debtor took three objections to the sale.

The Subordinate Judge, for reasons that he gave, disallowed objections Nos. 1 and 2. The third objection was as follows :—"Thirty days had not elapsed to the affixing of the notification at the Court when the sale took place."

The Subordinate Judge allowed this objection, recording the following remarks and order :—

"The third objection should certainly be allowed, because the sale notification was affixed to the Court gate on 3rd December, 1887, and the sale was held on 20th December, 1887, therefore according to the ruling made in the case of *Jasoda* v. *Mathura Das* (2) on 23rd March, 1887,

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(1) 7 C. 730. (2) 9 A. 511.

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the sale was improperly held and, in the absence of direct proof as to actual loss, should be set aside. Ordered that the sale held on the 20th December, 1887 be set [339] aside; the costs be charged to the decree-holder. The auction-purchaser duly to get back the sale consideration."

The case now comes before us as a first appeal from the Subordinate Judge's order, and the plea that has been taken and that is supported by Mr. *Spankie* is that "the lower Court should not have set aside the sale without proof on the part of the judgment-debtor that he suffered substantial injury, and on this point no evidence was given."

The ruling referred to by the Subordinate Judge is reported not only in the Weekly Notes for 1887, p. 145, but also in the I.L.R. 9 All. 511. It is by the learned Chief Justice and my brother Mahmood, and they both appear at first sight to have followed a judgment delivered by Mr. Justice Oldfield and concurred in by Mr. Justice Mahmood in *Bakhshi Nand Kishore* v. *Malak Chand* (1).

The judgment is as follows:—" The infringement of the rule in s. 290 of the Civil Procedure Code vitiates the sale. It is an illegality vitiating the sale, and is something more than a material irregularity in publishing and conducting a sale to which s. 311 refers. The sale is set aside and the appeal decreed with costs."

This judgment is very brief, and it gives no reasons for the conclusions arrived at, but the meaning of it apparently is that non-fulfilment of the provisions of s. 290 of the Civil Procedure Code is something more than a material irregularity in publishing and conducting a sale to which s. 311 refers; that it is an illegality; that s. 311 is in nowise applicable to an illegality of the kind referred to, and that such an illegality of itself renders a sale void. The Legislature however has not enacted, as it might have done, that non-compliance or failure to fully comply with the provisions of s. 290 will of itself render a sale of immoveable property void, and if an illegality of the kind noticed is, as held in the rulings above mentioned, even something more than a material irregularity as referred to in s. 311, the Legislature cannot but have intended to provide a prompt remedy for it also.

[340] In the case of *Jasoda* v. *Mathura Das* (2), the learned Chief Justice and my brother Mahmood delivered separate judgments. They both agreed in reversing the judgment of the lower Court and in setting aside the sale of immoveable property which that Court had confirmed; but whilst the Chief Justice entirely approved of the judgment that was delivered by Mr. Justice Oldfield for himself and his learned colleague in the case of *Bakhshi Nand Kishore* v. *Malak Chand* (1), Mr Justice Mahmood appears to have almost completely changed his opinion as to the law on the subject: for though in the first judgment he held that the infringement of the rule in s. 290 is an illegality vitiating the sale and something more than a material irregularity in publishing and conducting a sale to which s. 311 refers, in the later judgment he considers non-compliance with the provisions of s. 290 a material irregularity within the meaning of s. 311, and the only doubt he entertains is "whether material irregularities such as those found in this case are not in themselves sufficient within the meaning of the first paragraph of s. 311 of the Code of Civil Procedure to justify a Court in setting aside a sale, without inquiring whether such material irregularity had resulted in substantial injury within the meaning of the second paragraph of the section."

(1) 7 A. 289. (2) 9 A. 511.

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Mr. Justice Mahmood also observes:—"I think an argument might well be addressed in support of a contention that material irregularity is, *ipso facto*, fatal to a sale. I only wish to add on this point with reference to the judgment of Mr. Justice Oldfield in the case above referred to, that I concurred without expressing any definite opinion whether a sale that infringes the rule of thirty days provided by s. 290 would not in itself be a sale subject to such a material irregularity as the earlier part of s. 311 contemplated. I have considered it necessary to say this with reference to the argument insisted upon before us on behalf of the respondent. The question in this form does not really arise, because as the learned Chief Justice has said, it is impossible for us as a Court of first appeal dealing with facts as well as law, to hold as a question of [341] fact, that a sale held under such conditions as the sale in this case, ever resulted otherwise than in a substantial injury to the judgment-debtor within the meaning of the last part of s. 311 of the Code of Civil Procedure. I concur with the learned Chief Justice."

It is obvious that the judgment is on a point of law in conflict with the previous ruling of Oldfield and Mahmood, JJ., and with the judgment of the Chief Justice which follows that ruling.

I concur with my brother Mahmood in his later judgment that the infringement of the rule in s. 290 is a material irregularity within the meaning of s. 311, but I am unable to follow him in other parts of his judgment with regard to s. 311. His remarks relating to paragraph 2 of this section were probably made without having heard full arguments on the subject, and may be considered as *obiter dicta*.

Mr. *Spankie* by his references to the law and to the rulings of the Calcutta High Court on a precisely similar point and to a ruling of the Privy Council on an analogous question, has, I think, left but little room for doubt as to the meaning of the statute.

The case in point is a sale of immoveable porperty before the expiration of thirty days from its having been proclaimed, and it undoubtedly comes under s. 290, chapter XIX of the Civil Procedure Code. S. 311 is in the same chapter which is headed "of the execution of decrees," and this latter section is also in division (c) "Rules as to immoveable property."

The rule referred to in s. 290 is not invariable, for if the judgment-debtor gives his consent in writing, the sale of immoveable or moveable property may take place before the expiration of thirty days and fifteen days respectively. As, then, the Court can, with the written consent of the judgment-debtor and presumably for his advantage, order a sale of either description of property to take place before the expiration of the usual time, it is, I think, reasonable that the Court, when the judgment-debtor applies to it to set aside a sale on the ground that the full period referred to in s. 290, has through an oversight or otherwise not expired, should require [342] the applicant to prove to its satisfaction that he has sustained substantial injury by reason of the irregularity.

I may here add that though the word "illegality", does not of course include an "irregularity", the latter word as used in s. 311 of the Civil Procedure Code is, I think, wide enough to include an illegality, and was probably there employed to avoid surplusage. In support of this opinion I notice that in Webster's Dictionary "irregularity" is first described as the state of being irregular, and that one of the meanings of irregular is given as "not in conformity to laws human or divine."

Some of the meanings of "material" are "important." "momentous," "essential," "of consequence," "not to be dispensed with."

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The periods during which the sale of immoveable and moveable property are required to be proclaimed in the Judge's court-house are both stated in s. 290. If a sale of immoveable property has, owing to a miscalculation, taken place after the expiration of only twenty-nine days instead of thirty days, or if, as possible in this case, owing to confusion between the periods required for the two different kinds of property, that for moveable property had only just been exceeded, in either of these cases there would, in my opinion, have been a material irregularity in publishing the sale within the meaning of s. 311, but in neither case could the sale be set aside unless the applicant was able to prove to the satisfaction of the Court that he had sustained substantial injury by reason of the irregularity.

In my opinion then infringement of the rule in s. 290 of the Civil Procedure Code does not of itself vitiate a sale, but it is a material irregularity in publishing the sale which is referred to in s. 311 of the Code.

The meaning of s, 311 is, I think, quite clear. The two paragraphs of the section must be read and considered together: one is of no force without the other. If the Court, on application to set aside a sale of immoveable property, finds that there has been [343] a material irregularity, in publishing or conducting the sale, it will then have to decide whether the applicant has sustained substantial injury in consequence of the material irregularity, for "no sale shall be set aside on the ground of irregularity, unless the applicant proves to the satisfaction of the Court that he has substained sustantial injury by reason of such irregularity."

The view is supported by ruling of Division Benches of the Calcutta High Court in the following cases:—*Mohunt Megh Lall Pooree* v. *Shib Preshad Madi* (1), *Bonomali Mozumdar* v. *Woomesh Chunder Bundopadhya* (2), *Bandy Ali* v. *Madhub Chunder Nag* (3).

There are also several other rulings of the same High Court to a similar effect, as also a ruling of a Bench of this Court: but the only other ruling to which, I think, special reference is called for is that of their Lordships of the Privy Council in *Olpherts* v. *Mahabir Pershad Singh* (4).

The head note of this judgment is as follows:—"In order to set aside an execution-sale under s. 311 of Act X of 1887 there must have been material irregularity in publishing or conducting it, and the applicant must further prove substantial injury in consequence of the irregularity. *Held*, that he not stating the amount of Government revenue in the proclamation of sale is an irregularity which may be properly (*i.e.*, in the Court of first instance) objected to; but if inadeqacy of price is relied upon as substantial injury, such injury must be proved, under s. 311, to have occurred in consequence of the irregularity, and cannot be assumed to have so occurred by the appellate Court in the absence of evidence."

The appeal to the privy Council was from a judgment of the High Court of Calcutta, dated 22nd April, 1881, reversing an order of the officiating Subordinate Judge of Tirhoot of the 26th September 1880, which disallowed the petitions of objection filed by the respondents

[344] "The application was made under s. 311 of the Civil Procedure Code of 1877 'to set aside a sale of certain property in execution of a decree in consequence of irregularity.' The principal irregularity complained of was that no notification of the sale was properly published'"

(1) 7 C. 34. (2) 7 C. 730. (3) 8 C. 932. (4) 10 I.A. 25.

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The sections of Act X of 1877 that are referred to in the judgment of their Lordships of the Privy Council are ss. 286, 287 and 311; those sections are reproduced word for word in ss. 286, 287 and 311 of Act XIV of 1882. and none of them has been modified by any subsequent enactment.

The question before the Privy Council was "solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published." "When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated." "The objection, if it had been properly taken in the first instance would have been good to this extent that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity; it would have been necessary to go on and show that substantial damage had been substained by the applicant in consequence of that irregularity. No evidence was given upon that subject before the lower Court, though by s. 311 the *onus* lay upon the applicant to prove to the satisfaction of the Court that he had sustained substantial damage in consequence of the irregularity, nor was there any finding of the lower Court upon it, because the question was never raised."

"The High Court having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say :—'but it may be reasonably supposed that the non-specification of the Government revenue in the sale-proclamations published is one of the causes [345] which caused the diminution in the price.' There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause any injury to the applicant by causing an inadequate price to be bid at the sale."

"Their Lordships think that it was too late for the applicant to make the objection; and even if it were not too late for him to make objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was an inadequacy of price occasioned by the non-statement of the revenue in the sale-proclamation. Under these circumstances their Lordships will humbly advise Her Majesty to reverse the decision of the High Court and to affirm the decision of the first Judge."

In the above case before the Privy Council there was an infringement of the rule in s. 287 of the Code of Civil Procedure which their Lordships held would entitle the decree-holder or any person whose immoveable property had been sold to apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it. S. 290 like s. 287 is in subdivision (*a*), general rules, and both those sections as well as s. 311 are in division G "of sale and delivery of property" in Chapter XIX of the Civil Procedure Code. The terms of ss. 287 and 290 are almost equally peremptory, and having regard to those sections and to the above-mentioned ruling of the Privy Council, I am of opinion that infringement of the rule in s. 290 of the Civil Procedure Code does not of itself vitiate the sale; that it is "a material irregularity" in publishing the sale which is referred to in s. 311 of the Code, and that no Court can, without

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evidence and upon a mere supposition, properly find that the sale of immoveable property before the expiration of thirty days, the time required by s. 290 of the Civil Procedure Code, did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

Under these circumstances I would allow the appeal and remand the case, under s. 562 of the Civil Procedure Code, to the lower Court [346] for re-trial of the third objection in accordance with the above remarks.

Appeal dismissed.

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11 A. 646 = 9 A.W.N. (1889) 127.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

RUP CHAND AND OTHERS (*Plaintiffs*) *v.* SHAMSH-UL-JEHAN (*Defendant*).* [14th March, 1889.]

Pre-emption—Conditional decree—Deposit of purchase-money—Appeal—Computation of time allowed for payment—Civ. Pro. Code, s. 214.

In a suit for pre-emption, the decree of the Court of firstinstance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the appellate Court.

Held that the decree of the appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh* v. *Bridgman* (1), *Luchman Persad Singh* v. *Kishun Persad Singh*(2), *Gobardhan Das* v. *Gopal Ram* (3), *Noor Ali Chowdhuri* v. *Koni Meah* (4), and *Daulat* v. *Bhukandas Manekchand* (5), referred to.

[**N. F.**—10 A.W.N. 92; 18 A. 455 (458) = 16 A.W.N. 130; **Appl.**—13 A. 376 (F.B.). 22 C. 467; **R.**—13 A. 189; 18 A. 223 (226) = 16 A.W.N. 43; 15 M. 170 (173); 31 M. 28 (30) = 17 M.L.J. 495 = 3 M.L.T. 26; 17 C.W.N. 457 (458) = 17 C.L.J. 120; 88 P.R. (1898). 48 P.R. (1906) = 104 P.L.R. (1906); **D.**—15 B, 370 (375), 11 C.P. L.R. 115 (119).]

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellants.
Mr. *Dwarka Nath Banerji*, for the respondent.

JUDGMENT.

MAHMOOD, J,—The facts of the case are the following :—

The plaintiffs-decree-holders in this case, appellants before me, obtained a decree for pre-emption from the Court of first instance on the 12th September, 1887, which directed that the pre-emptor was to obtain possession of the pre-empted property on payment of a sum of Rs. 1,000 within one month of the date of the decree, and on failure of such payment the decree would stand cancelled; in [347] other words, it was a decree

* Second Appeal, No. 956 of 1888, from a decree of T.R. Redfern, Esq., District Judge of Bareilly, dated the 29th March, 1888, confirming a decree of Babu Ganga Prasad, Munsif of Bareilly, dated the 14th December, 1887.

(1) 4 A. 376. (2) 8 C. 218. (3) 7 A. 366. (4) 13 C, 13. (5) 11 B, 172.

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11 A. 346 = 9 A.W.N. (1889) 137.

which aimed at being in conformity with the terms of s. 214 of the Civil Procedure Code.

On the 28th October, 1887, the purchasers, who are defendants-respondents before me, preferred an appeal to the District Judge, but the appeal was dismissed on the 25th November, 1887, by an order confirming the decree of the first Court.

Meanwhile the purchase-money had not been deposited, but after the passing of the appellate Court's decree the pre-emptors decree-holders, appellants before me, deposited the money in Court on the 15th December, 1877.

To the deposit, however, objections were taken by the judgment-debtors purchasers upon the ground that the decree by its very terms had become unavailable to the decree-holders pre-emptors, since their deposit was not made within the period allowed by the decree. Both the Courts have concurred in accepting this view, and the application for execution of the 5th December, 1887, was therefore rejected.

It is from this order passed upon the application, namely, the learned Judge's order of the 29th March, 1888, that this second appeal has been preferred, and the main contention which has been pressed upon me by Mr. *Madho Prasad* for the appellants is that, under the Full Bench ruling in *Shohrat Singh* v. *Bridgman* (1) and in *Luchman Persad Singh* v. *Kishun Parsad Singh* (2) and the interpretation put upon those rulings in *Gobardhan Das* v. *Gopal Ram* (3), the only decree which could be executed is the appellate decree, and that it must be taken to have incorporated the terms of the decree, of the first Court as forming part of the appellate decree even to the extent of calculating the period of one month allowed by the first Court's decree as incorporated in the appellate Court's decree. The learned pleader for this contention relies upon the ruling of the Calcutta High Court in *Noor Ali Chowdhuri* v. *Koni Meah* (4), which was followed by the Bombay High Court in *Daulat* v. *Bhukandas Manekchand* (5), and argues that these cases are so similar to [348] the principle involved in this case that the deposit of the 5th December, 1887, for the purpose of the one month within which it was to be made, must be taken to be calculated from the date of the appellate Court's decree, which is the only decree capable of execution. The learned pleader also relied upon the rulings of this Court in *Sheikh Ewaz* v. *Mokuna Bibi* (6) and in *Ram Sahai* v. *Gaya* (7) which followed the earlier case.

I am of opinion that the contention urged on the part of the appellants is sound. Whatever views may have been suggested by the consideration that the original decree of the 12th September, 1887, had been passed fixing one month from the date of the decree within which the purchase-money was to be deposited, and that the period had terminated before the appeal was filed in the appellate Court, thus rendering the mandatory part of the decree ineffective for purposes of enforcement of possession, I cannot forget that the effect of the Full Bench ruling, that the only decree that can be executed is the appellate decree, is entirely in favour of Mr. *Madho Prasad's* contention. The cases *Noor Ali Chaudhuri* v. *Koni Meah* (4) and *Daulat* v. *Bhukandas Manekchand* (5) are also in favour of Mr. *Madho Prasad's* contention, and I hold that the deposit of the 5th December, 1887, was within time.

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(1) 4 A. 376. (2) 8 C. 218. (3) 7 A. 366. (4) 13 C. 13.
(5) 11 B. 172. (6) 1 A. 132. (7) 7 A. 107.

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In the result I decree the appeal, and setting aside the order of the lower Court, remand the case under s. 562 of the Civil Procedure Code for such further proceedings as may be necessary for the purpose of executing the decree.

[*Cause remanded*] (1).

11 A. 346 = 9 A.W.N. (1889) 127.

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11 A. 349 = 9 A.W.N. (1889) 119.

[349] EXTRAORDINARY ORIGINAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED. [21st March, 1889.]

Company—Application for registration—Act X of 1866 *(Indian Compnies Act)—Application received while Act X of* 1866 *was in force—Delay in office of Registrar—Certificate purporting to be issued under X of* 1866, *but issued after repeal thereof by Act VI of* 1882*—Act I of* 1868 (*General Clauses Act*), s. 6—"*Proceedings commenced*"*—Company held to have been registered under Act X of* 1866*—Practice—Costs.*

Prior to the 1st May, 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay for which the applicants were not responsible, registration was not effected and the certificate was not issued till the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the Company having gone into liquidation, the Official Liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act, VI of 1882.

Held that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration, commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April, 1882, while Act X of 1866 was in force, that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares.

[350] The Official Liquidator's application to place the shareholders upon the list of contributories having been *bona fide* made in the liquidation, the Court ordered that the costs of each side should be paid as a first charge out of the estate.

[N. B.—See, in this connection, 9 A. 180.]

THIS case was transferred by the High Court, under s. 25 read with s. 647 of the Civil Procedure Code, to its own file from the Court of the

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(1) See, *contra*, *Sheo Prasad Lal* v. *Thakur Rai* (N. W. P. H.C. Rep. 1868, p. 254, Full Bench) and *Chhidda* v. *Imdad Husain*, 8 A.W.N. (1888) p. 4.

District Judge of Saharanpur and the circumstances connected with the transfer are stated in the report at I.L.R., 9 All. 180. The facts of the case were as follows :—

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On or about the 13th June, 1860, a company called the West Hopetown Tea Company, Limited, the object of which was the cultivation of tea at a plantation called the West Hopetown Estate near Dehra Dun, was registered under Act XIX of 1857, the Indian Companies Act then in force. Its nominal capital was Rs. 1,09,000 in 18⅙ shares of Rs. 6,000 each. Early in 1882 it was determined to re-construct the Company, the principal reason assigned being that the sharers were too large to be readily saleable. On the 11th March, 1882, an extraordinary general meeting of the share-holders was called for the purpose of considering a scheme of re-construction, and certain resolutious were passed, and were confirmed by another extraordinarv general meeting held on the 27th March. At the latter meeting all the share-holders of the Company (nine person) were present, either in person or by proxy. The resolutions passed were as follows :—

"1. That the Company be wound-up voluntarily, and that Mr. C. G. Vansittart be and hereby is appointed liquidator for the purpose of such winding-up,

"2. That the following scheme of re-construction be, and the same is hereby approved, *viz.*, that a new Company be incorporated under the Indian Companies Act, X of 1866, as a Company limited by shares, by the name of the West Hopetown Tea Company, Limited, with a capital of Rs. 3,00,000 divided into 3,000 shares of Rs. 100 each, with power to increase, and having power to acquire and take over the business, property and liabilities of this Company; that of the capital, Rs. 2,50,700 be allotted to the shareholders of this Company, being at the rate of twenty-three fully paid-up shares in the new Company for every Rs. 1,000 invested by shareholders in this Company, and the balance of the 3,000 shares be issued by the Directors when and as they think fit; that the said liquidator be and is hereby authorized, pursuant to s. 175, Indian Companies Act, X of 1866, to sell to such new Company upon the above terms the property of this Company, but so that the new Company shall also undertake all the liabilities of this Company, and shall pay the costs of winding-up; [351] and that the said liquidator be and is hereby authorized to execute and do all such things as may be necessary for carrying out the above scheme into effect."

On the 8th April, 1882, the following letter was sent :—

"No. 185.

"WEST HOPETOWN TEA CO., LIMITED, DEHRA DUN.
8th April, 1882.

"*To the Registrar of Joint Stock Companies, Allahabad.*

"SIR,—I enclose herein the following papers :—

"(i) Duly stamped and executed memorandum and articles of association of the West Hopetown Tea Company, Limited.

"(ii) Treasury receipt for Rs. 225 paid into the Dehra Treasury, as required under s. 17, Act X of 1866.

"(iii) Treasury receipt, *vide* my No. 175 of 1st instant.

"Kindly return the receipts to me after you have done with them; and grant me a certificate of incorporation.

Yours, &c.,
C. G. VANSITTART,
Secretary and Manager."

Upon this letter the following memorandum, dated the 29th April, 1882, and initialled R. B. C. (the initials of the Head Assistant of the Registration Office, Allahabad), was endorsed :—

"Mr. Vansittart has sent for registration the memorandum of association and articles of association of the West Hopetown Tea Company; and has paid into the

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Dehra Dun Treasury on account of registration fees Rs. 225, but we only require Rs. 155, according to the following calculation :—

"TABLE B, ACT X OF 1866.

		Rs.
For a Capital of Rs. 20,000	...	40
Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000	...	60
Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000	...	25
Above Rs. 1,00,000, Re. 1 for each Rs. 10,000, *i.e.*, Rs. 3,00,000 in this case.	...	20
Total	...	145
For registering articles of association	...	5
Certificate of registration	...	5
Total	...	155

[352] "I do not know how this is to be remedied. We must give a certificate of registration. In this certificate we shall have to state the amount paid. If we enter Rs. 225, and then refund the excess paid, the Company will hold a certificate as having paid a larger sum than they actually did. So that the refund, if it be given, must be made before the company is registered."

After the 29th April no further steps were taken in the Registration Department until the 6th May, when the Officiating Registrar of Joint Stock Companies made the following order :—

"Refund the excess and then register, showing the proper fees."

Between these two dates, that is on the first May, 1882, the Indian Companies Act, VI of 1882, repealing Act X of 1866 came into force, having received the assent of the Governor-General on the 24th February. After a further delay of nearly a fortnight, the Head Assistant sent the following letter :—

"No. 40.

"*19th May*, 1882.

"*To C. Vansittart, Esquire, Secretary and Manager. West Hopetown Tea Co., Limited.*

"SIR,—I reply to your No. 185, dated 8th ultimo, I have the honor to point out that you have paid Rs. 70 too much on account of registration fees. The capital of your Company is Rs. 3,00,000. The fees payable by you are as follows, claculated according to Table B of Act X of 1866 :—

		Rs.
For the first Rs. 20,000	...	40
Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000	...	60
Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000	...	25
Above Rs. 1,00,000, Re. 1 for each Rs. 10,000	...	20
Total	...	145
For registering articles of association	...	5
For certificate of registration	...	5
Total	...	155

"You should apply to the Collector for a refund of Rs. 70. When you have obtained the refund, I shall feel obliged by your intimating the fact to me, as until then I shall not be able to register the papers sent by you."

[353] This letter was signed by both the Head Assistant and the Officiating Registrar. On the 23rd June, 1882, the following answer was returned :—

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"WEST HOPETOWN.
June 23rd, 1882.

"*To the Registrar, Joint Stock Companies, Allahabad.*"

"SIR,—With reference to your No. 40, dated the 19th ultimo, I now beg to advise you that the Rs. 70 overpaid has been refunded to me by the Dehra Dun Treasury, and I beg to thank you for pointing out the error.

Yours faithfully,
C. G. VANSITTART,
Secretary and Manager.

Inreply,the Head Assistant, on the 8th July,1882, forwarded a certificate of registration to the following effect:—

"In the office of the Registrar of Joint Stock Companies, North-Western Provinces and Oudh.

In the matter of the West Hopetown Tea Company, Limited.

"I do hereby certify that pursuant to Act X of 1866 of the Legislative Council of India, entitled the Indian Companies Act, memorandum of association and articles of association have been this day filed and registered in my office, and that the said Company has been duly incorporated, and is a company limited by shares pursuant to the provisions of the said Act.

"*3rd July*, 1882, *at Allahabad.*

T. BENSON.
"*Assistant Registrar of Joint Stock Companies, N. W. P. and Oudh.*"

Clause 3 of the Memorandum of Association, stating the objects for which the Company was established, contained the following sub-clause :—

"(*a*) To purchase of otherwise acquire and undertake all the business, property and liabilities of the West Hopetown Tea Company. Limited (now in liquidation), and of any other Company, together with the manufacturies, land, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof."

The following clauses in the articles of association had reference to the same subject :—

"4. The Board of Directors may, upon such terms and conditions as they think fit, purchase and acquire all the business, property and liabilities of the West Hope-[354]town Tea Company, Limited (now in liquidation), together with the manufacturies, lands, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof.

"12. Shares in the Company shall be allotted to such person and in such manner as the Directors shall think fit ; but the Directors shall, in pursuance of an agreement made with the liquidator of the West Hopetown Tea Company, Limited (now in liquidation), allot, as therein provided, the number of shares specified in the agreement.

"13. Fully paid-up shares taken by the members of the West Hopetown Tea Company, Limited (now in liquidation), in payment for the business and property, &c., of the said Company shall, for all purposes, be considered as shares on which the whole amount due has been paid in cash ; and no holder of any such share shall in respect thereof be liable to pay any future sum thereon."

It was stated at the hearing of the case that an agreement to the effect mentioned in clauses 12 and 13, and in conformity with the resolution passed by the shareholders of the old Company on the 11th and 27th March, 1882, was executed ; but neither the original nor any copy was produced ; no trace of it was to be found at the office of the Registrar of Joint Stock Companies ; and it was not stated who were the parties to its execution. Apart from the resolutions above referred to, and clause 13 of the articles of association, there was no contract of the kind mentioned in s. 28 of the Indian Companies Act, VI of 1882.

In March, 1886, the principal creditor of the Company, the Delhi and London Bank, applied, under s. 128 (*d*) of the Act, that the

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Company should be wound up, and the application was granted without opposition. The winding-up proceedings were initiated in the Court of the District Judge of Saharanpur, but were transferred to the High Court as already stated (1). Owing to various causes, which need not be stated, the list of contributories did not come before the Court for settlement until April, 1888. The Official, Liquidator, applying s. 28 of Act VI of 1882, entered upon the list all those shareholders who had been members of the old Company and who, in exchange for the property and business of that Company and in accordance with clause 13 of the articles of association of the new Company, had received shares purporting to be fully paid up, as having paid nothing upon their shares. and **[355]** as consequently liable to contribute to the Company's assets to the full value of those shares, upon the principle laid down in *Fothergill's Case* (2), *Spargo's Case* (3) *Andress's Cases* (4), *White's Case* (5) *Pagin and Gill's Case*, and other cases decided upon the corresponding s. 25 of the English Companies Act of 1867. The shareholders objected that the Company must be held to have been incorporated, not under Act VI of 1882, but under the former Companies Act, X of 1866, which contained no provision similar to s. 28 of the Act of 1882, and under which, therefore, contracts for the payment of shares otherwise than in cash were valid.

Mr. *A. Strachey*, for the official liquidator, contended that at the time when the certificate of registration was issued, the 8th July, 1882, Act X of 1866 was no longer in force, and that the Registrar had no power to grant a certificate under a repealed Act, or otherwise than under Act VI of 1882. It could not be said that, prior to the repeal, which took effect on the 1st May, 1882, there had been any "proceedings commenced," within the meaning of s. 6 of the General Clauses Act (I of 1868), so as to save the application of Act X of 1866. All that had occurred was that an application for registration was made on the 8th April, 1882, but no order or action of any kind was taken upon that application until after the 1st May, and there was no authority for the proposition that a mere application to a public officer, without any action on the part of that officer himself, fell within the description of "proceedings commenced." The nearest case was where some order had actually been passed, prior to the repeal, upon such application : *Vidya Ram* v. *Chandra Shekaram* (7). No action can be taken for the first time under a repealed statubte, as distinguished from steps consequent upon, and for the purpose of maintaining the operation of, action previously taken. A step taken for the first time is a separate proceeding. [He also referred to *Shivram Uda Ram* v. *Kondiba* (8), *Ratansi Kalianji's Case* (9), and *R.* v. *Denton* (10).]

[356] [EDGE, C. J.—According to your argument, the proceedings could not have commenced until the certificate of registration was granted. But that was what determined the proceedings, and cannot be the act from which the commencement of the proceedings is to date.]

We say that the proceedings commenced with the Registrar's order of the 6th May, 1882, directing registration after the refund of the excess payment. That was subsequent to the repeal of Act X of 1866. Next, the letter of the 23rd June, 1882, from the Secretary and Manager, which was written nearly two months after Act VI of 1882 had come into force, at a time when the writer knew nothing had yet been done by the Registrar.

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(1) 9 A. 180. (2) 8 Ch. 270. (3) 8 Ch. 407 (4) 8 Ch. D. 126.
(5) 10 Ch. D. 720 = 12 C. L. D. 511. (6) L. R. 6 Ch. D. 681.
(7) 4 B. 163. (8) 8.B. 340. (9) 2 B. 148. (10) 21 L.J. M.C. 208.

was substantially a fresh application. If not a fresh application the writer must be presumed to have known that the law had been altered since his letter of the 8th April, and his renewal of the application in June was equivalent to acquiescence in its being governed by the new law. [He referred to the observations of Jessel, M. R., in *Hasluck* v. *Pelly* (1)].

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The Hon. *T. Conlan*, Mr. *H. Vansittart*, and Mr. *J.C. Mullaly*, for the shareholders, contended that s. 6 of the General Clauses Act was applicable, and also s. 2 (*b*) and s. 251 of Act VI of 1882. The certificate of registration showed, upon its face, that it was granted under Act X of 1866, and the resolutions of the 11th and 27th March, 1882, the memorandum and articles of association, all showed a clear intention that the Company should be incorporated under Act X of 1866 only. The Registrar could have no power, upon an application for incorporation under Act X of 1866, to issue a certificate under Act VI of 1882.

Mr. *A. Strachey*, in reply.

JUDGMENT.

EDGE, C. J.—This is an application made on behalf of the liquidator of the West Hopetown Tea Company, Limited, now in liquidation, to settle a list of contributories, and to place on that list of contributories some of the original shareholders and some **[357]** other shareholders who have taken from the original shareholders by assignment or otherwise. A Company had been registered under Act XIX of 1857 bearing the same name as the present Company. That Company had been registered on or about the 13th June, 1860. It was considered advisable for certain *bona fide* reasons which we need not now go into, that the Company which had been registered under Act XIX of 1857 should be reconstructed, and that the share capital should be divided into shares of smaller amount. On the 11th March, 1882, the shareholders of the then Company accordingly resolved to reconstruct the Company, and on the 27th March that resolution was confirmed at an extraordinary meeting of the shareholders. The shareholders agreed amongst themselves in what proportion the shares of the new Company should be allotted, such shares representing the then existing interest of the shareholders in the assets of the Company. In pursuance of that resolution, a memorandum and articles of association were prepared and stamped, and were dated the 8th April, 1882, and on that day were forwarded by the Secretary and Manager of the then existing Company to the Registrar of Joint Stock Companies at Allahabad for registration. The Secretary's letter was as follows:—

"*Dehra Din, 8th April*, 1882.

"To the Registrar, Joint Stock Companies, Allahabad.

"Sir—I enclosed herein the following papers:—

"1.—Duly stamped and executed memo and articles of association of the West Hopetown Tea Company, Limited.

"2.—Treasury receipt for Rs. 225 paid into the Dehra treasury, as required under s. 17, Act X of 1866.

"3.—Treasury receipt, *vide* my No. 175, dated 1st instant.

"Kindly return the receipts to me after you have done with them and grant me a certificate of incorporation."

That application was received by the Registrar in due course of post. The question then arose in the office of the Registrar as to the amount of the stamp which should be paid, and ultimately it was ascertained that the stamp-fee which had been paid exceeded by Rs. 70 the correct stamp-fee, and an order was made on the 6th **[358]** May, 1882, to refund the

(1) L. R. 19 Eq. 271.

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excess. The result was that prior to the 1st May, 1882, everything that was required to be done by or on behalf of the new Company to obtain its certificate of registration under Act X of 1866 was done. They had, in fact paid Rs. 70 in excess of the stamp which was required. Owing to delay in the office of the Registrar and to no cause, for which the applicants for registration and grant of certificate could be held responsible, the Company was not registered and the certificate was not issued until the 3rd July, 1882. On the 3rd July, 1882, the certificate of incorporation was issued under the hand of the Assistant Registrar of Joint Stock Companies of the North-Western Provinces and Oudh. It in terms purported to be granted in pursuance of Act X of 1866.

It is quite clear that the application for registration and for grant of certificate was made whilst Act X of 1866 was in force. That application was for registration and the grant of a certificate under Act X of 1866 and not under the Act of 1882, which came into force on the 1st May in that year. The Act which the parties desired the Company to be registered under was the Act which was in force at the time when they made the application, namely, Act X of 1886, and they never desired or requested to be registered under the Act of 1882. If we are to look at the certificate itself, it purports to be a certificate of registration under Act X, 1866, and not of registration under Act VI of 1882. We can have no doubt that the Assistant Registrar in issuing that certificate intended it to be a certicate of registration under Act X of 1866.

The share-holders in the old Company which was registered under Act XIX of 1857, as I have said, agreed to transfer their interest in the concern to the new Company in consideration of the paid-up shares issued to them. No contract in writing was filed with the Registrar of Joint Stock Companies under s. 28 of Act VI of 1882 at or before the issue of such shares. That is admitted on all hands here. The contention before us on behalf of the liquidator is that Act X of 1866 having expired on the 1st May, 1882, the Company must be deemed to have been registered and **[359]** the certificate of registration granted under Act VI of 1882 and not under Act X of 1866. If that contention on behalf of the liquidator were a good contention in law or in fact, the respondents before us would be liable to be placed upon the list of contributories ; on the other hand if that contention fails, it is not contested before us, on behalf of the liquidator, that the respondents before us or any of them would be liable to be placed on the list of contributories in the winding up of the Company.

It appears to us that in deciding this case we must have regard to Act I of 1868. By s. 6 of that Act it is enacted :—" The repeal of any Statute, Act, or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation."

Act VI of 1882 was, so far as Act X of 1866 was concerned, a repealing Act within the meaning of s. 6 of Act I of 1868. It is contended on behalf of the liquidator that the application for registration and for a certificate of registration to be granted made to the Registrar of Joint Stock Companies and received by him whilst Act X of 1866 was in force, was not a commencement of proceedings within the meaning of s. 6 of Act I of 1868. On behalf of the liquidator it is further contended that no proceeding can be considered to have commenced within the meaning of s. 6 of Act I of 1868, unless and until an official or judicial order of some kind has been passed in a proceeding by an executive or judicial officer. With that contention I do not agree. It appears to me that in ordinary

plain English, the proceedings for obtaining registration of this new Company, and a certificate of registration, had commenced when the application together with the memorandum and the articles of association stamped and properly drawn up were received in the office of the Registrar in April, 1882. According to the contention on behalf of the liquidator there was no commencement of proceedings at all in this case in the ordinary meaning of the term, inasmuch as no official order was made on the application until the grant of certificate. The granting of the certificate of the registration of the Company which determines [360] the proceedings, cannot be the act from which the commencement of the proceedings is to date. I am clearly of opinion that the proceedings for obtaining registration and a grant of a certificate of such registration of the new Company had commenced within the meaning of s. 6 of Act I of 1868 on the 12th April, 1882, and whilst Act X of 1866 was in force, and that s. 6 of Act I of 1868 applies to this case. In this view I am of opinion that we should disallow this application which has been made on behalf of the liquidator.

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The only question that remains is the question of costs. I am of opinion that this is an application which was *bona fide* made in this liquidation, and that it is an application with regard to which we should not saddle the official liquidator personally with the payment of costs. The reasonable and proper order to be made is that the costs of each side be paid as a first charge out of the estate, and that order, we, in disallowing the application, make.

STRAIGHT, J.—I am entirely of the same opinion. The application for registration was made while Act X of 1866 was in force. It is therefore to be inferred that the persons who made that application contemplated and desired that the Company should be registered under that statute. But for the delay which took place in the registration office, the registration would have been granted while the Act under which registration had been asked for was in operation, but by reason of that delay, the certificate was not granted until that Act was no longer in force. Nevertheless the certificate, which was granted on the 3rd July, was granted, as it expressly states, under Act X of 1866; and in my opinion, we should not, unless constrained to do so, hold that it was granted under Act VI of 1882. I am entirely of the same opinion as the learned Chief Justice that, for the reasons he has fully given, not only was a proceeding commenced under Act X of 1866, as interpreted by s. 6 of the General Clauses Act (I of 1888), but was carried through and completed by issue of the registration certificate of the 3rd July, 1882, in the manner contemplated by that statute. I am of the same opinion as regards the question of costs.

Application rejected.

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CRIMINAL REVISIONAL.

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11 A. 361=9 A.W.N. (1889) 128=13 Ind. Jur. 477.

[361] CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* PAIAMBAR BAKHSH.* [1st April, 1889.]

Practice—Contempt of Court—Act XLV of 1860 (*Penal Code*), s. 228—*Criminal Procedure Code*, ss. 480, 537.

The procedure laid down in s. 480 of the Criminal Procedure Code should be strictly followed. The provisions of the section should be applied then and there, at any rate before its raising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under s. 480.

Where a Magistrate in whose presence contempt was committed, took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days,—*held* that such action, though it might be irregular, was not illegal, and, as the accused had not been in anyway prejudiced, was covered by s. 537 of the Criminal Procedure Code.

Held also that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused, and dealt with the matter at once or before his rising.

[F., 10 C.W.N. 1062=4 C.L.J. 415 (417).]

THE petitioner in this case was convicted by the Deputy Magistrate of Allahabad of contempt of Court under s. 480 of the Criminal Procedure Code, and sentenced to a fine of Rs. 50, or, in default, one week's simple imprisonment. He was a mukhtar, and on the 1st August, 1888, was conducting the case of an accused person then being tried by the Magistrate for an offence punishable under s. 9 of Act XII of 1882. During the argument in the case, the petitioner appeared to have lost his temper with the Inspector of the Customs Department, who was prosecuting on behalf of the Crown, and spoke to him in such a way that the Magistrate interposed and checked him. He then repeatedly said excitedly, "Produce it, produce it," *i.e.*, produce the law on the subject, and continued to argue the case in an excited manner. The Magistrate having observed that any reasonable argument would receive due attention, the petitioner replied, "Perhaps, perhaps" in a manner implying a doubt of the Courts impartiality. After continuing for some time, the Magistrate desired him to address the Court in a pro-[362] per manner and to desist from talking nonsense ("*behuda guftagu*") or further measures would be taken with him. To this the petitioner replied, "*Bahut se adalat roz ate hain*"—many a Court comes every day. The Magistrate thereupon made a note of the expression used, and requested the petitioner to explain what he meant by it, but he declined to reply on the ground that no formal proceeding had been drawn up. He also refused to sign his statement to this effect. The Magistrate then prepared a proceeding embodying the facts just stated and while this was being done the petitioner left the Court, and, though searched for, could not be found up to the time when the Court rose. Next day (the 2nd August) he applied for a copy of the proceeding before giving his reply. The Magistrate declined to grant a copy, and, on the next day, the reply was filed. On the 6th August the

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* Criminal Revision, No. 33 of 1889.

petitioner applied to have the proceedings stayed until he could apply for a transfer under the provisions of ss. 526 and 526-A of the Criminal Procedure Code. The Magistrate declined to stay proceedings, and, on the 9th August, proceeded to convict and sentence the petitioner as above stated.

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The petitioner appealed to the Sessions Judge, who dismissed the appeal and confirmed the conviction and sentence. It was contended on behalf of the appellant that the Magistrate could not legally call upon him to reply until a formal proceeding had been recorded, that he did not refuse to sign the statement which he had made, that he did not leave the Magistrate's Court or conceal himself, that the Magistrate had taken evidence against him in his absence, that the Magistrate ought not to have refused to stay proceedings, that, under s. 480 of the Criminal Procedure Code, the Magistrate was bound to pass sentence on the day when the offence was committed, and that the offence was committed under provocation. In the course of his judgment the Sessions Judge observed :—

"The Magistrate was not, in my judgment, bound to pass sentence on the same day. He was bound to take cognizance of the matter the same day, and did so. He would have been justified in taking time to consider the sentence if the appellant had replied, **[363]** and it was desirable that he should not pass his order in the heat of the moment. The appellant's refusal to file a reply put him in a difficulty. I do not know that he was called upon to wait for a reply, but there was nothing illegal in doing so, and the accused was clearly not prejudiced by that course. It is argued that the Magistrate ought, when the matter was not or could not be concluded in one day, to have proceeded according to s. 482 of the Criminal Procedure Code. But a Court is required to resort to the provisions of that section only when it considers that the person accused should be imprisoned otherwise than in default of payment of fine. It is not open to the accused to force a Court to have recourse to those provisions by refusing or delaying to reply......I feel no doubt that the words and bearing and the whole attitude of the appellant were insolent and disrespectful from the beginning. He disregarded the Court's admonition to urge his point with less heat and excitement, implied an offensive doubt as to the Courts impartiality, and said finally (using his own version of what he said), "Many Courts have come and gone," words of obviously disrespectful import, implying that he had seen a good many Courts come and go, and that therefore he was not particularly impressed by the dignity of the particular Court before which he stood. The appellant was no doubt guilty of a gross and continuous contempt of Court."

The petitioner applied to the High Court for revision of the orders of the Magistrate and the Sessions Judge. The first ground stated in the petition for revision was, "Because the learned Magistrate not having elected to follow the procedure laid down by s. 480 of the Criminal Procedure Code, the conviction and the sentence passed upon the petitioner are illegal."

Mr. *W.M. Colvin*, for the petitioner.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

JUDGMENT.

STRAIGHT, J.—In my opinion the first ground taken for revision, though it has some force in it and has deserved consideration, cannot prevail.

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[364] I agree with Mr. *colvin*, that the provisions of s. 480 of the Criminal Procedure Code were intended to be applied *then and there*, or at any rate before its rising by the Court in whose view or presence a contempt has been committed, which it considers could be properly and adequately dealt with under that section, and that they did not ordinarily contemplate such action as was adopted by the Deputy Magistrate in the present case. But while it may be his procedure was irregular, to pronounce it illegal is quite another thing, and knowing as I do the difficulty native magisterial officers, must necessarily at times be placed in to preserve order in their Courts, I should not be disposed to take that view unless coerced to do so by the terms of the statute. It is perfectly clear that the postponement of his final orders in the matter was adopted by the Deputy Magistrate for the purpose of affording the petitioner an opportunity of showing cause why such order should not be made, though I doubt if under the circumstances disclosed there was any necessity for the Deputy Magistrate to take that course. Anyhow I cannot hold that the petitioner in anyway was prejudiced by the Deputy Magistrate's action, and as I think at most it amounted to no more than an irregularity of procedure, I think it was cured by s. 537 of the Criminal Procedure Code. The first ground for revision therefore fails. I may add, however, that Courts when resorting to a use of s. 480 of the Criminal Procedure Code would do well to strictly follow the procedure therein laid down. Held the Deputy Magistrate in the present instance directed the detention of the petitioner and dealt with the matter at once or before his rising, this application would probably have never been made. Upon the findings of fact recorded by the learned Judge in appeal which I must accept, and the statement of what actually occurred as recorded by the Deputy Magistrate, I cannot say that there was no contempt of the kind covered by s. 228 of the Penal Code, at any rate in the nature of prolonged and offensive interruption to the Magistrate's getting on with the case he was engaged in trying. I cannot, however, help thinking that the incident was inflamed somewhat by the unfortunate remark of the Deputy Magistrate in the course of which the word "*behuda*" was used, with what [365] context is not quite clear. At the same time the petitioner would have been better advised when time was given him for reflection, had he apologised and expressed his regret for any apparent, but as he maintained not intended, discourtesy or interrruption to the Court. Looking to all the circumstances, I decline to disturb the order of the learned Judge confirming that of the Deputy Magistrate, but as I do not regard the conduct of the petitioner as of a very gross or serious character, I reduce the fine to Rs. 20, or, in default, one day's simple imprisonment. If realized, the difference between that and the Rs. 50 fine inflicted will be returned.

Conviction affirmed, sentence varied.

11 A. 365=9 A.W.N. (1889) 131.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1889 APRIL 27. APPELLATE CIVIL. 11 A. 365= 9 A.W.N. (1889) 131.

DILDAR FATIMA (*Plaintiff*) v. NARAIN DAS AND ANOTHER (*Defendants*).*
[27th April, 1889.]

Court-fee—Suit to obtain a declaratary decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of 1870 (*Court Fees Act*), *sch ii. No* 17 (i) *and* (*ii*).

Held that the court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (*a*) for a declaration of right to certain property, and (*b*) that the said property might be released from attachment in execution of a decree, was Rs. 10 in respect of each of the reliefs prayed.

[R., 12 A. 129 (162); 14 M. 23 (24, 25; 31 C. 511 (512); U.B.R (1897—1901) at p. 359; 1 L.B.R. 1 (3); Cons., 16 A. 308 (312)=14 A.W.N. 109.]

THIS was a refernce by the Officiating Registrar as taxing-officer of the High Court, under s. 5 of the Court-fees Act (VII of 1870). The order of reference was as follows:—

"In this case there seem to be two prayers:—

"(*a*) For a declaration of right to certain property.

"(*b*) That the said property may be released from attachment.

"The former taxing-officer held that consequential relief was sought, and that therefore an *ad valorem* stamp was due. The [366] appellant's Counsel has drawn my attention to the following rulings.

"*Fatima Begam* v. *Suhhram* (1).

"*Manraj Kuari* v. *Maharajah Radha Prasad Singh* (2).

"In both these cases the prayer was formally to set aside an order passed on an objection to an attachment, and it was held that this came under sch. ii, art. 17 of the Court-fees Act and should bear a Rs. 10 stamp.

"The latter of these two cases, however, shows that the additional prayer cannot be treated as mere surplusage, but must be stamped or considered in the valuing in accordance with its nature.

"In this case it will be observed that the form of the prayer is somewhat different; it is not to set aside an order, but to release the property. The result in each case would doubtless be the same, but the formal prayer is different.

"In the Full Bench ruling of *Ram Prasad* v. *Sukhdai* (3) a prayer that property "be exempted from sale" was held to involve consequential relief and an *ad valorem* fee.

"This case seems analogous to the present one, and were it not for a Bombay case to which I will refer, I should clearly hold with Mr. Thomson that the consequential relief was sought.

"The case however of *Dayachand Nemchand* v. *Hemchand Dharamchand* (4) gives some ground for supposing that the actual result, not the wording of the prayer, is to be considered. Thus a prayer to restore an attachment is held to be stamped as a suit to set aside a summary order.

"If the Court-fees Act, as a fiscal Act, is to be construed as far as possible in favour of the subject, it might he held as indicated by the

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* Miscellaneous Application in S. A. No. 259 of 1888.

(1) 6 A. 341. (2) 6 A. 466. (3) 2 A. 720. (4) 4 B. 515.

1889 APRIL 27. — APPELLATE CIVIL. — 11 A. 365 = 9 A.W.N. (1889) 311.

Bombay ruling that where there has been an attachment and an unsuccessful objection followed by a regular suit under s. 283 of the Civil Procedure Code, that suit however worded is one to set [367] aside a summary order, in other words, that the result, not the formal wording of the suit, should be considered.

"If consequential relief be deemed as prayed for, the deficiency is Rs. 70 × 3 = 210.

"If a declaratory decree *plus* an order to set aside a summary order is deemed as prayed for, the difficiency is Rs. 10 × 3 = 30.

"As it is important to have a clear ruling, and I am inclined to think there is much to be said in favour of the latter view, I refer the question to the Court."

The case came before Brodhurst, J., who referred it to a Division Bench.

Mr. *Hamidullah*, for the appellant.

OPINION.

STRAIGHT and TYRRELL, JJ.—A court-fee of Rs. 10 must be paid in respect of each of the reliefs prayed.

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11 A. 367 = 9 A.W.N. (1889) 140

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

UMDA AND OTHERS (*Defendants*) *v.* UMRAO BEGAM (*Plaintiff*.)*
[11th December, 1888.]

Mortgage, usufructuary—Suit for sale by usufructuary mortgagee—Suit not maintainable—Act IV of 1882 (*Transfer of Property Act*), *s.* 67 (*a*).

Under s. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary martgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh* v. *The Collector of Moradabad* (1) *Dulli* v. *Bahadur* (2), *Ganesh Kooer* v. *Deedar Buksh* (3), *Venkatasami* v. *Subramanya* (4), and *Jhabbu Ram* v. *Girdhari Singh* (5) referred to.

[F., 24 C. 677 (680, 681); R., 12 A.W.N. 66; 4 L B.R. 222 (224).]

THE facts of this case were as follows:—

ONE Mussammat Khanam Jan executed a usufructuary mortgage of a house in favour of one Inaitullah Khan for a sum of [368] Rs. 300 repayable after four years. The mortgage was executed on the 25th September, 1874, and under its terms the mortgagee was placed in possession. The mortgagee Inaitullah, on the 11th November, 1875, executed a deed of mortgage whereby he sub-mortgaged his mortgagee's rights in lieu of Rs. 300 for a term of two years, ten months and twelve days, at the end of which the money borrowed was to be repayable. The second mortgage was executed in favour of Muzaffar Khan, who was no party to this litigation.

The aforesaid Muzaffar Khan by a sale-deed executed on the 19th December, 1878, conveyed his rights under the deed of the 11th November,

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* Second Appeal, No. 383 of 1887, from a decree of Maulvi Saiyid Muhammad Khan, Subordinate Judge of Moradabad, dated the 2nd December, 1886, confirming a decree of Maulvi Zagir Husain Khan, Munsif of Moradabad, dated the 30th August, 1886.

(1) S.D.A.N.W.P., 1859, p. 13. (2) N.W.P.H.C.R. 1875, p. 55.
(3) N.W.P.H.C.R. 1873, p. 128. (4) 11 M. 88. (5) 6 A. 298.

1875, to his wife, Musammat Umrao Begam, who was the plaintiff-repondent in the present case.

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The original mortgagor, Musammat Khanam Jan had a brother named Sadik Ali, and on her death the equity of redemption descended by inheritance upon the aforesaid Sadik Ali. After the demise of Musammat Khanam Jan, Sadik Ali executed a sale-deed of his equity of redemption in favour of the ladies, Musammats Umda and Imtiazan. This was done on the 5th January, 1886.

The present suit was instituted by Musammat Umrao Begam with the object of recovering the mortgage-money by bringing the property to sale, and it was based upon the sub-mortgage of the 11th November, 1875, and also the terms of the original usufructuary mortgage of the 25th September, 1874. The defendants were Musammat Umda, and Musammat Akbari and Piare Khan, the heirs and representatives of Musammat Imtiazan.

The suit was defended upon various grounds, but those grounds were disallowed by both the Courts below, and those Courts decreed the claim for recovery of the money by bringing the property to sale in default of payment within one month.

The defendants appealed to the High Court. The questions raised by the grounds stated in the memorandum of appeal were (1), whether the usufructuary mortgage of the 25th September, [369] 1874, could be so enforced as to bring the property to sale, and (2) if so, whether with reference to the terms of the sub-mortgage of the 11th November, 1875, under which the plaintiff claimed as sub-mortgagee, she was entitled to maintain such a suit ?*

Munshi *Madho Prasad*, for the appellants.

Munshi *Kashi Prasad* and Mir *Zahur Husain*, for the respondent.

BRODHURST and MAHMOOD, JJ. (after stating the facts, as above, continued)—We have heard the learned pleaders for the parties upon both these points, but we are of opinion that the answer to the first point is sufficient for dismissal of the suit. Reading the terms of the original Hindustani of the mortgage-deed of the 25th September, 1874, which is the origin of the title asserted by the plaintiff, it seems to us perfectly clear that the deed is an ordinary deed of *rahn-bil-kubz*, that is to say, a deed of usufructuary mortgage involving possession of the mortgagee as the method and form of the security given to him for the loan advanced by him to the mortgagor. Further, it is admitted before us that under the terms of that document, possession was actually given to the original mortgagee. Inaitullah Khan, under whom Mussammat Umrao Begam claims to have the mortgagee's rights. There is no allegation that either the original mortgagee, Inaitullah Khan, or his sub-mortgagee, Muzaffar Khan, or the present plaintiff, Musammat Umrao Begam, have ever been unlawfully disturbed in their possession of the mortgaged house.

There is no contention of this kind, and what we have to consider is the question whether, under such circumstances, the plaintiff, even if she represented all the rights of the original mortgagee, Inaitullah Khan, could maintain such an action, which practically is a suit to secure a remedy such as that which appertains to an ordinary hypothecation, and is not contemplated by the relation created by usufructuary mortgage.

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* This portion, though given in the statement of facts, forms part and parcel of the judgment of the Court.

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In considering this question we have been referred by Mr. *Madho Prasad* for the appellants to a ruling of the late Sadar Diwani [370] Adalat, N. W. P., in *Chowdhri Umrao Singh* v. *The Collector of Moradabad* (1) and also to a ruling of a Division Bench of this Court in *Dulli* v. *Bahadur* (2.) In the latter of these two cases it was held that "a suit on a deed of usufructuary mortgage to bring the property to sale for the realization of the amount due under the deed, where the property was not hypothecated in the deed to secure the debt, was unmaintainable."

The case was decided by Pearson and Spankie, JJ, and is mainly relied upon by Mr. *Madho Prasad* for the defendants-appellants. On the other hand, Mr. *Kashi Prasad* for the respondents relies upon another Division Bench ruling of this Court in *Ranee Ganesh Kooer* v. *Deedar Buksh* (3) and also on a ruling of the Madras High Court in *Venkatasami* v. *Subramanya* (4) and relying upon these judgments the learned pleader urges that even a usufructuary mortgagee in possession of the mortgaged property, without such possession being in any manner disturbed by the mortgagor, is entitled after the expiry of the period for which the money was borrowed, namely, the time of the mortgage, to recover such money by an action such as this, namely, an action which aims at recovery of money by bringing the mortgaged property to sale, much in the same manner as in the case of a hypothecation or simple mortgage as defined in clause (*b*). s. 58 of the Transfer of Property Act, IV of 1882.

In dealing with the contention urged before us, we do not think it is necessary for us to enter into any minute discussion as to the various reasons upon which the rulings which have been cited before us proceed. We are of opinion that whatever conflict of decision there may have existed, even if such conflict is understood to have existed, the law as embodied in s. 67 of the Transfer of Property Act represents the old law as it stood before the enactment came into force, and further that even if the enactment itself is to be taken as representing that which the statute has enacted, the provisions of that statute are applicable to this case. Mr. *Kashi* [371] *Prasad* has indeed urged that the original mortgage in the case being dated the 25th September, 1874, and the sub-mortgage of the 11th November, 1875, being also anterior to the passing of the Transfer of Property Act, IV of 1882, that enactment has no bearing upon the fate of the decision of this case.

It seems to us that the contention so addressed is analogous in principle to that which a Full Bench of this Court had to consider in *Ganga Sahai* v. *Kishen Sahai* (5), where the learned Judges went fully into the consideration of the various sections, of which the most important is the effect of the saving clause in s. 2 of the Transfer of Property Act. The effect of the decision was that the learned Judges held that where a mortgage is to be enforced, after the coming into force of the Transfer of Property Act, IV of 1882, whether such mortgage was anterior to such enactment or not, the date of deciding whether such enactment applies or not, is the date of the suit and not the date of the mortgage. This view was adopted by a Full Bench of the Calcutta High Court in *Bhobo Sundari Debi* v. *Rakhal Chander Bose* (6), and the broad effect of these rulings is that, although a mortgage may be anterior to the passing of the Transfer of Property Act, yet when a person comes into Court and claims

(1) S. D. A. N. W. P. 1859, p. 131.
(2) N.W.P.H. C.R. 1875. p. 55.
(3) N.W.P.H.C. R. 1873. p. 128.
(4) 11 M. 88.
(5) 6 A. 262.
(6) 12 C. 583.

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remedy under a mortgage, the new procedure of the enactment would apply. We are, therefore, of opinion that s. 67 (*a*) of the Transfer of Property Act is applicable to the case, namely, that, even if the plaintiff is entitled to fall back upon the terms of the original mortgage of the 25th September, 1874, the mortgage being of a usufructuary character, she has no right to come into Court when her possession remained undisturbed to claim either foreclosure or sale such as that she asks for in this action. In reference to this point we may refer also to the *ratio decidendi* of a ruling of this Court in *Jhabbu Ram* v. *Girdhari Singh* (1), to which case one of us was a party, and where the question was considered as to the circumstances under which a usufructuary mortgagee could sue for recovery of the mortgage-money. The case is not on all fours with the present case, and need not be considered further than by saying [372] that it fully recognises the law to be that the usufructuary mortgagee cannot, whilst his possession remains undisturbed, convert such usufructuary mortgage into hypothecation, or seek foreclosure or sale by an action such as this.

We are, therefore, of opinion that the suit and the relief prayed for in it were unmaintainable, and that the Courts below should have dismissed the suit altogether.

This view renders it unnecessary for us to consider the second point which has been pressed before us by Mr. *Madho Prasad*, namely, whether or not a sub-mortgagee, such as the present plaintiff, may possibly be under the terms of the deed of the 11th November, 1875, could, in any case, be entitled to maintain such an action. We are anxious to say that we express no opinion upon the matter, and because, taking the case on behalf of the respondent, she has no right for maintaining an action for bringing the property to sale.

For these reasons we decree the appeal, and setting aside the decrees of both the Courts below, dismiss the suit *in toto* with costs in all the Courts.

Appeal allowed.

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11 A. 372 = 9 A.W.N. (1889) 113.

APPELLATE CIVIL.

Before Mr. Justice Straight.

GIRDHARI AND OTHERS (*Decree-holders*) *v.* SITAL PRASAD (*Judgment-Debtor*).* [23rd January 1889.]

Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Civil Procedure Code, s. 315—Act XV of 1877 (Limitation Act), sch. ii, No. 178.

A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

Held that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877); that the right to apply accrued on the passing of [373] the High Court's decree, and the application was therefore not barred by limitation ; but

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* Second Appeal No. 357 of 1888 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Mainpuri, dated the 22nd December, 1887, confirming a decree of Munshi Girraj Kishor Dutt, Munsif of Etah, dated the 5th November, 1887.

(1) 6 A. 298.

1889 JAN. 23. that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs.

[R.—12 C.P.L.R. 49 (51).]

APPELLATE CIVIL.

11 A. 372 = 9 A.W.N. 1889) 118.

THE facts of this case are stated in the judgment of the Court.

Munshi *Juala Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This is a second appeal in execution from an order of the Subordinate Judge of Mainpuri, dated the 22nd December, 1887, in affirmance of an order of the Munsif of Etah made in reference to an application of the appellants for a refund of certain purchase-moneys, which they had paid in execution of a decree. It appears that one Ram Gopal held a decree against one Khiali Ram, and in execution of that decree the decree-holder first of all brought to sale the zemindari rights of Khiali Ram in the particular village. The proceeds of that sale were insufficient to fully satisfy the decree; and on a subsequent date the rights and interests of Khiali Ram in the *sir* attaching to his zemindari were put up for sale and purchased by Girdhari, Kallu and Kundan, the appellants, on the 21st November, 1881, and the sale was confirmed in their favour. Subsequently Khiali brought a suit in the Civil Court to have it declared that the *sir* rights purchased by the appellants were incapable of sale under the law, and that they had brought no more than a bag of wind. He succeeded in the first Court, which apparently made some order in its decree directing a return to the appellants, who were defendants in that suit, of the purchase-money paid in respect of the sale which was declared to be a void sale. Ultimately the case came in second appeal to this Court before my brothers Oldfield and Brodhurst; and on the 13th June, 1884, they passed a decree sustaining the decision of the first Court declaring the sale to be void and illegal; but they modified the decision of the first Court in so far as it directed in execution of that decree the return of the purchase-money to the appellants. On the 11th June, 1887, the appellants applied under s. 315 of the Civil Procedure Code to the Court which passed the original decree against Khiali Ram and ordered the sale of the 21st November, 1881, [374] for the refund of the purchase-money, which they had paid for the *sir* right. It may also be mentioned that the appellants had then instituted a suit to recover from the decree-holder the amount of the purchase-money paid by them, but that suit was, so I am informed, dismissed upon the ground that it was not maintainable, because the remedy provided by law was by an application in the execution department.

The question now is, what article of the limitation law is applicable to the present application for refund. Certainly not art. 172, because that is concerned with the application to set aside the sale on a particular ground, which this application is not. There is no other article that I can find in terms specifically applicable; it therefore seems to me that it falls within the general category provided for by art. 178, and that limitation must be taken to count from the date the appellants had accrued to them a right to make their present application. I think in this case I am taking a reasonable view when I say that until it was specifically declared by this Court in affirmance of the decision of the lower Courts that the sale of the 21st November, 1881, passed no saleable interest to the appellants—the auction-purchasers at a sale at that date,—it cannot be said that a right to apply for a refund accrued to them.

Under these circumstances I do not think that the application of the appellants of the 11th June, 1887, was barred by time, and accordingly reversing the decisions of the Courts below, I direct that the Munsif of Etah restore this application to his file of pending applications and dispose of it according to law. But looking to the very great delay that there has been on the part of these appellants, and to the fact that they waited till within two days of the expiry of the three years from the date of the decision of the Court, I should certainly not allow them any costs in this matter. Each party will pay their own costs. *Appeal allowed.*

1889 JAN. 23. — APPELLATE CIVIL. — 11 A. 372 = 9 A W.N. (1889) 113.

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11 A. 375 = 9 A.W.N. (1889) 70.

[375] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BANNO BIBI AND OTHERS (*Petitioners*) v. MEHDI HUSAIN AND OTHERS (*Opposite parties*).* [16th February, 1889.]

Practice—Letters Patent, N.W.P., s. 10—Appeal from single Judge—"Judgment"—Interlocutory order—Order refusing leave to appeal in forma pauperis—*Civil Procedure Code, ss.* 588, 591, 632.

Under ss. 588 and 591 of the Civil Procedure Code, no appeal lies, under s. 10 of the Letters Patent for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal *in forma pauperis*. *Achaya* v. *Ratnavelu* (1) and *in re Rajagopal* (2) followed. *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (3) distinguished.

[N.F.,—26 C. 361 (367, 375); F.,—20 M. 407 (410); R.,—14 A. 226 (F.B.) = 12 A.W.N. 14, 17 A. 438 = 15 A.W.N. 89; 22 M. 68 (F.B.) = 8 M.L.J. 231.]

THE facts of this case are sufficiently stated in the judgment of Edge, C. J.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *W. M. Colvin*, for the respondents.

JUDGMENT.

EDGE, C. J.—This is an appeal under s. 10 of the Letters Patent from an order of our brother Straight refusing an application for leave to appeal *in forma pauperis*. Mr. *Colvin* on behalf of the respondent has taken a preliminary objection that the appeal will not lie. Ordinarily, and unless there is something in the Code of Civil Procedure to take away the appeal, an appeal lies, under s. 10 of the Letters Patent from a judgment, or order, not being a sentence or order passed or made in a criminal trial of one Judge of this Court. On behalf of the appellant Mr. *Moti Lal* has cited a judgment of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (3) and he has referred more particularly to a passage at p. 494, where it is said —"It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court." I do not understand their Lordships there to have held that s. 588 of the Civil Procedure Code does not apply at all to appeals attempted to be brought to the Full Court, from an order passed by a Judge of the Court. I think

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* Appeal No. 25 of 1888 under s. 10, Letters Patent.

(1) 9 M. 253. (2) 9 M. 447. (3) 9 C. 482.

1889 FEB. 16. — APPELLATE CIVIL. — 11 A. 375 = 9 A.W.N. (1889) 70.

[376] they were restricting their observations to the case before them. In that case the question arose from a so-called order of Pontifex, J., in respect of an order of the Privy Council for execution. Mr. Justice Pontifex considered that the decree as it then stood was not susceptible of execution, and refused to transmit the decree to the Court below. An appeal was preferred under s. 15 of the Letters Patent of the Calcutta High Court. Two of the Judges of that Court differed from the Chief Justice; the Chief Justice thinking that Mr. Justice Pontifex's order was merely ministerial, and the other two Judges apparently thinking that his proceeding was more than ministerial. Mr. Justice Mitter pointed out that Pontifex, J., ought to have acted under s. 244 of Act X of 1877. Those two Judges considered that an appeal lay under s. 15, Letters Patent.

With regard to that case my observation is this, that apparently Mr. Justice Mitter considered that Mr. Justice Pontifex must have taken action or ought to have acted under s. 244 or 245 of the then Code. If Mr. Justice Pontifex was acting under those sections, it was quite obvious that an appeal would lie. If he was not acting under those execution sections of the Code, but under s. 610 of the Code, I have difficulty in seeing how s. 588, Civil Procedure Code, could have applied to what he did. The term "an order" as defined in the present Code of 1882 would hardly be applicable to any direction which the Judge might give under s. 610, Civil Procedure Code. In the present Code an order is defined as "the formal expression of any decision of a Civil Court which is not a decree as above defined."

As I understand it, under s. 610, all that a Judge has to do is to transmit the decree and give such direction as may be required, &c. I come to the conclusion that the case in the Privy Council does not apply to this case. On the other hand, we have two cases in the Indian Law Reports, 9 Madras, which I think bear directly on the present case.

The first of those cases is *Achaya* v. *Ratnavelu* (1) in which Mr. Justice Muthusawmi Ayyar, in a very careful and elaborate judgment [377] shows how the Code of Civil Procedure has affected s. 15 of the Letters Patent. The next case is *in re Rajagopal and others* (2) in which the present Chief Justice and Mr. Justice Parker held that an order passed under s. 592 of the Code of Civil Procedure, rejecting an application to appeal as a pauper, is not appealable. That was an appeal from an order of one of the Judges of that Court, who rejected an application to appeal as a pauper. In my opinion the correct view of the law as applicable to such cases is to be found in the two cases of the Indian Law Reports, 9 Madras, and is a view which we ought to follow. I may observe that considerable difference exists between s. 588 of the present Code and s. 588 of Act X of 1877, which was the Act under consideration in the case before the Judicial Committee. In my opinion this appeal should be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion (3).

Appeal dismissed.

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(1) 9 M. 253. (2) 9 M. 447.

(3) This appears to be the first decision of this High Court upon the effect of ss. 588, 591 and 632 of the Civil Procedure Code, on s. 10 of the Letters Patent. In the other High Courts, a similar construction has been placed on the corresponding clauses of their Letters Patent. The following cases were decided when the Civil Procedure Code of 1859 was in force, s. 363 of which prohibited appeals from interlocutory orders:— *Apcar* v. *Howah Bye* (1 Ind. Jur, N. S., 337); *Kumara Upendra Krishna Dob Bahadur*

11 A. 378=9 A.W.N. (1889) 104.

1889 FEB. 21. APPELLATE CIVIL. 11 A. 378= 9 A.W.N. (1889) 104.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KHAIRATI LAL (PETITIONER) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY).* [21st February, 1889.]

Act X of 1870 (*Land Acquisition Act*) *s.* 55--*Part of property acquired for public purposes--Owner desiring that the whole shall be acquired—Right of owner not restricted to small or confined areas—Convenience of owner not the test.*

The Local Government having appropriated for public purposes under the Land Acquisition Act (X of 1870) some of the out-houses attached to a dwelling-house and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances or the rest of the compound, the owner objected, under s 55 of the Act, that the Government should take the whole of such property or none.

Held, applying to s. 55 the interpretation placed by the Courts in England upon the corresponding s. 92 of the Land Clauses Consolidation Act (8 & 9 Vic., c. 18), that the section was applicable, and the objection must be allowed, *Grosvenor* v. *The Hampstead Junction Railway Company* (1) *Cole* v. *The West London and Crystal Palace Railway Company* (2), and *King* v. *The Wycombe Railway Company* (3) referred to.

Held, also that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner.

[R., 27 M. 350 (354); 9 O.C. 311,313, 314) ; 7 Ind. Cas. 436 (441); D., 30 A. 176 (178)=7 W.N. (1908) 63=5 A.E.J. 166]

THIS appeal arose out of a reference by the Collector of Meerut to the District Judge, under s. 15 of the Land Acquisition Act (X of 1870).

Certain buildings were appropriated by Government for the purposes of a railway line, in the city of Meerut. The buildings formed out-houses of a bungalow in cantonments, standing upon the land the property admittedly of the Cantonment Committee.

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* First appeal No. 163 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 27th June, 1887.

(1) 26 L. J. N. S. Ch. 731. (2) 28 L.J. Ch. 767. (3) 29 L.J. Ch. 462.

v. *Nabin Krishna Bose* (3 B.L.R.. O.C., at p. 117) ; *Baka Bibi* v. *Khaja Mahomed Umar Khan* (4 B.L.R., A.C., 10) ; *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, (8 B.L.R. 433) ; *Sonbai* v. *Ahmedbai Habibhai* (9 Bom. H.C. Rep. 398); *Mowla Buksh* v. *Kishen Pertab Sahi* (I.L.R., 1 Calc. 102) ; *Somasundram Chetti* v. *The Administrator-General* (I.L.R., 1 Mad., 148). The effect of these cases was (a) that appeals under the clauses of the other Letters Patent corresponding with s. 10 of the Letters Patent for this High Court, were treated as subject to the provisions of the Code of 1859 generally ; (b) that the term 'judgment" in the clauses under consideration was understood in the sense of a final adjudication or "decree" as defined in s. 2, of the present Code The only ruling in which the term was applied in a sense comprehending orders of every description, final or interlocutory and without reference to the provisions of the Code, was *De Souza* v. *Coles* (Mad. H.C. Rep. 384), which has never been followed to its full extent.

The cases decided (in addition to those mentioned by Edge, C.J.) since the coming into force of the Code of 1877 and in particular s. 588 making certain interlocutory orders appealable, are *Howard* v. *Wilson* (I.L.R., 4 Calc. 231) ; *Ebrahim* v. *Fukhrunnissa Begam* (I.L.R., 4 Calc. 531) ; *Kali Kristo Paul* v. *Ramchunder Nag* (I.L.R , 8 Calc. 147), and *Navivahoo* v. *Narytamdas Camdas* (I.L.R., 7 Bom. 5). Their effect, stated shortly, appears to be that a decision, to be a "judgment" within s. 10 of the Letters Patent, either must be a "decree", as defined in s. 2 of the present Code, or if an order not amounting to a decree, must be one of those specified in s. 588

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The compensation offered by the Collector was at one time Rs. 825, at another, Rs.1,717, calculated exclusive of the 15 per cent. to be paid under s. 42 of the Act. The owner declined this offer, claiming—

(1). With reference to s. 55 of the Act, that Government should appropriate the whole of the buildings appertaining to the bungalow, [379] including the bungalow itself, and setting the total value at Rs. 35,672-15.

(2). That, in the event of the liability of Government to take the whole not being conceded by the Court, the owner was entitled to a sufficient sum to enable him to erect buildings anew, and any other amounts that might be held due under s. 24.

On the 11th May, 1887, the District Judge passed the following order :—

"The land which has been appropriated, 3 bighas 18 biswas 12 biswansis in extent, forms a portion of a large compound, attached to a house within cantonment limits, the land is cantonment land admittedly, and the ownership of it vests in the Cantonment Committee. All that belongs to the claimant is the buildings upon the land, comprising a pucka house with its appurtenant out-houses. The appropriation does not interfere with the house itself, this is left at some 25 yards beyond the boundary of the appropriated land, but includes a portion of the cook-room, the sweeper's house, stables, latrines, some tiled servants' houses, and a small portion of garden, and also an old tomb.

"For the claimant it is contended that the whole of the buildings, including of course the main residence, must be taken. It is urged that, in accordance with rulings of the English Courts (s. 92 of the English Act being parallel s. 55 of Act X of 1870), the appropriation as made by the Collector, is the appropriation of 'part' only of a 'house', and that accordingly, the owner wishing it, Government is bound to take the whole of the buildings or none at all. Special stress is laid upon the Court's remarks in the case of *King* v. *The Wycombe Railway Co.* (1) (quoted at p. 47 of Ingram's Law of Compensation), in the case of the *Government of St. Thomas' Hospital* v. *Charing Cross Railway Co.* (quoted as above), and upon the authority also of English Judges, it is urged that the 'test' to be applied, in order to decide whether these buildings are or are not "part" of the house, is whether the portions acquired would pass on a conveyance of the house as part of the appurte-[380] nances. Now, deciding strictly in accordance with the letter of this test, unquestionably the buildings now appropriated would form 'part' of the house. But it must be borne in mind that the circumstances of property of this description are different in India from those of property of the same kind in England, and especially that in the present case, the land itself is not the claimant's property. In England, such properties are, as a rule, very limited in extent; they are compact, and, as a rule, all available space is utilized for some special purpose, and the taking of any particular portion may be presumed under such conditions to place the owner in difficulty, or put him to great inconvenience; and in many cases, in England, another test appears to have been applied, *viz.*, whether the plot or building to be appropriated is essential to the convenient occupation of the house, or whether, without great inconvenience to the owner of the house, it can be severed from the remainder. Unquestionably, the stables and cook-houses and servants' huts are essential to

(1) 29 L.J. Ch. 462.

the convenience of the occupant of the house; but I am of opinion that this fact would not necessarily make it incumbent upon Government to appropriate the whole of the buildings in the compound, unless it is shown that these could not *without inconvenience* be erected elsewhere. These buildings are of small value as compared with the main residence, and are usually of a kind readily demolished and as readily replaced—and here also the peculiar conditions of the claimant's occupation of the land are entitled to consideration. The land is not his own, it is simply a temporary loan as it were from Government, given for the purposes of building a residence, and so long as *without inconvenience* the buildings appropriated can be replaced by fresh buildings upon other sites, I am of opinion that the owner cannot force the appropriation of the whole. Now, the enclosure or compound is of very large extent, and a large portion of it would seem to have been invariably let out for cultivation. The area of 17 bighas is far beyond the requirements of any bungalow, and is far beyond that of the majority of compounds in Meerut, or any other station. This large area cannot certainly be considered as a necessary adjunct to the house, or as necessary for the convenience even of the occupant, and there is [381] ample space available wiibin the area for the construction of the out-houses now proposed for removal. I have myself visited the place, and am certainly of opinion that the removal and re-erection of the buildings in another part of the compound would in no way inflict a hardship upon the owner, and I accordingly hold it is not incumbent upon the Government to appropriate the whole of the buildings within the area of the 17 bighas; and that s. 55 of Act X does not bar this partial appropriation, so long as adequate compensation is paid so as to enable the buildings to be reconstructed in another part of the enclosure."

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The District Judge proceeded to assess the compensation due to the claimant in respect of such buildings only as were situate upon the area originally appropriated, at the sum of Rs. 2,590 plus, 5 per cent. on the market-value payable under s. 42 of the Act, with interest on the whole amount decreed at the rate of 6 per cent. from the date of appropriation, under the same section.

The claimant appealed to the High Court, on the ground (*inter alia*) that, with reference to s. 55 of Act X of 1870, he was entitled to require that the whole of the property in question should be taken, and compensation awarded to him in respect thereof.

The Hon. *T. Conlan* and Mr. *G. T. Spankie*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J. and TYRRELL, J.—This was a case under the Land Acquisition Act (X of 1870) which was referred by the Collector to the Judge of Meerut. The Government took some of the out-offices and some of the land in the appellant's compound for public purposes. The appellant had objected under s. 55 of that Act that the Government must take the whole or none. As a matter of fact, the Government pulled down some of the out-offices, cut down some of the trees, and appropriated some of the land. The Judge of Meerut, assessing the compensation to be given to the appellant, came to the conclusion that the case did not fall within s. 55 of the Act. We are prefectly satisfied that the correct interpretation of s. 55 is the same as the interpretation that has been put on the corres[382]ponding s. 92 of the Land Clauses Consolidation Act; and that in this case, for instance, the appellant objecting, the Government could not take under

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the compulsory powers of the Act the out-offices or that portion of the compound which they did take, unless they took the whole: that is to say, the house with its other out-offices and appurtenances and its compound, so far as the compound was the compound of the house. Several English authorities on the point have been quoted, among them the following:—*Grosvenor* v. *The Hampstxad Junction Railway Company* (1), *Cole* v. *The West London and Crystal Palace Railway Company* (2) and *King* v. *The Wycombe Railway Company* (3).

The Judge of Meerut was quite wrong in supposing that the English Courts in putting the interpretation which they did upon s. 92 of the Land Clauses Consolidation Act were dealing only with small or confined areas. The convenience of the proprietor is not the test. The proprietor is entitled to stand upon his rights and say "You shall not apply your compulsory powers at all, unless you take the whole of my house.' Under these circumstances we allow the appeal and remand the case to the Judge, directing him to assess the compensation on the whole property in question. In doing so he will ascertain, as far as possible, what the market-value of the property was at the time it was taken, deducting of course Rs. 32, the value of the trees taken by the appellant; and he will, on that market-value, add 15 per cent. for compulsory sale. We allow the appeal with costs, which will be allowed by the Judge in finally deciding and making his award. *Appeal allowed.*

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11 A. 383 = 9 A.W.N. (1889) 151.

[383] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GOPAL DAS (*Petitioner*) v. ALAF KHAN AND ANOTHER (*Opposite party*).*
[23rd March, 1889.]

Second appeal—Order on appeal affirming order granting application for review of judgment—High Court's power of revision—Civil Procedure Code, ss. 584, 622, 629.

No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment.

The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the rehearing.

[F.—15 A. 405 (407) = 13 A.W.N, 172; R.—33 P.R. 1902 = 24 P.L.R. 1902; 12 O.C. 109; 8 Ind. Cas. 876 = 13 O.C. 341 (343); 8 Ind. Cas. 613; 14 Ind. Cas. 39. Cons. —18 A. 133 (167).

THIS was an appeal under s. 10 of the Letters Patent, from an order of Straight, J., dismissing an application for revision under s. 622 of the Civil Procedure Code. The facts are stated in the judgment of Straight, J.

STRAIGHT, J.—The following are the facts out of which this application for revision has arisen. The respondents before me, Alaf Khan and Jungbaz Khan, brought a pre-emption suit in the Court of the Subordinate Judge of Mainpuri against Sundar Lal, vendor, and Gopal Das, vendee, in respect of a sale by the former to the latter of a fifteen

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* Appeal No. 22 of 1888 under s. 10, Letters Patent.

(1) 26 L.J.N.S Ch. 731. (2) 28 L. J. Ch. 767 (3) 29 L. J. Ch. 462.

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biswansi zemindari share on the 16th September, 1885. A second suit by one Kharagjit, impeaching the same transaction, on the ground of pre-emptive right, was subsequently instituted in the same Court and Alaf Khan and Jungbaz Khan were made parties, defendants, to that suit, and Kharagit defendant to their suit. Both suits were tried together, and, in the result, that of Kharagjit was decreed by the Subordinate Judge, on the ground that he was the superior pre-emptor and had the call of the two plaintiffs in the other suit which was in turn dismissed, and no appeal was preferred from either that decree or the decree in favour of Kharagjit, as plaintiff. By this last-mentioned decree, Kharagjit was directed to deposit in Court the purchase-money found to have been paid by Gopal Das to Sundar Lal, within two [384] months, otherwise his suit would stand dismissed. This Kharagjit failed to do, and thereupon Alaf Khan and Jungbaz Khan applied for review of judgment, setting up this failure on the part of Kharagjit, and the admitted fact of their being next to him in order of pre-emptive right as the grounds for the application. On the 20th May, 1887, the Subordinate Judge admitted the application for review, holding that it was covered by s. 623 of the Civil Procedure Code, the ascertainment by the petitioners of the failure of Kharagjit to deposit the money within time being the discovery of " a thing which was not known before."

To this order of the Subordinate Judge objection was taken by Gopal Dass by way of appeal to the Judge in the manner indicated in s. 629 of the Code and on the 5th September, 1877, the Judge upheld the order and dismissed the appeal with costs. It is this order of the Judge that is the subject of this application for revision before me under s. 622 of the Code. Now, I take it to be the recognised rule of this Court that, if a party to civil proceedings applies to us to exercise our powers under s. 622, he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally or irregularly or without jurisdiction done by a Subordinate Court. Now, when the Subordinate Judge admitted the application of Alaf Khan and Jungbaz for review, the petitioner before us Gopal Das, who was prejudiced thereby, had two alternatives open to him under s. 629 of the Code, namely, to object to such admission *(a)* by an appeal from the order granting the admission upon the grounds therein specified, or *(b)* in any appeal against the final decree or order made in the suit. Gopal Das availed himself of the first of these alternatives by taking an appeal to the Judge and staying further proceeding with the re-hearing pending its decision. The Judge has decided against him by dismissing his appeal, and the first question I have now to consider is, does any second appeal lie from the order of the Judge? I am very clearly of opinion that it does not. A right of appeal is the creation of a statute, and unless I can find any specific provision in the Code of Civil Procedure in [385] terms conferring such a right I cannot hold it to exist. Turning to that law I find in Part VI " of appeals " that there is an appeal from the decrees or from any part of the decrees of the Courts exercising original jurisdiction (s. 540), to a High Court from all decrees passed on appeal by any Court subordinate to a High Court (s. 584), from the orders specified in s. 588 and from no other such orders, in respect of which the orders passed in appeal "shall be final," and, in s. 629 to which I have already referred, from an order admitting an application for reveiw of judgment. But as to this last matter there is no mention anywhere in terms to be found recognizing a right of second appeal from an order passed on appeal

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from such an order. It is clear to my mind that an order passed on appeal from an order objecting to the admission of an application for review is not a "decree"; indeed, it is in terms contradistinguished in s. 629 from a decree. Consequently, s. 584 which contains the only sanction to a second appeal, and that only from a "decree," cannot apply. So far, then, as the immediate proceeding under s. 629 which the petitioner has adopted is concerned, he has no power under the law to carry it further, except of course as provided in s. 622, if I consider that section to be applicable. But then arises the further question whether, as an appeal is provided by law from any decree that may hereafter be passed by the Subordinate Judge at the re-hearing of suit, that will, if his and the Judge's order of review remains untouched, take place, I should upon this application in anticipation determine the point as to whether it will be open to him to again contest the propriety of the order admitting the review. I am of opinion that I ought not to do so, and for the obvious reason that, assuming the case to be decided against the petitioner, not only will he have an appeal to the Judge from the decree but a second appeal to this Court; which, if I refuse now to interfere under s. 622, on the ground that he has a remedy *in future*, will not have expressed any opinion upon the question of the propriety of grant of the review. If the case is decided in his favour, *cadit quæstio*. I therefore refuse to interfere under s. 622 of the Code and dismiss the petition, but costs will be costs in the cause.

[386] The petitioner appealed from this decision under s. 10 of the Letters Patent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—We agreee with the view taken by Mr. Justice Straight, and we think that he exercised a sound discretion in refusing to interfere under s. 622 of the Civil Procedure Code.

We dismiss the appeal with costs. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUHAMMAD SAMI-UD-DIN KHAN (*Plaintiff*) *v.* MAUNU LAL AND OTHERS (*Defendants*).* [9th April, 1889.]

Mortgage, usufructuary—Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Res judicata—*Civil Procedure Code, s. 13—Foreclosure—Act IV of 1882 (Transfer of Property Act), s. 93—Estoppel—Act I of 1872 (Evidence Act), s. 115.*

In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct.

Held, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem

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* Second Appeal, No. 1182 of 1887 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 30th March, 1887, confirming a decree of Maulvi Saiyad Muhammad, Subordinate Judge of Aligarh, dated the 6th April, 1886.

and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

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Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

[387] The decision in *Sheikh Golam Hossein* v. *Musammat Alla Rukhee Beebee* (1) treated as not binding since the passing of the Transfer of Property Act. *Chaita* v. *Purum Sookh* (2) and *Anrudh Singh* v. *Sheo Prasad* (3) referred to.

Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem,—*held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption.

[Diss.—19 A. 202 (204) ; N.F.—25 M. 200 (F.B.) ; 43 P.R. 1907 = 101 P.W.R. 1907 = 169 P.L.R. 1908 ; R.—21 A. 251 ; 24 A. 44 (F.B.) = 21 A.W.N. 194 ; U.B.R. (1897—1901), 582.]

THE facts of this case are stated in the judgment of Straight, J.

Mr. *G. E. A. Ross* and Mr. *Hamidullah*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Pandit *Ratan Chand*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This second appeal raises questions of considerable difficulty, and in order to understand the method by which I have arrived at the conclusions I am about to pronounce, it is essential that I should state very fully the circumstances out of which this present litigation has arisen. In the year 1842 Dalip Singh and others mortgaged twenty biswas of mouza Karia Buzurg in the Aligarh district for a sum of Rs. 4,000 to one Khushwakt Rai. The mortgage was of a possessory kind, and the mortgagee was to take possession of the mortgaged twenty biswas and to satisfy the amount of the principal debt and the interest thereupon from the usufruct of the property. By various subsequent assignments the interests of the original mortgagee passed to other persons, and in the end they centred in the person of Mannu Lal, the defendant-respondent to the present appeal. Among the persons interested under the mortgage of 1842 as mortgagors were Mussamut Khushalo and others, and the extent of their interests therein was four biswas seven biswansis ten kachwansis. On the 13th August, 1881, Mussamut Khushalo and others under a registered instrument of that date assigned over to the plaintiff in the present suit their [388] interests in the four biswas seven biswansis ten kachwansis. From what I have said it will thus be seen that the plaintiff-appellant before us represents the interest of certain mortgagors, while the defendant Mannu Lal and those who are arrayed alongside of him in the litigation represent the interests of the mortgagees.

The present suit is a suit for redemption, and it has been dismissed by both the lower Courts, much upon the same ground, namely, that by

(1) N.W.H.C.R. 1871, p. 62. (2) N.W.H.C.R. 1867, p. 256. (3) 4 A. 481.

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the operation of a rule somewhat like that of *res judicata*, the plaintiff, having been a party to a suit which ended in a decree of this Court of the 27th August, 1883, in which Musammat Khushalo and others were the plaintiffs and the present defendant was a defendant, is by that decree passed in that suit barred from now coming into Court with his present claim. I have already stated that the mortgage of 1842 was of a usufructuary character, and that the term of it was that the mortgagees were to remain in possession so long as and until the principal money and the interest thereon were satisfied from the usufruct. In the suit which was brought by Musammat Khushalo and others in the year 1882, they claimed that not only had the mortgage been redeemed to the extent of their four biswas seven biswansis ten kachwansis share, but that in addition, in proportion to the amount of that share, the mortgagees in possession had realized a considerable sum of money over and above what they were entitled to and they claimed through the medium of the Court to receive a decree for that amount.

It is unnecessary for me to deal with the decree of the lower Court which dealt with that original suit as a Court of first instance. It is enough to say that in appeal this Court gave the plaintiffs a conditional decree subject to their paying into Court the sum of Rs. 1,999-10-6, which had been found to be the amount still remaining due and owing from the plaintiffs to the defendant-mortgagee in possession, and the decree of this Court went on to declare that if that amount was not paid within the time stated therein, the suit of the plaintiffs would stand dismissed. As a matter of fact that amount of money was not paid in, and consequently that suit [389] of Musammat Khushalo and others stood dismissed from the expiration of the fixed period.

It is said by the learned Judge in his judgment in this case, that by the order of this Court passed in that suit, the right of redemption of Musammat Khushalo and others was extinguished, and that consequently with that extinguishment disappeared all or any rights that the present plaintiff possessed. It is suggested in the pleas taken in the present suit that that litigation was practically the litigation of the plaintiff, that he found the money for it, that he took a prominent part in promoting it, and that although in name he was not joined as a party, he was in fact a party thereto. I may say at once, that from the way in which I look upon this matter, it is wholly indifferent to the decision of the case whether he was or was not a party to that suit. If I understand the law of mortgage as now more or less embodied in the Transfer of Property Act by which we are governed in these Provinces, there is nothing to prevent a person who has usufructuarily mortgaged his property from making a second usufructuary mortgage with a condition that the second mortgagee shall take all the necessary steps of effect and bring about the redemption of the first mortgagee so as to obtain possession of the mortgaged property. I also understand the law to be that if a usufructuary mortgagor brings a suit against his usufructuary mortgagee, alleging that the mortgage has been satisfied out of the usufruct for his principal and interest, and in that suit it is found that at the time of the determination of that suit the mortgage has not been so satisfied, than there is no bar in law to his subsequently instituting a second suit after a further expiration of time when by further enjoyment of the profits of property by the mortgagee, the mortgagor can come into Court and say the mortgage-debt has now been discharged. This is the distinction which places simple mortgagors and mortgagees and usufructuary mortgagors and mortgagees upon a

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distinct and different footing. It is unnecessary for me in the present case to do more than discuss the question in so far as it relates to usufructuray mortgages. It seems to me that even if it could be said [390] that these usufructuary mortgagors wrongly brought their suit in the year 1882, and still more wrongly refused or declined to, or refrained from paying into Court the amount they were called upon to pay, there was nothing to prevent them at a subsequent period from bringing another suit in which they might allege and prove that the Rs. 1,999-10-6 had been satisfied out of the usufruct. From this it would be apparent that my view is that *quoad* the decree of this Court of the 27th August, 1883, all that that decided was that in order to redeem and get possession of the property, the plaintiffs must pay the sum of Rs. 1,999-10-6: and if the present plaintiff can be held bound by that decree, this is all that can be held to have been decided against him. I may observe in passing that no question arises in this case as to the right of the plaintiff to maintain this suit for redemption as to the four biswas seven biswansis ten kachwansis share, part of what was originally mortgaged. By that I mean it is not suggested that he was under the ordinary legal obligation regulating these matters of mortgage to come into Court and offer to redeem the *whole* mortgage. It is admitted that so far this suit is maintainable.

Looking then at this as a suit brought by the plaintiff for redemption of mortgage as against the defendant-mortgagee in possession is it barred by any rule of law such as *res judicata* or estoppel as enunciated in s. 115 of the Evidence Act, or by any other principle of equitable estoppel which we as a Court of equity ought to apply? It seems to me that altogether apart from anything that may have taken place between the plaintiff and the assignors to him of an interest by way of subordinate charge, as to who should have instituted the suit which was originally brought, the plaintiff is, under the Transfer of Property Act, a person who at this time is interested in and has a charge upon the four biswas seven biswansis ten kachwansis. It would be protracting this judgment to unnecessary length were I to go in detail into the terms of the instrument of transfer of the 13th August, 1881. It, in my opinion, constitutes a perfectly good document of title to sanction the plaintiff's maintaining his present suit.

[391] For a moment to revert to the point as to whether the plaintiff is barred by the rule of *res judicata*. It is clear from the array of parties in this former litigation, that he was no party to that litigation; but as I have already said, even if he were bound by what was done in that particular suit, all that the decision therein amounted to was a declaration of a Court that, if the plaintiffs in that suit wanted to get possession of the property, then they must pay a sum of Rs. 1,999-10-6. Although in the course of the hearing of this appeal this was not the ground on which the case was argued, and consequently no authorities bearing upon this point were referred to, I have been at pains to look into the matter. The reason why I said at the outset that it is not without difficulty is because of the circumstance that there is a Full Bench ruling of this Court, *Sheikh Golam Hossein* v. *Musammat Alla Rukhee Beebee* (1) in which it was held in effect that where a person by his own neglect has lost a remedy by process of execution to which he became entitled by an adjudication in a former suit, he cannot be permitted to revert to the position which he held prior to the institution of that suit, and to bring a fresh suit. In that judgment the

(2) N.W.P. H.C.R., 1871, p. 62.

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first learned Chief Justice of this Court, Sir Walter Morgan, joined, and it was a ruling of the year 1871. I confess, upon referring to another ruling, *Chaita* v. *Purum Sookh* (1), I find it difficult to reconcile the view which in the first mentioned case he concurred in, with that expressed by him in the second case, in which it was held that where a person has obtained a decree for redemption but has not executed it within the prescribed period for execution, the mortgagee, does not by omission of the mortgagor to execute the decree ceased to be mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. I confess with the most profound respect that these two rulings appear to my mind irreconcileable. My brother Mahmood and I in the case of *Anrudh Singh* v. *Sheo Prasad* (2) followed the Full Bench ruling of 1871, but what I have now to say with regard to it, is this; in the first place, when it was passed, the Transfer of Property Act, **[392]** which embodies and defines the precise legal nature of the rights and obligations of the mortgagors, and mortgagees, and as to the procedure to be adopted in suits between them, was not in force, and further it does not appear to me, if I can form my opinion from the judgment of the Full Bench, that the question as to what was the precise nature of the rights of a usufructuary mortgagor and his usufructuary mortgagee was discussed. Taking the definition of the Transfer of the Property Act as to what this latter's rights are, we find that he is entitled to remain in possession and enjoyment of the property mortgaged according to the terms of the instrument, until such time as (in the case before me) the principal sum with interest thereupon shall have been satisfied and discharged from the usufruct. It is a noticeable matter in the Transfer of Property Act that in s. 93 which is to be found in the particular portion of the statute relating to redemption of mortgage, it is laid down in paragraph 2 that where a sum has been ordered by a Court to be paid in a suit for redemption of mortgage and is not paid, certain consequences will follow, or to quote the words of that paragraph, it is enacted:—"If such payment is not so made, the defendant may (*unless the mortgage is simple or usufructuary*) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem." Therefore I presume from that indication in the statute itself that it was not contemplated that in a suit brought by a usufructuary mortgagor against a usufructuary mortgagee for possession upon the ground that he had been satisfied and discharged out of the usufruct, and having been ordered to pay something because the mortgagee had not been so satisfied, therefore the decree passed against him would have the effect of foreclosing him for all time from redeeming the property. It seems to me from what is stated in the Transfer of Property Act as to the relations of a usufructuary mortgagor and mortgagee and their rights in reference to one another that I am not constrained to follow that ruling of the Full Bench of this Court, and consequently I cannot hold that any doctrine or principle of *res judicata* applies to the present case.

[393] Then arises the question; Is there any principle such as s. 115 of the Evidence Act lays down, or any other equitable principle of estoppel that should bar the plaintiff from maintaining his present suit? I find nothing in the course of the proceedings in the former litigation of 1882 to lead one to the conclusion that the defendant was in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff. I need scarcely say, it is not enough that he should

(1) N. W. P. H. C. R, 1867, p. 256. (2) 4 A. 481.

have put forward or consented to have put forward the original mortgagors as the persons entitled to redeem. It would no doubt have been far more satisfactory under all circumstances had he been joined as a party in that litigation, but by his action and his abstinence from asking to be joined therein, I cannot hold that there was any conduct on his part in respect of which it can be reasonably inferred that the defendants were led to do anything they would otherwise not have done. I am of opinion that there is no estoppel of any kind to bar the suit. This being the view that upon a very anxious and careful consideration of the whole matter I have arrived at, I have come to the conclusion that the appeal should be allowed and that the decree of the lower Court should be set aside. That decree practically being passed upon a preliminary ground, this case must be dealt with under s. 562, Civil Procedure Code, and must be remanded to the Court of the Judge of Aligarh for restoration to the file of pending appeals and disposal upon the merits according to law. Costs to abide the result.

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BRODHURST, J.—I concur. *Cause remanded.*

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11 A. 393 = 9 A.W.N. (1889) 152.

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* KHALAK.
[3rd May, 1889.]

Criminal Procedure Code, s. 35—"*Distinct offences*"—*Act XLV of* 1860 (*Penal Code*), ss. 75, 411—*Practice*.

A person convicted under ss. 411—75 of the Penal Code is not convicted of "distinct offences," within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress* v. *Zor Singh* (1) explained.

[394] Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session.

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Mainpuri. The facts of the case are stated in the judgment of Brodhurst, J.

JUDGMENT.

BRODHURST, J.—The reference in this case is made under the following circumstances :—The Joint Magistrate of Mainpuri tried Khalak Kisan under ss. 411,75 of the Indian Penal Code. In his judgment he stated all the facts of the case and he concluded as follows :—" Defendant has given no satisfactory proof how he came to be in possession of them—the stolen articles—and it further appears that it is only about six months since he was released after two and a half years' imprisonment on two charges under s. 411 of the Penal Code. I convict defendant under s. 411 of the Penal Code (retaining possession of stolen property knowing the same to be stolen). He is further charged with having been previously convicted on the 22nd December, 1885, on two charges under s. 411 of the Penal Code. He admits these convictions (the *misls* have been produced.) Under ss. 411,75 of the Penal-Code (acting on the ruling in *Queen-Empress*

(1) 10 A. 146 = 8 A.W.N. (1888) 5.

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v. *Zor Singh* (*Weekly Notes*, 1888, p.5), I sentenced defendant to be rigorously imprisoned for four years."

The Sessions Judge in his referring order mentions that he called for the record under the provisions of s. 435 of the Criminal Procedure Code for the purpose of satisfying himself as to the legality of the sentence. He observes, "Under the provisions of s. 35 (*b*) of the Criminal Procedure Code a Magistrate can, in the case of a person convicted at one trial of two or more *distinct offences*, impose an aggregate punishment not exceeding twice the amount of punishment he is ordinarily competent to inflict. In the present case I would submit that the prisoner was not convicted of two distinct offences; he was convicted of having been in dishonest possession of property stolen in a burglary committed in the prosecutor's house, and he was further charged under s. 75 of the Indian Penal Code **[395]** with having been previously convicted of a similar offence. I am therefore of opinion that the fact that the prisoner was convicted under s. 411 of the Indian Penal Code after having been previously convicted of the same (*sic*) offence, was not sufficient to give the Joint Magistrate the increased powers referred to in s. 35 of the Criminal Procedure Code."

I am responsible for the judgment in *Queen-Empress* v. *Zor Singh* (1). There is no doubt that just at the time I wrote that judgment, I was under the impression that a Magistrate of the first class might, under the provisions of s. 75 of the Penal Code on a second conviction as referred to in that section, award double the amount of punishment, as he may under the provisions of s. 35 (*b*) of the Criminal Procedure Code award an aggregate punishment not exceeding twice that which he is in the exercise of his ordinary jurisdiction competent to inflict. I think a Magistrate of that class might well be entrusted with such powers, but I soon became aware of the error referred to, and with my sanction the few words referred to by the Sessions Judge as *obiter dicta* were omitted from the judgment as reported in I. L. R. 10 All. 146. I think that, under the circumstances stated by the Joint Magistrate, Khalak Kisan was deserving of enhanced punishment, ahd that following the remarks made by me in the case of *Queen-Empress* v. *Zor Singh* (1), the best course for the Joint Magistrate to have adopted would have been to have committed the accused for trial in the Court of Session under s. 411, 75 of the Indian Penal Code. I direct that notice issue to Khalak Kisan to show cause why his conviction and sentence under ss. 411, 75 of the Penal Code should not be set aside and why he should not be committed for trial, under the same sections, in the Court of Session (2).

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(1) 10 A. 146 = 8 A.W.N. (1888) 5.

(2) The accused not having appeared in answer to the notice to show cause, Brodhurst, J., directed that he should be committed for trial under ss. 411, 75 of the Penal Code in the Court of Session.

11 A. 396 (P.C.) = 5 Sar. P.C.J. 372 = 13 Ind. Jur. 171.

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PRIVY COUNCIL.

11 A. 396 (P.C.) = 5 Sar. P.C.J. 372 = 13 Ind. Jur. 171.

[396] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.

[On appeal from the High Court for the North-Western Provinces.]

ANAND KUAR AND ANOTHER, REPRESENTATIVES OF CHAUDHRI LACHMAN SINGH (*Defendant*) v. TANSUKH (*Plaintiff*). [22nd February, 1889.]

Question in issue—Parties—Admission.

The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the appellate Court that even if this deed had been executed it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution, and the plaint also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest.

APPEAL from a decree (26th May, 1884,) of the High Court, affirming a decree (17th July, 1882), of the Subordinate Judge of Meerut.

The question raised on this appeal was as to which of two collateral relations of the deceased was entitled to succeed to his inheritance.

The question arose thus. Two brothers, one being Rup Singh, whose estate was now in dispute, and the other, Salig Ram, were grandsons of Guman Singh, whose only brother, Rattan Singh, was grandfather of Chaudhri Tansukh, the plaintiff, and of Madho Singh; the latter being nominally a defendant, as he waived any right in this suit. In fact, Salig Ram's son Lachman Singh, was substantially the sole defendant in the suit which was brought by Chaudhri Tansukh against his two second cousins, Lachman Singh, and Madho Singh, to prove his title to inherit to Rup Singh, deceased.

Rup Singh died in 1870; his widow died in 1872. The plaint alleged that Luchman Singh had taken possession, without real title, of Rup Singh's estate on his death, and previously, in 1875, had sued the plaintiff Chaudhri Tansukh, for a declaration of his right, relying on an alleged deed of gift from Rup Singh, dated 1st [397] March, 1853, which suit failed; the decision having been that the gift was ineffectual. The right of inheritance, resulting from the relationship of Lachman Singh as nephew's son, to the deceased, was negatived, according to the plaint, by his father, Salig Ram's having been adopted into another branch of the family, so as to lose his rights in the line of his natural parent. Madho Singh waived any right he might be held to have. But the substantial defence, that of Lachman Singh, was that the deed of the 1st March, 1853, executed by the deceased Rup Singh, in his favour, was in operation.

One of the issues in the present suit raised the question of the operation of this deed; the defendant insisting at the hearing that the decision referred to in the plaint was not that the deed had never been executed, but that it had never been accepted or acted upon.

The judgment of the Court in 1875 was that even if the deed had been executed, the gift was inoperative, never having been acted upon, or followed by possession, and Macnaghten's Hindu Law, p. 217, was referred to on this point. This judgment had been upheld by the High Court on 19th November, 1880.

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In the present suit the Subordinate Judge held that the right of inheritance from Rup Singh had not devolved upon Lachman Singh, because Saligram, the father of the latter, had been adopted into another family; and in regard to the deed of gift, the decision was that as Lachman Singh had never obtained possession under it of Rup Singh's estate, it could not now be enforced. With reference to the admission of Madho Singh, the Subordinate Judge decreed the plaintiff's claim to his share, as well as his own, decreeing the claim in full.

On an appeal by Lachman Singh, the High Court (OLDFIELD and MAHMOOD, JJ.,) found the deed of gift not proved; and held that, even if executed, it never took effect to pass the property. The Court, however, modified the decree; holding that the plaintiff was entitled, upon what he had proved, to only a moiety of the estate claimed, inasmuch as Madho Singh's admission and disclaimer could [398] not be used against the appellant, who had not set up the title of Madho Singh, to defeat the plaintiff, and had not had an opportunity of answering a title which had not been insisted on by the plaintiff. Reference was made to *Amirto Lall Bose* v. *Rajoneekant Mitter* (1).

Mr. *C. W. Arathoon*, for the appellant, argued that insufficient effect had been given to the fact that Rup Singh in his lifetime acted as Lachman Singh's guardian, treating him as his son, and living jointly with him: a state of things that rendered it unnecessary, in order to prove the fact of a gift having been made by Rup Singh to Lachman, that actual transfer of possession at any particular time should appear. The evidence of the execution of the deed of gift had not been negatived, but it had rather been the case that the question of its operation had been treated as decided. The question, therefore, of the actual execution, had been left undisposed of, or at least was still a question open to decision, never having been in actual contest.

The respondent did not appear.

Their Lordships' judgment was delivered by LORD MACNAGHTEN.

JUDGMENT.

LORD MACNAGHTEN.—Their Lordships are of opinion that there is no foundation for this appeal.

The appeal was based upon an allegation that the appellants, or the person from whom they claim to have derived title, had been in possession under a deed of gift made by Rup Singh. In order to make out their case it was incumbent on the appellants to prove the execution of that deed. Mr. Arathoon desired to proceed on the assumption that the matter had never been in contest. But that is not the case. The respondent referred to the deed in his plaint, and gave what seems to their Lordships to be distinct notice that its execution was not admitted. In the course of the suit the execution of the deed was put in issue in the ordinary way. Two Courts have tried the question, and both have held that the execution was not proved.

[399] Under these circumstances their Lordships will humbly recommend to Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed, but there will be no costs, as there is no appearance on the part of the respondent.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T.L.Wilson & Co.*

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(1) 2 I.A. 113=15 B.L.R. 10.

11 A. 399 (P.C.)=5 Sar. P.C.J. 384=13 Ind. Jur. 253.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.
[*On appeal from the High Court, North-Western Provinces.*]

HAR LAL (*Defendant*) v. SARDAR (*Plaintiff*).
[27th March, and 3rd April, 1889.]

Assent to and validity of mutation of names in the Collectorate record-of-rights—Act XIX of 1873 (N.W.P. Land Revenue Act) ss. 94, 97.

The question was according to the judgment of the High Court, whether a change of names in the collectorate record-of-rights represented a *bona fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this "dakhil kharij" and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court.

[R., 13 Ind. Cas. 436 (438).]

APPEAL from a decree (15th January, 1886,) of the High Court, reversing a decree (15th September, 1885,) of the subordinate Judge of Banda.

The suit out of which this appeal arose was for a declaration of title to a mauza named Nakra in the Banda district, and sought the cancellation of an order of 27th June, 1881, for change of names in the record-of-rights, on the ground that the plaintiff's assent to such change had been obtained by intimidating her (1). The mauza Nakra was formerly owned in equal shares by Thakur [400] Das and Mussammat Sirdar Dullia, widow of one Bojraj, deceased, and was recorded in their name. They were indebted to Bijai Ram, adoptive father of Har Lal, who was now appellant. Bijai Ram had on the 4th August, 1885, obtained a money-decree against them, and he proceeded to execute this decree by sale of their lands including Nakra. It was, however, disputed as to whether the latter mauza had not been excluded by the effect of an arbitration award from liability to be sold for their debts to Bijai.

According to the plaint, it was by purchases at successive judicial sales, first of Thakur Das's share and then of the Musammat's share, that Ganesh Pershad, the recently deceased husband of the plaintiff, became entitled to the whole of Nakra, the sales being in execution of decrees in favour of Bijai Ram, who afterwards disputed, but without success, the right of Ganesh Pershad, as purchaser, on the ground of collusion with the debtors. However, after the death of Ganesh Pershad in April, 1861 (he having been murdered on account of a quarrel not connected with the present dispute), his widow, the present plaintiff assented to the name of Mussammat Sardar Dullia being entered in the Collectorate record

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(1) Act XIX of 1873, the N. W. P. Land Revenue Act, in section 94, requires the Collector to keep and maintain the record-of-rights, registering "all changes that may take place;" and, in section 97, enacts that all succession to and transfers of proprietary rights shall be notified, and if on inquiry they appear to have taken place, they shall be recorded in the register. Should a dispute arise, the entry is to be made subject to any order that may subsequently be passed by the civil Court: section 101.

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of proprietors as owner of the eight-annas share of Nakra which the latter had possessed before the sale in execution of Bijai Ram's decree.

The plaint asked that " the mutation proceeding of 1881 be declared null and void, and that the plaintiff's right of proprietary possession as widow of Ganesh Pershad be declared." It alleged a gift of her assumed share in Nakra by Mussammat Sardar Dullia to the defendant, Har Lal, in July, 1872, and the latter, at first, was sued alone. But Har Lal in his defence maintained that the suit could not proceed against him alone without Musammat Sardar Dullia being impleaded.

The Subardinate Judge, Manmohan Lal, Rai Bahadur made the order on 17th December, 1884, that she should be made a defendant under s. 32 of the Code of Civil Procedure. She referred to herself in the following written statement filed, by her as defendant No. 2 :—

"During the lifetime of the plaintiff's husband there was unity of interest between him and defendant No. 2, with their mutual [401] consent. On the death of the plaintiff's husband an application was filed bv defendant No. 2 for entry of her name in respect of the entire mauza Nakra, on the declaration of her being the actual proprietor thereof ; then the plaintiff, of her own accord and free will, and without any compulsion or coercion, filed an application before a competent authority for the entry of defendant's name in respect of an 8-anna share in mauza Nakra. and the defendant No. 2 waived her right to the other 8-anna share. Therefore, the plaintiff cannot now deviate from her former declaration, according to s. 115, of the Evidence Act."

The Subordinate Judge found it clearly proved that all the proceedings relating to the mutation of names were taken by the plaintiff willingly, and that the entry of names was duly made. He found that the plaintiff's late husband, Ganesh Pershad, was in his lifetime in the employment of Musammat Sardar Dullia as a mukhtiar, and that not until she had executed a deed-of-gift in favour of Har Lal, for the entire mauza of Nakra (including the 8-anna share claimed by the plaintiff had been entered in the name of Har Lal, did the plaintiff raise any objection. Not till then did she file her objection to the entry of Har Lal's name, which she ultimately did, and carried the question through the offices up to the Commissioner and to the Board of Revenue. The Subordinate Judge also found that the plaintiff had been lambardar, while Musammat Sardar Dullia had only been pattidar of her share, so that collection of rent by the former proved nothing in her favour as between the two. He declined to pronounce whether the possession of Ganesh Pershad had been proprietary on his own account or only *benami* for his employer, Musammat Sardar Dullia, because " when she "(the latter) "had become owner of the share in Nakra by the admission of the plaintiff she had power to make the gift in favour of Har Lal, and that the plaintiff had no concern therewith."

He, therefore, dismissed the plaintiff's claim.

On an appeal to the High Court by the plaintiff, a Division Bench (PETHERAM C. J., and TYRRELL, J.,) reversed the above [402] decision, and decreed the plaintiff's claim. Their judgment was as follows :—

"It is unquestionable that up to May, 1881, the legal estate in the whole village vested in the representative of the deceased Ganesh Pershad, and whatever other statements may have been imported into the case, it is clear—and this was accepted by the Court below—that the defendant's title is based exclusively on the transaction between her and the plaintiff in the Revenue Court and the dakhil-kharij proceedings. So that the real question is, whether this was a *bona fide* transfer by the

plaintiff, or whether there was a mere assent by her to a paper transaction relating to the ownership of the 8-anna share, and she did not act freely but under coercion. We have heard all the evidence in the case, and we entertain no doubt, not only that, under the circumstances which have been proved, the plaintiff's allegations were extremely probable, but that the direct evidence produced by her was sufficient to establish her allegations. On the other hand, it appears to us to be almost impossible that the defendant's story should be true, and the alleged reason why the defendant should, according to her story, leave any part of her estate in the plaintiff's hands, is incredible to us. We cannot believe that the defendant would give half her property to the plaintiff from motives of commiseration for the murder of the latter's husband ; and it seems probable that the plaintiff's apparent acquicesence in the defendant's wishes regarding half the village is rightly explained by the intimidation which she has alleged. It therefore appears that the lower Court should have decided in favour of the appellant, and the decree must therefore be reversed, and the appeal allowed with costs of both Courts."

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On this appeal,

Mr. *R. V. Doyne.* for the appellant, argued that the earlier relations of the parties, not sufficiently adverted to by the High Court, explained the conduct of the respondent in assenting to the proceedings at which the change of names had been effected, a change which she had since sought to have disallowed. The contention, and actual state of the facts, was that Musammat Sardar **[403]** Dullia had been the real purchaser, although she had used the name of her agent Ganesh Pershad *benami* for her. To show this, he referred to an application of 12th May, 1881, to the Deputy Collector, in which she alleged that by reason of her being *parda-nashin*, she had the name of Ganesh Pershad, her "karinda," fictitiously entered against Mouza Nakra in the column of proprietors : also that Ganesh Pershad having lost his life, her own name should be entered. Reference was also made to a petition of the 18th of the same month presented by Musammat Sardar, the respondent, stating the death of her husband "shareholder and lambardar of Nakra," and requesting that her own name and that of Musammat Sardar Dullia should be entered in respect of equal shares. Also to a statement of the respondent that her claim was only to the half of Nakra purchased by her husband at the auction-sale (*i.e.*, Thakur Das's moiety), and that Musammat Dullia was entitled to the other half, *i.e.*, that which had been the subject of sale apparently to Ganesh Pershad. Moreover, as held by the first Court, the burden of proof was on the respondent to prove intimidation and coercion exercised upon her, and in this she had failed.

The respondent did not appear. Their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

LOLD HOBHOUSE.—The only question in this case is as to the validity of certain transactions which took place in the months of May and June, 1881, and affecting the title to a moiety of a village called Nakra. The parties to the transaction were, first, the plaintiff, who is the widow of one Ganesh Pershad, and, secondly, the defendant, Sardar Dullia, under whom the other defendant, Har Lal, claims by virtue of a deed-of-gift.

The nature of the transaction is this : The village Nakra stood in the name of Ganesh Pershad, husband of the plaintiff, who had been the

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servant and agent of Dullia's husband, and afterwards of herself, and who had when in their service acquired the ownership of the village. He was recorded in the Collector's books as the owner. In May and June, 1881, the plaintiff came before the patwari, acknowledged Dullia's title to one moiety of the village, [404] claiming the other moiety for herself, and a mutation of names was effected from that of Ganesh Pershad into those of the plaintiff herself and of Dullia, one moiety each. The mutation of names was followed by possession on the part of Dullia by receipt of rents and profits, and she was found to be in possession in a proceeding before the Revenue Court in November, 1883, when she executed the gift to Har Lal, and he applied for possession. The plaintiff now says that in effecting this mutation of names she was acting under intimidation and fear; that Dullia had incited a caste or sect in the village called Lodhis, hostile to Ganesh Pershad, who threatened the plaintiff with death unless she would transfer half the estate to Dullia. If the plaintiff fails to prove that case, her suit must fail altogether.

Now, Ganesh Pershad was murdered on the 13th of April, 1881, and his murder was imputed to this caste of Lodhis, five of whom were committed for trial. But it turned out that though the real culprit was a Lodhi, he was a person who had a private grievance against Ganesh Pershad, who, he said, had deprived him of his estate. He killed him out of private revenge. He was convicted and sentenced to death, and the other four who were tried with him were acquitted. The suggestion made in the suit now is still that the real murderers were the caste of Lodhis, and that they effected the murder because they were at enmity with Ganesh Pershad and favoured Dullia, and that the same motives operated to make them threaten the plaintiff unless she would transfer a moiety of the estate to Dullia. To prove that case several witnesses were called. The Subordinate Judge disbelieved the witnesses. He considered that their character was such as to make them not very trustworthy; that there were discrepancies in their evidence; and, above all, that the improbability of their story was so great that it should be rejected. On those grounds he dismissed the suit.

The plaintiff appealed to the High Court, and the High Court say as to the evidence.—" We have heard all the evidence in the case, and we entertain no doubt, not only that under the circumstances which have been proved the plaintiff's allegations were extremely [405] probable, but that the direct evidence produced by her was sufficient to establish her allegation." That is the whole of their comment on the evidence. They do not mention any point on which they think the Subordinate Judge has gone wrong in disbelieving the witnesses, but they differed with him in the result, and they reversed his decree, and gave the plaintiff a decree for the moiety of the estate that she claimed.

Such being the difference between the Courts below, the duty is thrown upon their Lordships of looking into the whole of the evidence, and of examining which of them is right.

The substantial story told by the witnesses is this: that one day after the murder of Ganesh Pershad—nobody says exectly how long, but one of them says a month after—the plaintiff and Dullia were sitting at the doors of their respective houses, which closely adjoined one another; that on that occasion Dullia spoke to a number of Lodhis who were present, and incited them to threaten the plaintiff with death or injury if she did not give Dullia half the estate; that the plaintiff at first refused; that she refused several times, but the mob of Lodhis went on repeating the

threats, until at last the plaintiff yielded and promised to give the moiety of the estate. Therefore what the Court is asked to believe is that, while five of these Lodhis were accused of a capital crime and were on their trial, another group of Lodhis assembled to commit another heinous offence by intimidating the widow of their former victim into parting with some of her property, from the very same motive that instigated the murder of Ganesh Pershad, and that the person who was to profit by that crime sat by and openly incited it. That is a story which would require proof by clear consistent testimony from persons who are above suspicion. Six witnesses are called to prove it. Three of them are tenants of the plaintiff, one of them is a servant of the plaintiff, and one of them is the plaintiff's brother, and the sixth is apparently an independent man.

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What has been the conduct of the parties? The plaintiff herself does not go to any Magistrate, and does not seek any assistance. Shortly afterwards—we cannot tell exactly how long, but probably [406] a fortnight or three weeks afterwards—she appears openly before the patwari, is examined by him in the presence of her own general mukhtiar, one Debi Pershad, and gives evidence that Dullia is the proper owner of one moiety of the estate, and that the two have agreed to share that which stood in the name of Ganesh Pershad. The witnesses—these tenants, servants, brother, and neighbour—all appear to have been perfectly supine. Having seen this heinous crime committed, knowing that their mistress or their friend was under threats against her life, they do not appear to have gone to anybody to seek any assistance at all.

Their Lordships cannot agree with the High Court that that is a probable story. On the contrary, it seems to them to be a story of the highest improbability and one not to be believed without the clearest and most cogent evidence.

Then as to the amount of contradiction. The only independent witness is also the only one who speaks in any detail to the transactions, and he contradicts himself in a very material point. In the course of his examination he is asked whether he knew Dullia, whom he says he saw inciting the mob to threaten the plaintiff. He answard thus: "I did not hear"—by which he means I never heard—"the voice of Musammat Sardar Dullia, except on that day. I have seen Sardar Dullia on several occasions and recognise her also. On the day she asked the Lodhis to threaten the plaintiff her face was visible by the side of the door. I recognised her." But then in a subsequent part of his examination he says: "When the said Musammat"—that is Dullia—"was seated in her dehliz and asked to have the plaintiff threatened, I took her for the said Mussammat because the people said it was her." "I did not see her face, nor could I recognise her." So that on the important point of the identity of Dullia this witness tells first one story and then the exact contradictory of it. Moreover, the witnesses mention several persons as having been present on the occasion. Three of those persons are called. Two of them deny that there was any enmity between the Lodhis and Ganesh Pershad, and all three deny that there was any intimidation whatever. There [407] seems to have been a conference of some kind, and according to these three witnesses Dullia required the plaintiff, whether on legal or moral grounds does not appear, to give her some advantage out of the estate, and the agreement ultimately was that she should have half.

So much for the evidence that was given. But then there was evidence which might have been given, and was not given, of a very important kind. The plaintiff herself, who would be a very important witness, is not

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one of those Indian ladies who could not be expected to come forward in a Court of justice. She is in the habit of appearing in public with her face uncovered, and she did appear before the patwari and was examined in the mutation case. Therefore there is no reason why she should not have appeared in this case, and yet she is not called. Moreover, the witnesses said that her general mukhtiar, Debi Pershad, was present on the occasion of the threats. He appeared also on the question about possession after the conveyance to Har Lal, and he deposed to the appearance of the plaintiff before the patwari and to the story that was told there, and he said nothing then about any threat used to the plaintiff. He did say that after the mutation into Dullia's name he received the rents and that he paid over a moiety to Dullia because he was afraid of the villagers; but it appeared that he very soon abstained from paying the moiety, and, when asked whether he was not still afraid of the villagers he said he was, but he had not an opportunity to pay the rents. So that he gave somewhat ambiguous evidence on that occasion. But it is obvious that he would be the most important witness to prove the plaintiff's story if it were true, and yet he is not called, although he is still living.

Having regard then to the strange nature of the plaintiff's story; to the position of her witnesses; to her conduct and theirs at the time of the alleged threat; to the contradictions, internal and external, of the evidence adduced; and to the omission of evidence that ought to have been adduced, their Lordships think that her story is entirely incredible; that the Subordinate Judge was quite right in rejecting it; that the High Court ought to have dismissed [408] the appeal to them with costs; that a decree to that effect should now be made; and that the respondent should pay the costs of this appeal. Their Lordships will humbly advise Her Majesty to that effect. *Appeal allowed.*

Solicitors for the appellant: Messrs. *Pyke* and *Parrott*.

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11 A. 408 (F.B.)

FULL BENCH,

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

CHAJMAL DAS AND OTHERS (*Defendants*) *v.* JAGDAMBA PRASAD (*Plaintiff*)* [2nd April, 1889.]

Appeal—Abatement—Death of plaintiff respondent—Application by defendants-appellants for substitution—Application presented after the 1st *July*, 1888—*Limitation—Civil Procedure Code*, ss. 368, 582—*Civil Procedure Code Amendment Act* (*VII of* 1888), ss. 58, 66—*Act* XV *of* 1877 (*Limitation Act*,) *sch.* ii, *No.* 175*C*.

The plaintiff respondent in an appeal pending before the High Court died on the 17th September, 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased; on the 15th April, 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February, 1887, such suit was dismissed. On the 8th February, 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das* v. *Jagdamba Prasad* (1). On 24th July, 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent.

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* Application in First Appeal, No. 59 of 1884, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) 10 A. 260.

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Held that the application having been made subsequent to the 1st July, 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and Art. 175 C of the Limitation Act (XV of 1877).

Held also that the petitioners had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. *Ram Jiwan Mal* v. *Chand Mal* (1) referred to.

[R.,—20 M.L.J. 347 (348)=5 Ind. Cas. 420 (421)=7 M.L.T. 115 (116); 34 M. 292 (293); 17 C.L.J. 316 (351).]

[N. B. This is an off-shoot from 10 A. 260.]

[409] THIS was a reference to a Bench of three Judges by Straight and Mahmood, JJ. The facts are stated in the following order of reference.

STRAIGHT, J.—In order to make the preliminary questions that arise in the appeal by way of preliminary intelligible, the following facts may conveniently be stated :—

On the 20th July, 1883, one Jagdamba Prasad instituted a suit against his father, Narain Lal, and the present defendants-appellants and other persons, to avoid certain alienations which he alleged Narain Lal had made in favour of the other defendants in derogation of the plaintiff's rights as a member of a joint Hindu family consisting of himself and his father. He also sought partition of his share in the joint estate from that of his father's share. Narain Lal made no defence to the suit, but it was contested by the defendants, who are appellants upon the record in this Court. The Sub-Judge of Mainpuri decreed the plaintiff's claim, and upon the 15th April, 1884, the three defendants who had contested the suit filed an appeal in this Court. Upon the 17th September, 1885, Jagdamba Prasad died, leaving behind him his father, his mother, his widow and a daughter. The widow and the daughter are now out of the question, because they are already dead. Subsequently one Durga Prasad, alleging himself to be the adopted son of Jagdamba Prasad, applied to this Court to be brought on the record of the appeal here in the character of his legal representative. This Court considered that it was desirable before doing so that Durga Prasad should establish, if he could, his title as the adopted son of Jagdamba Prasad, and he was accordingly relegated to a suit for this purpose, which suit was instituted, tried and determined against him. He therefore is now also out of the question. Subsequently, the defendants appellants in this Court, put in a petition alleging that by reason of the circumstance that the legal representatives of Jagdamba Prasad had not put in any petition to be brought upon the record to defend the appeal, the defendants-appellants were entitled to judgment; and the question that they raised by the petition went to the Full Bench, and the Full Bench decided in *Chajmal Das* v. *Jagdamba* **[410]** *Prasad* (2) that art. 178 of the Limitation Law was applicable to the case. The next matter to be mentioned is that upon the 24th July, 1888, the defendants-appelllants put in a petition praying that Narain Lal and Musammat Genda Kuar should be brought upon the record as the legal representatives of Jagdamba Prasad, so that by their being made parties to the appeal this Court might proceed to dispose of the

(1) 10 A. 587.

(2) 10 A. 260.

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question raised by the former petition, which was put in by the petitioners on the 8th February, 1886. It is this petition that has come before us to-day, and it has been supported by Mr. *Juala Prasad* and Mr. *Conlan*, on behalf of the defendants-appellants. It has been opposed by Mr. *Jogindronath Chudhri* and Mr. *Kashi Prasad*, who severally represent Narain Lal and Musammat Genda Kuar. The position taken up by these learned gentlemen is that they are agreed in the contention that Musammat Genda Kuar is the proper person to bring upon the record, and if no difficulty had arisen upon another question we could have proceeded to dispose of the matter in difference as between Narain Lal and Musammat Genda Kuar as to which of them should be brought upon the record. But the point has been raised as to whether the petition at the instance of the defendants-appellants, which was filed on the 24th July, 1888, is to be dealt with under the provisions by way of amendment which have been introduced into the Civil Procedure Code by Act VII of 1888, or whether it is to be dealt with under the provisions of the Civil Procedure Code as it stood till the date when the amending Act came into operation: in other words, whether we are to apply a six months' limitation to the petition of the 24th July, 1888, under the new law, or, as the Full Bench ruling decided in this very case, the three years' rule of limitation. It is to my mind dfficult to see how, looking to the fact that the petition was presented after Act VII of of 1888 came into operation, and no saving clause is enacted therein to protect applications in reference to rights and incidents that have accrued in connection with litigations pending prior thereto, we can do other than apply the six months' rule. We have, looking to the terms of sec-[411]tion 582, as read with section 368 of the Civil Procedure Code, to take the defendants-appellants as standing in the position of plaintiffs in the suit, and as such standing as plaintiffs in the suit, asking us to bring upon the record the legal representatives of a deceased defendant. According to the law now passed they were bound to do this within six months from the 17th September, 1885, the date of the death of Jagdamba Prasad. Mr. *Conlan*, on behalf of the defendants-appellants, points out the hardship that such a construction of the statute would put upon his clients; but as at present advised I find it difficult to see how it is possible to adopt any other view. The case is necessarily one of considerable importance, because whatever view we arrive at as to the proper construction to be placed upon Act VII of 1888 read with the old Civil Procedure Code, that construction must govern a very large number of applications that will be presented; which are pending in this Court in reference to the Full Bench ruling in this very case which is now before us. Under these circumstances I think that it is desirable that my brother Mahmood and I should have the advantage of the learned Chief Justice's assistance in disposing of this particular point, and accordingly as the question is determined, what the effect of the action or want of action on the part of the defenndants-appellants will be upon this appeal in reference to its abatement under s. 368 read with s. 582 of the Civil Procedure Code.

MAHMOOD, J.—I willingly agree to the order of reference which has been made.

The reference was ordered to be laid before a Bench consisting of Edge, C. J., and Straight and Mahmood, JJ.

The Hon. *T. Conlan* and Lala *Juala Prasad*, for the petitioners.

Babu *Jogindro Nath Chaudhri* and Munshi *Kashi Prasad*, for Narain Lal and Genda Kuar.

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JUDGMENT.

STRAIGHT, J.—This is an application made by the appellant in the F.A. No. 59 of 1884.* pending in this Court, praying that Narain Lal and Musammat Genda Kuar should be brought upon the record as the legal representatives of Jagdamba Prasad, the [412] deceased plaintiff-respondent, whose death took place upon the 17th September, 1885. The history of the litigation to which the appeal pending in this Court has reference and in respect of which this application now before us has been made, is very fully stated in my referring order of the 26th November, 1888, in which my brother Mahamood concurred. There are before this Full Bench only two questions for determination. The first of those questions is whether the application of these petitioners, who are appellants in the appeal in this Court, is to be dealt with under the Civil Procedure Code, Act XIV of 1882, as amended by Act VII of 1888, or whether it is to be dealt with under Act XIV of 1882, as it stood before it was so amended. The second question is, assuming that it is to be dealt with under Act XIV of 1882, as amended by Act VII of 1888, have the petitioners satisfied us that they had sufficient cause for not making their application within the period required by law and as contemplated by s. 368 of the Civil Procedure Code of 1882 as amended by Act VII of 1888 ?

I have very carefully considered this question, and it may be seen from the terms in which the order of reference was made, that from the moment of this first point being raised, I did not entertain much doubt as to what the decision should be. Further consideration has not altered my view, and I have come to the conclusion that this application of the 24th July, 1888, which was presented to this Court subsequent to the coming into operation of Act VII of 1888 amending Act XIV of 1882, must be entertained, dealt with and disposed of under those two statutes taken together. In the Full Bench ruling of this Court, which determined the mode in which questions arising between mortgagors and mortgagees in respect of mortgages made before the passing and coming into operation of the Transfer of Property Act (1), I stated that I believed the rule of law to be that no person has any vested right in procedure, and that an application made or a suit commenced after a particular Act regulating procedure has come into operation must be dealt with according to the rules provided in such Act. It is true that [413] the litigation between these petitioners and Jagdamba Prasad commenced as far back as 1884, and that the appeal was filed in this Court upon the 15th April, 1884. But it is equally clear that the application which we are now concerned with was a fresh application and not a continuation of any former proceedings taken by the same parties : in short, it was an entirely new application made on the 24th July, 1888, which date I need scarcely point out was subsequent to the 1st of July 1888, when Act VII of 1888 with its amendment of Act XIV of 1882 had come into operation. The point of time then to be looked at for the purpose of determining the question of limitation, which has now been settled by Act VII of 1888 in its amendment of the then existing Civil Prodedure Code and of the then existing Limitation Act, is the 17th September, 1885, the date of the death of Jagdamba Prasad. It is therefore clear that the application being made after the amendment of Act XIV of 1882 had been made by Act VII of 1888, s. 368, Civil Procedure Code, as it now stands with the intepretation to be

* See 10 A. 260.

(1) *Shib Lal* v. *Ganga Prasad*, 6. A. 252.

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attached to the article of the Limitation Law which is now numbered Art. 175-C, to be found in the schedule of Act VII of 1888, is to be applied to the present case. As I stated in the referring order, these defendants-appellants are to be regarded in the light of plaintiffs in the suit, and they stand in the position of plaintiffs who are coming in to have the representatives of a deceased defendant brought upon the record. Now from the terms of that article which amends the Limitation Law, the starting point is the date of death of the deceased defendant or of the deceased plaintiff-respondent. In this case Jagdamba Prasad was the deceased plaintiff-respondent, and the date of his death is the date from which time must be counted. As that death took place on the 17th September, 1885, and as the application to bring upon the record the heirs of the deceased was not made until the 24th July, 1888, when the Amending Act VII had come into force, it has not been made within the time, and cannot, therefore, *prima facie* be granted.

The second question then that arises is, have the petitioners satisfied the Court that they had "sufficient cause" for not making [414] the application within the required period? I have taken occasion more than once to say that the Limitation Law in force in this country is made for the purpose of being obeyed, and not, as the suitors seem to imagine, of being disobeyed and indulgence under it is not to be extended in uncertain haphazard fashion according to the fancy of a particular Judge or Bench of Judges, but upon well-understood and recognised rules even at the risk of hardship to a particular party. For my own part, I do not think that in the present case any hardship will be inflicted upon these petitioners; they have no one but themselves to blame for the consequences that have resulted from their own negligence and dilatoriness. Recently the learned Chief Justice and my brother Tyrrell have laid down in very expicit terms the correct rule in regard to the mode in which the provisions of s. 14 of the Limitation Act are to be applied. By parity of reasoning the principle may be used in dealing with the question of what is "sufficient cause" under s. 368, Civil Procedure Code, with which I am now concerned. In the case above referred to, the learned Chief Justice and my brother Tyrrell accepted the ruling of my brother Mahoomd in *Ram Jiwan Mal* v. *Chand Mal* (1) in which the learned Judge's remarks were as follows. He says:—"In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent and clear and is limited to cases where from *bona fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase 'other cause of a like nature' which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to know the law of the land in which he lives." Now applying that principle to the case before us, I cannot for a moment come to the conclusion that these petitioners have shown any "sufficient cause" for not making their application within the period provided by law. Great stress is laid by them upon the circumstance that by the action of this Court in consequence [415] the application made by Durga Prasad to be brought on the record in place of Jagdamba Prasad, the proceedings in their appeal were hung up for a considerable time. They were no doubt hung up from the 15th April 1886, until 25th Febauary, 1887, when the suit of Durga

(1) 10 A. 587.

Prasad was dismissed by the Sub-Judge of Mainpuri, but even if indulgence for that period were to be granted to them, yet they had from the 25th February, 1887, until the 24th July, 1888, or a period of more than a year, left within which to apply, and yet no application was made on the part of these petitioners of the character and description they have now presented. I am of opinion that both the questions referred must be answered adversely to the petitioners. The first is answered by saying that this application is governed by the existing Civil Procedure Code with the amendment introduced by Act VII of 1888, the second that they have not satisfied us that they had "sufficient cause" for not preferring the application contained in their present petition within the proper period.

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The effect of that view will be that the appeal will abate; but as this Bench is not seized of the appeal, the view expressed by this Bench will be laid before the Division Bench and no doubt will be given effect to by that Bench.

EDGE, C. J.—I concur.

MAHMOOD, J.—I also concur and concur entirely in what has fallen from my brother Straight. Yet I wish to add a few words to what he has said. The real difficulty in this case, as it seems to me, has arisen over the Full Bench ruling of this Court, where a line of distinction was drawn between plaintiffs-appellants and defendants-appellants for the purpose of array of parties, after the death of any respondent whether such respondent be plaintiff or the defendant. I have no desire to refer to those rulings, because their effect has now been settled by Act VII of 1888, to which my brother Straight has already referred.

The other difficulty has arisen in consequence of the circumstance that in s. 368 of the Code of Civil Procedure the following words [416] occur:—"When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period."

This is not the first occasion upon which I have expressed a regret that this question as to the extension of the period of limitation or as to the interpretation of what the "*sufficient cause*" should be, is out of place in the Code of Civil Procedure, because that is not an enactment dealing with that department of the adjective Law of Limitation. The proper place for the sentence above quoted would have been s. 5 of Act XV of 1877. It is however not there, and because it is not there, we have had the difficulty with which my brother Straight has fully dealt, and which required the case to be dealt with by three Judges instead of my brother Straight and myself, when we originally heard the case in the Division Bench.

The judgment of my brother however disposes of the difficulty, and I agree with him entirely.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BHAGWANT SINGH (*Plaintiff*) v. DARYAO SINGH AND OTHERS (*Defendants*).* [11th June, 1889.]

Bond—Interest post diem*—Damages for non-payment on due date—Limitation—Act XV of* 1877 *(Limitation Act), sch. ii, No.* 116*—Charge on hypothecated property—Successive or continuing breaches of contract—Practice—Danger of deciding case upon a document by construction put on another document in another suit.*

A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal* v. *Chajmal Das* (1) followed. *Chhab Nath* v. *Kama Prasad* (2) and *Baldeo Panday Gokal Rai* (3) refereed to.

[417] Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract; and under art. 116, sch. ii, of the Limitation Act (XV of 1877), a suit to recover such damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art 116 inapplicable. *Price* v. *The Great Western Railway Co.*(4), *Morgan* v. *Jones* (5), *Gordillo* v. *Weguelin* (6), *in re Kerr's Policy* (7), *Lippard* v. *Ricketts* (8), *Oook* v. *Fowler* (9), and *Bishen Dyal* v. *Udit Narain* (10) distinguished.

In such cases there is one breach of the contract, namely the non payment on the date agreed upon; and there is no question of continuing or successive breaches. *Mansab Ali* v. *Gulab Chand* (11) referred to.

The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond.

[N.F., 24 C. 699 (706); 95 P.R. 1902=21 P.L.R. 1903; F., 13 A. 330 (333); R., 17 A. 581 (584); 18 M. 331; 19 C. 19 (25); D., 22 B. 107 (110).]

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This was a suit on a hypothecation bond dated September 24th, 1875. The bond was in the following terms:—"I, Hansraj Singh, son of Bhajan Singh, caste Thakur, occupation zemindari resident and zemindar of Kalhor Bajhana, pargana Karor, tahsil Mainpuri, do declare as follows:—I have borrowed Rs. 1,000, half of which

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* First Appeal. No. 74 of 1888, from a decree of Maulvi Shah Ahmad-ul-lah, Subordinate Judge of Mainpuri, dated the 14th February, 1888.

(1) Decided 7th March, 1889, not yet reported. (2) 7 A. 333. (3) 1 A. 603. (4) 16 L.J. Exch. 87. (5) 22 L.J. Exch. 232. (6) L.R. 5 Ch. D. 287. (7) L.R. 8 Eq. 331. (8) L.R. 14 Eq. 291. (9) L.R. 7 E. and 1. 27. (10) 8 A. 486. (11) 10 A. 85.

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is Rs. 500, from Bhagwant Singh, son of Dalel Singh, caste Thakur, occupation zemindari and banking, of Faizpur, pargana Karor, to pay the debt due to Baldeo Singh, Thakur, resident of mauza Bendauli, pargana Mainpuri, and brought the same to my use. I promise to pay the whole amount, including principal and interest, in six years. The interest has been agreed to be paid at Re. 1-2 per cent. per mensem. I shall pay [418] interest annually, and if I do not pay interest in any year, the interest would become principal, and interest at Re. 1-8 per cent. per mensem would be charged by the creditor. I have for the creditor's satisfaction, hypothecated a $1\frac{1}{3}$ biswas zemindari share in the aforesaid Kalhor Bajhana. I shall not transfer it in any way so long as the full amount is not paid off. If I do so, it shall be illegal. Whatever money I shall pay on account of interest, I shall get it endorsed on the bond. There would be no necessity for a separate receipt. If I do not pay the full amount, principal and interest, within the prescribed term, the creditor shall be entitled, to recover his money from the property hypothecated thereunder, as also from other moveable or immoveable properties belonging to me. I and my heirs shall have no objection to it. I have therefore made these few presents by way of hypothecation bond so that they may serve as evidence and be of use when needed."

Under that bond the principal and interest agreed to be paid by it became payable on September 24th, 1881. This suit was instituted on January 14th, 1888, *i.e.*, more than six years from the due date of the bond. The Subordinate Judge gave the plaintiff a decree, but misunderstood the provision as to compound interest. He disallowed the claim for interest or damages *post diem*. The plaintiff has brought this appeal. It appears to us quite plain that the meaning of this contract is that whenever in any year default was made in the payment of the interest, the interest due for that year should be added to the principal, and that after the first default the interest payable should be at Re. 1-8 per cent. per mensem, and not at the rate of Re. 1-2 per cent. per mensem. In other words, the contract provided that during the contract period there should be rests, and the unpaid interest should be added to the principal, and that in case of default of payment of interest during the contract period, the rate of interest should be increased. No interest was paid during the contract period. The decree below must be varied by adding Rs. 440-12 to the sum decreed in respect of interest unpaid during the currency of the contract, and interest at the increased rate to the 4th January, 1881.

[419] Pandit *Ajudhia Nath*, for the appellant, contended on the other branch of the case, that impliedly the parties contracted that interest should be payable *post diem*, and if we do not so read the deed, then that damages should be allowed in lieu of interest, that in such case the damages are a charge on the estate, and art. 116 of sch. ii of the Limitation Act would not apply, and in any event that his client was entitled to damages for the six years immediately preceding the commencement of this action. In support of his contention that interest was payable after due date, he referred to the case of *Chhab Nath* v. *Kamta Prasad* (1). That case and the case of *Baldeo Panday* v. *Gokal Rai* (2) were considered by us in a judgment which we delivered on March 7th, 1889, in the case of *Narain Lal* v. *Chajmal Das*. We do not think it necessary to repeat what we said in that case as to those authorities. We adhere to the views there expressed

(1) 7 A. 333. (2) 1 A. 603.

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on that subject. It is plain that there was here no express agreement that interest should be paid *post diem*. It is not contended that there was any such express agreement, and it is equally plain to us that there is nothing in the contract from which we can or ought to imply that the parties intended that interest *post diem* should be payable. For our part we do not see why a contract to pay interest *post diem* on a mortgage ought to be implied by a Court in India when the parties to the written contract have not expressed any such intention in the contract which they executed. This is particularly the case when we find, as here, that they did provide in very clear terms for the payment of interest and compound interest during the term of the mortgage. It would have been easy by the use of a few apt words inserted in the written contract for the parties to have expressed a covenant that interest should be payable *post diem*, if such they had intended the contract to be. In our opinion there was here no implied contract to pay interest *post diem*. As to the limitation which applies in cases of this kind where damages are sought for the breach of a contract to pay the principal on the due date, we considered that matter at some length in the case of *Mansab Ali* v. [420] *Gulab Chand* (1), and we would not again consider the question if it had not been for the vigour with which the Hon. Pandit *Ajuahia Nath* contended that in that judgment we were mistaken as to the law. A Full Bench of this Court in *Husain Ali Khan* v. *Hafiz Ali Khan* (2) as we think rightly, applied art. 116 of sch. ii of the Limitation Act (XV of 1877) to a suit on a registered bond for the payment of money. Now if interest as such is not payable after the due date of a mortgage either by express or implied agreement, the mortgagee can only seek compensation for the non-payment of the principal on the due date by claiming damages for the breach of the contract. It may be said that those damages are given in lieu of interest. Call such damages by any name one likes, they are damages for a breach of contract, and not interest payable in performance of a contract, and unless there is something to make art. 116 of sch. ii of the Limitation Act inapplicable, such damages cannot be awarded or given by the Court unless the suit in which they are claimed is brought within six years from the time when the contract, for the breach of which the damages may be awarded, was broken. The contention of the Pandit *Ajudhia Nath* leads one to ask oneself whether there is some magic about damages for the non-performance by a mortgagor of his contract to pay on the due date, which takes the damages which may be awarded for a breach of that contract out of the ordinary category of damages, and out of the purview of art. 116 of sch. ii of the Limitation Act. It is not easy to understand the Pandit's contention. It is that damages for a breach by a mortgagor to pay on the due date, are, from the date when the contract is broken or even before they have been ascertained or decreed, a charge upon the property hypothecated, and being such a charge, art. 116 does not apply to them. It is not necessary here to consider whether if a Court in a suit on a hypothecated bond did decree for damages for such a breach in a case in which such damages could be decreed, the damages so decreed would or would not thereby become a charge on the property hypothecated, or whether if damages so decreed became a charge upon the hypothecated property the charge so created would or would not take [421] priority over a second mortgage subsequent in date to that for the breach of which the damages were decreed, but prior in date to the commencement of the suit in which

(1) 10 A. 85. (2) 3 A. 600.

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such damages were claimed, or upon what principle such priority could or could not be decreed, or whether a Court could or could not declare such damages to be a charge upon the hypothecated property. Unless in some way the damages which, during the six years (to take this case) following September 24th, 1881, were uncertained and undecreed, and in respect of which no claim had been made within those six years, could in some way by relation back from a decree passed in a suit commenced after the period of limitation had expired, be held to be a charge upon the land from the date of breach, we fail to see how we, by our decree on the 11th June, 1889, could create a charge on this hypothecated property in respect of damages, the right to sue for which had, by reason of the Indian Limitation Act, determined prior to the commencement of this suit. That is what it appears to us we are asked to do here. The learned Pandit has cited several authorities to us in the course of his argument. He has referred us to Fisher on Mortgages (14th ed.) paragraphs 1484, 1485, 1487, 1488. We see nothing in any of those paragraphs to support his contention. The first case to which he referred us was *Price* v. *The Great Western Railway Co.* (1). All that is to be said about that case is that the learned Barons of the Exchequer were of opinion that the document in question there showed that the parties intended that the interest claimed should be paid. That was the inference they drew from the document. The next case was the case of *Morgan* v. *Jones* (2), and there the Chief Baron, and apparently the other Barons of the Exchequer, considered that the agreement in the document to pay the interest was evidence to go to the jury that interest was to be payable *post diem.* We were then referred to the case of *Gordillo* v. *Weguelin* (3). That case turned apparently more on the facts and dealings between the parties than on anything else. The next case was a case *in re Kerr's Policy* (4) in which, James, V. C., held that the deposit of title-deeds to secure [422] a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds with interest; *i. e.*, he inferred from the deposit of the title-deeds a contract to execute a mortgage under which the parties would contract to pay interest. Here the parties have not contracted to pay interest, although they have executed a mortgage. The next case was *Lippard* v. *Ricketts* (5). In that case Vice-Chancellor Bacon said, referring to the case in L.R., 8 Eq., p. 331 :—"In the case of *Kerr's Policy*, the Court seems to have proceeded on the theory that a debt secured by an equitable mortgage will, unless something is said or may be implied to the contrary, carry interest ; and it seems to follow that when the Court has once decided that there is a charge, the sum charged must bear interest" (p. 294). The Pandit also referred to a case in the House of Lords—*Cook* v. *Fowler* (6). That case we have already commented upon in the case of *Mansab Ali* v. *Gulab Chand* (7). The next case relied upon by the Pandit was *Bishen Dial* v. *Udit Narain* (8). The hypothecation bond in that case was somewhat similar to that in the present, and there Mr. Justice Straight and Mr. Justice Mahmood held that the plaintiff's remedy for the non-payment of the bond on the due date was a suit for damages, and as that part of the case had not been dealt with by the Court below they remanded issues on the subject of damages. No one appears to have suggested to them that the damages which were being claimed were

(1) 16 L.J. Exch. 87 (2) 22 L.J. Exch. 232, (3) L.R. 5 Ch. D, 287.
(4) L.R. 8 Eq. 331. (5) L.R. 14 Eq. 291. (6) L.R. 7 E. and I. 27
(7) 10 A. 85. (8) 8 A. 486.

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apparently barred by limitation. On the remand no question was raised as to limitation, and the parties left it to the discretion of the District Judge to say what damages should be allowed. On the return to the remand a decree was passed on that basis in the appeal by the consent of counsel. Consequently on this particular point that case is not an authority against the view which we hold. Many of the cases which have been cited were decided by the Judges on the construction which was put in each case on the particular document in the case. We can only say, as we have more than once pointed out, that there is considerable danger in deciding one case by the construction put in another suit on another [423] and a different bond. This was a danger forcibly pointed out by Sir George Jessel, late Master of the Rolls in England (1). In our judgment to which we have already referred, we have explained as well as we could that in a case like this there is one breach of the contract, namely, the non-payment on the day agreed upon, and that there is no question of continuing or successive breaches. That was a breach once and for all. The decree will be varied by increasing the sum of Rs. 2,156 by Rs. 440-12 giving a total decree for Rs. 2,596-12. The appellant will have proportionate costs, so far as he has suceeded, and will have to pay costs so far as he has failed.

Decree modified.

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11 A. 423.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

ASHFAQ AHMAD AND OTHERS (*Plaintiffs*) *v.* WAZIR ALI AND OTHERS (*Defendants*).* [18th January, 1889.]

Mortgage—Redemption by co-mortgagor—Suit by other mortgagors against redeeming mortgagor for redemption of their shares—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 144, 148.

In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1816, for redemption of their shares in the mortgaged property.

Held that the limitation applicable to the suit was that provided by art. 148, sch. ii, of the Limitation Act (XV of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagee if he had been a defendant, *i.e.*, the date of the original mortgage of 1822; [424] and that the suit was therefore barred by limitation.

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* Second Axpeal No. 403 of 1887 from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 4th December, 1886, reversing a decree of Shah Amjud-ullah, Munsif of Deoband, dated the 23rd June, 1886.

(1) The judgments of Sir George Jessel, M.R., above referred to, regarding the danger of construing a document with reference to previous decisions construing other documents, are probably *Aspden* v. *Seddon* (L.R. 10 Ch. A. 394; 44, L. J. Ch. 363), and *Southwell* v. *Bowditch* (L.R.I.C.P.D., 377; 45, L.J.C.P. 630) See also *Robinson* v. *Evans* (43, L.J. Com, Law. 83). *Athill* v. *Athill* (L.R., 16 Ch. D., at p. 223, *per* Jessel, M.R. and *in re Tanqueray-Willaume and London* (L.R., 20 Ch. D., at p. 481, per Brett, L.J.). A similar principle has been laid down regarding the danger of deciding questions of fact with reference to previous decisions upon other questions of fact: see *Ecclesiastical Commissioners of England* v. *King* (L.R. 14 Ch. D., at p. 225, *per* Brett, L.J.) and *Queen-Empress* v. *Gobardhan* (I.L.R. 9 All. at pp. 555, 556, *per* Edge, C.J.)

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JAN, 18.
APPEL-
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CIVIL.
11 A. 423.

Umr-un-nissa v. *Muhammad Yar Khan* (1) explained. *Nura Bibi* v. *Jagat Narain* (2) and *Ram Singh* v. *Baldeo Singh* (3) referred to.

[Diss., 3 Bom. L.R. 685 (689); R., U.B.R. (1892—1896) Civil 502; 61 P.L.R. 1904; 32 P.R. 1905=39 P.L.R. 1905.]

THE facts of this case are fully stated in the following order of reference:—

MAHMOOD J.—In order to explain the facts which are necessary to be borne in mind in considering the question of law raised in this case, the following genealogical table may be stated:—

Ahmad Ali.

Musammat Khwaji, daughter.	Musammat Haliman, daughter.	Musammat Sharfan, daughter.	Musammat Rahiman, daughter.
Khwaj Bakhsh, husband.	Mushtak Ahmad, son.		

The suit relates to four properties all of which are stated to have belonged to Ahmad Ali, the common ancestor of the parties; and it is further stated in the plaint that he mortgaged the properties separately under the following deeds:—

(1) Property No. I, under a deed executed on 2nd Jamadi-ul-awal, 1236 Hijri, corresponding with 6th January, 1821.

(2) Property No. II, under a deed executed on 4th Ramazan, 1238 Hijri, corresponding with 16th June, 1823.

(3) Property No. III, under a deed executed on 14th Shawal, 1237 Hijri, corresponding with 5th July, 1822.

(4) Property No. IV, under a deed executed on 7th Shawal, 1230 Hijri, corresponding with 12th September, 1815.

It is stated in the plaint that these various properties were mortgaged to different mortgagees, but that all such mortgages were usufructuary, and the various mortgagees were duly placed in possession.

Ahmad Ali died some time in 1825, leaving his four daughters as his heirs, and these also subsequently died. It is then alleged [425] that Khwaj Bakhsh, the husband of Musammat Khwaji, and as such having inheritance in her share, redeemed the whole of the aforesaid mortgages in the following manner:—

(1)	Property No.	I	redeemed in	1837.
(2)	,, No.	II	,, ,,	1837.
(3)	,, No.	III	,, ,,	1828.
(4)	,, No.	IV	,, ,,	1861.

and obtained possession of the entire rights in these mortgaged properties.

The plaintiffs are the heirs and descendants of Musammat Haliman through her son Mushtak Ahmad, and they assert that they are entitled to her one-fourth share in all the four properties above-mentioned. The present suit was instituted against the defendants who are the descendants of the other three daughters of Ahmad Ali, the principal of whom are in possession under the redemption of the mortgages by Khawaj Bakhsh as above mentioned.

The object of the suit was to recover possession of the one-fourth share which the plaintiffs claim by inheritance from Musammat Haliman

(1) 3 A. 24. (2) 8 A. 295. (3) 5 A.W.N. (1885) 300.

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and also for recovery of mesne profits, upon the allegation that the mortgages having been executed anterior to the repeal of the usury laws by Act XXVIII of 1855, the mortgage-money due on the four above mentioned mortgages had been liquidated from the usufruct of the mortgaged property, leaving a balance of mesne profits in favour of the plaintiffs.

The suit was resisted by a total denial of the plaintiffs' allegations as to the mortgages and their redemption by Khwaj Bakhsh, and upon this allegation the defendants further pleaded that their possession, derived by inheritance from Khwaj Bakhsh, had all along been adverse, and that the suit was barred by twelve years' limitation, and even by the sixty years' limitation provided for redemption, because more than 60 years had elapsed since the alleged mortgages by Ahmad Ali, the suit not having been instituted till the 5th of February, 1886.

[426] The Court of first instance decreed the claim in respect of property No. III, to which the mortgage of 14th Shawal, 1237 Hijri (5th July, 1822), related, and to that extent decreed the claim, together with mesne profits, and dismissed the rest of the suit, holding that the other three mortgages were not proved by the plaintiffs.

From the first Court's decree the defendants appealed to the lower appellate Court, and the plaintiffs preferred objections under s. 561 of the Criminal Procedure Code in respect of so much of the claim as had been dismissed by the first Court. The learned Judge of the lower appellate Court had therefore before him the entire suit, that is to say questions relating to all the four mortgages above mentioned. He has, however, not gone into the merits of the whole case, and has dismissed the whole suit by decreeing the defendants' appeal before him and dismissing the cross objections of the plaintiffs.

The ground upon which the learned Judge has dismissed the whole suit is limitation, and in doing so he has dealt especially with the mortgage of 5th July, 1822, relating to property No. III, which had been found to have been redeemed by Khwaj Bakhsh in 1828 from the original mortgagee.

The learned Judge has held that: "The respondents mortgagors (plaintiffs) cannot claim that the transaction of 1828 was a mortgage on their part, inasmuch as they were in no way parties to the transaction; that they can only claim a right to redeem on the theory that defendant appellant is the representative of the original mortgagee against whom the right to sue began to run from 1822; that accordingly the suit is barred by art. 148 of the Limitation Act; and that any other theory involves this, that defendant appellant in redeeming respondents' (plaintiffs') share of the estate in 1828 was acting adversely to their proprietary rights, and in that case the suit would be barred by art. 144."

It was upon these grounds that the learned Judge dismissed the suit in respect of the mortgage of 5th July, 1822, and it was upon the same ground that he disallowed the plaintiffs' cross-objections relating to the other mortgages—all of which are older than 60 years.

[427] The second appeal has been preferred from the whole decree, but Mr. *Abdul Majid* on behalf of the appellants, and Mr. *Sundar Lal* on behalf of the respondents, have addressed their arguments as to limitation with special reference to the mortgage of 5th July, 1822.

The effect of Mr. *Abdul Majid's* argument is that inasmuch as a mortgage is indivisible, and a co-mortgagor cannot redeem his own share, except by redeeming the whole mortgaged property, including the shares of his co-mortgagors, Khwaj Bakhsh's action in redeeming the entire

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mortgage of 5th July, 1822, amounted to a mortgage in his favour so far as the plaintiff's share was concerned; that since such redemption did not take place till 1828, the period of 60 years' limitation under art. 148 of the Limitation Act (XV of 1877) applies to the case, and that period must be calculated not from the date of the original mortgage of 5th July, 1822, but from 1828 when Khwaj Bakhsh, by redeeming the whole property, obtained possession of the plaintiffs' share therein. Upon these steps of reasoning the learned counsel argues that the suit was not barred by limitation. Further, he argues that if art. 148 of the Limitation Act is not applicable to the case, then this suit not being regarded a suit for redemption, must be taken to be a suit for possession of immoveable property within the meaning of art. 144 of the Act, and even in this event the suit would not be barred by limitation, because the defendants' possession having initiated in the redemption of 1828 could not be regarded as adverse in respect of the plaintiffs' share, which could not have come into their possession, but for the redemption of 1828, which redemption, far from repudiating the plaintiffs' title, must have proceeded upon a recognition of the plaintiffs' title.

Similarly Mr. *Sundar Lal* has addressed an alternative argument to me. The learned Pleader argues as the first alternative, that art. 148 of the Limitation Act applies to the case, but then the limitation must be counted from 5th July, 1822, when the original mortgage was made, and the suit would thus be barred by limitation, for the last column of that art. gives no indication of any starting point other than that which would be applicable to suits against the mortgagee under the terms of the mortgage itself. As **[428]** the other alternative the learned Pleader contends that art. 148 has no application to the case, and that the suit falls under art. 144, and as such is governed by 12 years' limitation calculated from the time when the defendants' possession became adverse to the plaintiffs, which in this case must be taken to have commenced at the redemption of 1828, and if not, the case cannot be decided without a clear finding as to when the defendants' possession became adverse to the plaintiffs.

A third and a minor argument was also addressed to me by Mr. *Sundar Lal* on behalf of the respondents, namely, that the lower appellate Court has not clearly found that the plaintiffs have any such rights as would entitle them to the status of co-mortgagors of the mortgage of 5th July, 1822. I will not dispose of this contention before deciding the question of limitation raised by the arguments of the parties.

That question depends upon the determination of the following points:—

(1) Is this suit governed by art. 148 or art. 144 of the Limitation Act?

(2) If by art. 148, is the starting point of the period of limitation, the date of the mortgage of 1822 or the date of the redemption of 1828?

(3) If art. 144 applies, is the defendants' possession acquired under the redemption of 1828 to be taken as adverse to the plaintiffs from that date?

In order to dispose of these questions, it is necessary to premise that I take it to be a well-settled rule of law that when the equity of redemption vests in more than one mortgagor, any one of them can redeem the whole property on payment of the full mortgage debt; that the mortgagor who so redeems the entire property obtains possessions thereof subject to the right of his co-mortgagors to recover their shares from him on paying their proportion of the mortgage debt and of the expenses incurred in redemption

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by the co-sharer who has redeemed the original mortgage. This was a well recog-[429]nized rule of law before the passing of the Transfer of Property Act (IV of 1882), and it has been recognized by that enactment in s. 95 which also recognizes another well-known rule of law that the mortgagor who thus redeems the share of his co-mortgagors has a charge upon their shares for the proportionate amount which he has paid on behalf of his co-mortgagors. There are many old cases cited in the 7th edition of Macpherson's Law of Mortgage, pp. 342, and 343, and to those may be added the case of *Asansab Ravuthan* v. *Vamana Rau* (1).

It was upon the same principle that my brethren Straight and Tyrrell, in the case of *Nura Bibi* v. *Jagat Narain* (2), held that a co-mortgagor who obtains possession by redeeming the whole mortgage assumes the position of mortgagee, and that the other co-mortgagors could sue to redeem their shares and that such suit would be governed by art. 148 of the Limitation Act (XV of 1877). That case is undoubtedly an authority in favour of Mr. *Abdul Majid's* contention so far as that contention seeks to apply art. 148 to the present suit. But as pointed out by Pandit *Sundar Lal*, the case before my learned brethren was one in which the original mortgage redeemed by the defendants was not proved to be older than 60 years, and they therefore did not decide the question as to the period from which the starting point of the limitation of 60 years was to be calculated. They said :—"Such a suit naturally falls within the definition of art. 148 of Act XV of 1877 ; and we fail to appreciate how it is possible for one of two mortgagors redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

Relying upon this passage, Mr. *Sundar Lal* argues that the essential part and the turning point of the *ratio decidendi* of that ruling was the circumstance that the plaintiff had sued within 60 years of the original mortgage, which had been redeemed by the defendant, and that in this view the ruling supports the case of the [430] respondents rather than that of the appellants. I think this contention is sound, and that the ruling just mentioned is not on all fours with the present case, because in that case the exact question now before me did not and could not arise, *viz.*, whether in cases where the original mortgage is older than 60 years, and could not be redeemed under art. 148 by the plaintiff mortgagor, if no intermediate redemption had been made by the co-mortgagor defendant ; the date of such redemption furnishes a fresh starting point of a 60 years' period of limitation under art. 148.

Again, as far as the argument of the parties with reference to the applicability of art. 144 of the Limitation Act is concerned, reference has been made to a Full Bench ruling of this Court in *Umr-un-nissa* v. *Muhammad Yar Khan* (3), which would go to show that when a co-mortgagor obtains possession by redeeming the whole mortgage, his possession from the date of such redemption becomes adverse to the other co-mortgagors, and that their suit to recover possession of their shares would be governed by the 12 years' limitation prescribed by art. 144 of the Limitation Act. The ruling is no doubt a binding authority upon me sitting here as a single Judge, but as pointed out by my brethren Straight and Tyrrell, " the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of

(1) 2 M. 223. (2) 8 A. 295. (3) 3 A. 24.

whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit;" and it was, indeed, upon this ground that those learned Judges felt themselves at liberty to apply the 60 years' limitation prescribed by art. 148 and not the 12 years' limitation under art. 144, to a case in which the defendants co-mortgagors of the plaintiff had redeemed the whole mortgage 21 years before suit and had since been in possession.

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Mr. *Abdul Majid* in supporting his contention that the redemption of 1828 must be taken to amount to a fresh mortgage and as such furnishing a new starting point of 60 years' limitation under [431] art. 148 relies upon the dictum of Petheram, C. J., in *Ram Singh* v. *Baldeo Singh* (1) where the learned Chief Justice observed :—

"Art. 148 is, in my opinion, intended to apply to any person in possession of immoveable property which he is entitled to hold so long as an amount due to him, for which that property is charged, remains unpaid. The debtor, on payment, is entitled to possession; and this is in effect a redemption of the land or share in the land, the relation of mortgagor and mortgagee, in fact, as described in art. 148. Therefore I am of opinion the relation of mortgagor and mortgagee, as described in art. 148, did exist, and that the 60 years' limitation applies. I think also that the right to redeem must be reckoned from the year 1821 as the relationship was then created."

The report of the case in which these observations were made shows that all that had occurred in 1821 was a decree which the co-sharers of a village had obtained against the purchaser at a sale for arrears of Government revenue, which decree, setting aside the sale, directed that the co-sharers should obtain possession on payment of a certain sum to the purchaser; and subsequently one of such co-sharers paid off the whole decretal amount and obtained possession. Mr. *Abdul Majid* argues that if the decree of 1821 could establish the relation of mortgagor and mortgagee in that case, *a fortiori*, in this case the relation of mortgagor and mortgagee was established between the parties to this litigation when the redemption of 1828 was made, and that therefore that time must be regarded as the starting point of 60 years' limitation in this case under art. 148 of the limitation Act. Again, the learned Counsel, so far as his argument relates to the applicability of art. 145, calls my attention to a ruling of Mr. Justice Oldfield in *Karimdad Khan* v. *Faizan Bibi* (2) where the learned Judge held that in cases of one co-mortgagor obtaining possession by redemption of the whole mortgaged property, such possession could not, *ipso fatco*, be taken to be adverse to the other co-mortgagors, and that the suit would not be barred even though redemption had taken place more than [432] 12 years before suit. I delivered no separate judgment in that case, and concurred in the order which that learned Judge made, but the report does not show, and I do not remember that our attention had been called to the Full Bench ruling of this Court in *Umr-un-nissa* v. *Muhammad Yar Khan* (3), which as I now read it seems to me to be somewhat irreconcileable with the *ratio* upon which the judgment in the case before Oldfield, J. and myself just cited proceeded.

In this state of the case-law, and in view of intrinsic difficulties which have arisen in this case, I should ordinarily have regarded it as my duty to refer the case to a bench consisting of more than one Judge, by availing myself of the statutory provision to that effect which the rules of this

(1) 5 A.W.N. 300. (2) 5 A.W.N. (1885) 51. (3) 3 A. 24

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Court, dated the 11th June, 1887, contain. But this Court, as I have recently reason to think, is not unanimous as to the exact extent of the discretionary power which those rules imply in matters of reference. I shall therefore direct that the case be laid before the learned Chief Justice, who under s. 14 of the statute 24 and 25 Vic. c. 104, has extensive power in that behalf, for such orders as he deems fit to pass as to whether this case may be referred to a Division Bench consisting of two Judges, or should be disposed of by me sitting as a single Judge. I direct accordingly.

STRAIGHT, J.—As the accuracy or otherwise of a judgment of Petheram, C. J. when Chief Justice of this Court is in question, I think it desirable that the proposal of my brother Mahmood should be adopted. I accordingly support his recommendation.

The case was ordered by Edge, C. J., to be laid before a Bench consisting of himself and Straight and Mahmood, JJ.

Maulvi *Abdul Majid* and Pandit *Moti Lal Nehru*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J.—This was a suit for redemption of mortgage. The original mortgage was a usufructuary mortgage of 1822. One of the mortgagors redeemed the whole of the property in 1828. This [433] suit was brought against his heirs on the 5th February, 1886. The lower appellate Court dismissed the suit on the ground that it was barred by limitation. In my opinion the limitation applicable in a case of this kind is the limitation which would have been applicable if the original mortgagee or his heirs had been the defendants to the redemption suit, that is, if art. 148 of the Limitation Act applies, the period does not run from the date of the redemption of the whole property by one of the co-mortgagors, but from the time it would have run against the original mortgagee if he had been a defendant in the suit. As I understand the law, when one of two or more co-mortgagors redeems the whole, he as to the portion which represents the interest of his co-mortgagors stands in the shoes of the mortgagee from whom he redeems, and standing in those shoes, it appears to me that he has got the same rights and the same liabilities.

If art. 148 applies, as I think it does, this suit is barred by time. If the ruling of the Full Bench in the case of *Umr-un-nissa* v. *Muhammad Yar Khan* (1) be correct and exhaustive, then also the suit is barred as more than twelve years have run since the date of the redemption of the mortgage by the ancestor of defendants. So in either case the plaintiff's suit must fail. The ruling of the Full Bench above referred to was explained by my brother Straight and my brother Tyrrell in the case of *Nura Bibi* v. *Jagat Narain* (2). It appears from that explanation that the attention of the Full Bench was not drawn as to the question whether art. 148 of the Limitation Act was applicable to the case. There the attention of the Full Bench having been confined to the article before them, the result arrived at was that art. 144 was held applicable. This appeal therefore must be dismissed.

STRAIGHT, J.—The facts out of which the questions raised by this reference arose are very fully stated in the referring order of my brother Mahmood, and it is wholly unnecessary to repeat them now. The learned Chief Justice has summarised the position of the parties to the litigation out of which this appeal arose, by saying that this is a suit by the plaintiffs,

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(1) 3 A. 24. (2) 8 A. 295.

appellants, before us, for redemp-[434]tion of their share of certain property mortgaged in the year 1822, from the defendants respondents who are the representatives of one of the original mortgagors, who in the year 1828 redeemed the whole of the mortgaged property. The three questions raised by my brother Mahmood in his referring order are :—

(1) Is this suit governed by art 148 or art. 144 of the Limitation Act?

(2) If by art. 148, is the starting point of the period of limitation the date of the mortgage of 1822, or the date of the redemption of 1828?

(3) If art. 144 applies, is the defendants' possession acquired under the redemption of 1828, to be taken as adverse to the plaintiffs, from that date?

It will be convenient for me at once to deal with the obvious matter that was passing through the mind of my brother Mahmood at the time he made the reference of these questions, with regard to the applicability of art. 144 to facts like those disclosed here. No doubt what was present to his mind was a decision of the Full Bench passed in the year 1880 and reported in *Umr-un-nissa* v. *Muhammad Yar Khan* (1). I have already, as the learned Chief Justice has observed, taken occasion, in conjunction with my brother Tyrrell, in the case of *Nura Bibi* v. *Jagat Narain* (2) to explain the circumstances under which that particular ruling was delivered by the Full Bench. Having again refreshed my memory by reference to it, I am convinced that I was right in saying that the whole argument of the Full Bench proceeded upon the assumption that art. 144 of the Limitation Act was the article applicable to those particular facts, and assuming that particular article applicable, the question was whether as is stated in the order of reference of the two learned Judges, there had been such physical possession as would lay the foundation for finding adverse possession. I am quite convinced that the equitable principle which was then recognized, under which a co-mortgagor [435] redeeming for his other mortgagors was entitled upon redemption of the whole mortgage to hold their shares as against them as security for the mortgage, was never referred to or discussed, and there was at that time no statutory provision in force, which could have been brought to the attention of the Judges of the Full Bench, to show that article 148 was the limitation article applicable. Therefore, in so far as there is anything in that case to militate with the contention now raised, it must be taken that that case never did decide, and must not be regarded as an authority for deciding that article 148 is not applicable to such facts as we have here. Therefore it must be dismissed from consideration in dealing with the questions submitted to us.

Then arises the question whether art. 148 is applicable, and if so, from what date does the limitation begin to run. Does it run from the date of the original mortgage, or does it run from the date of the redemption of the whole mortgage by one of the co-mortgagors? As to art. 148 being applicable, I have no doubt I have already committed myself to that view in the case of *Nura Bibi* v. *Jagat Narain* (2), and there have been several other rulings to the same effect, among others one reported in Weekly Notes of 1886, p. 152 (*Raghubar Sahai* v. *Bunyad Ali*, (3). Further, even before the Transfer of Property Act came into operation, I took the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee, and was entitled to all the rights and the

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(1) 8 A. 24. (2) 8 A. 295. (3) A.W.N. (1886) p. 152.

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incidents connected with his estate. The principle that underlies that is, that he, having paid off the obligation to the creditor, is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place. Among others he cannot say that a new mortgage transaction commenced from that particular date, but his position as mortgagee stands upon the same footing as it would have if the original mortgagee had assigned over to him by sale his mort-**[436]** gage interest. Not only do I think that a co-mortgagor redeeming the whole mortgage stands in the position of the original mortgagee, but that time runs from the date of the original mortgage. No doubt this view is inconsistent with the one expressed by the late Chief Justice, Sir Comer Petheram, in the case of *Ram Singh* v. *Baldeo Singh* (1). That learned Judge was of the same opinion as I am, as to the applicability of art. 148 to the facts then before him. But it does not appear to have been seriously discussed before him as to what was the precise date from which the limitation would run. Mr. *Abdul Majid* is entitled to use that judgment in his favour, and it is entitled to all the respect which every utterance of that learned Chief Justice deserves. But I cannot myself agree with the view that the limitation runs from the date when redemption took place. It must, in my opinion, relate back to the date of the original mortgage, and upon this I have explained my reasons in the case of *Nura Bibi* v. *Jagat Narain* (2). The conclusion I have arrived at is the same as that of the learned Chief Justice, *viz.*, that this suit was barred and that this appeal must be dismissed with costs.

MAHMOOD, J.—The facts of the case as also the points of law raised by the arguments of the parties before me when the case first came up before me in the Single Bench, are fully stated in my order of the 17th July, 1888, and I regard what I then said as a portion of my judgment to-day.

That order shows that, at any rate, the case was a fit one for being disposed of by a Bench consisting of more than one Judge, and it was in consequence of that circumstance that the case was laid before my brother Straight and myself, and by our order of the 6th December, 1888, it was laid before the learned Chief Justice for consideration as to whether it should not go before a Bench of three Judges. It is in consequence of this circumstance that this is a third time that this Court is hearing the case, and it has not been due to any other cause than my desire to obtain such authoritative ruling upon the points raised in the case as this Court can give.

[437] The points which arise in the case have been so completely dealt with by the learned Chief Justice and my brother Straight, that I should be unnecessarily taking up their time if I dwelt upon the same points or made any endeavour to give expression to any exposition of the law which would minutely deal with the various cases that may arise under it. The question, however, upon which the fact of the case turns requires two things,—first, that it should be held by us that art. 144 of sch. ii of the Limitation Act has no reference to suits of this character, and secondly, that suits of this character are governed by art. 148. Upon both these questions, I, who am never content with dealing with any case without dealing also with the *ratio viz.*, the essential steps of reasoning, upon

(1) 5 A.W.N. (1885) 300. (2) 8 A. 295.

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which the Judgment proceeds, have no hesitation in saying with all deference that the judgment of the Full Bench in *Umr-un-nissa* v. *Muhammad Yar Khan* (1) proceeds upon a theory of law as to the application of the art. 144, which I find impossible to accept, notwithstanding the clear distinction which my learned brother Straight drew in the case of *Nura-Bibi* v. *Jagat Narain* (2), the result of which we have held to-day is to say that the Full Bench ruling need no longer be referred to for the purposes of finding out the periods of limitation for suits.

Again, it is also clear, and I do not wish to add a single word to what has fallen from my brother Straight upon the subject, that the ruling referred to in my referring order, viz., *Ram Singh* v. *Baldeo Singh* (3), cannot possibly be consistent with the *ratio* upon which our judgment proceeds. The truth is, as I understand the law, that there are various manners and methods whereby a person may stand in the shoes of a mortgagee. There may be a case such as that of an assignee, or there may be a case such as that which the broad principle of equity known as subrogation involves. A co-sharer suing for the redemption of the whole of the property and obtaining redemption thereof is not a person in adverse proprietary possession, as the Full Bench ruling would probably require. He is simply by subrogation on the same footing as an ordinary person would **[438]** be as representing the mortgagee, or rather the mortgagee's interest in property, *quoad* such of his co-sharers as have not either secured redemption or sued for it.

When in a suit the question arises whether or not a co-sharer can obtain his share from a redeeming co-sharer, the case to my mind is a suit such as art. 148 contemplates, and such a suit is governed by the sixty years' period. In the present case the original mortgage was so old as 5th of July, 1822. There was no endeavour made to prove that the redemption which took place in 1828 was other than an ordinary redemption by one co-sharer of the other co-sharer's property. The present defendants represent the right of the redeeming co-sharer, and they are entitled to rely upon the same limitation as art. 148 would require.

There is, however, because it is on account of that reference of mine that the case has come up before us, one point more that I wish to add. The reference, of course, relates to four properties as mentioned in my referring order, and what we have held with regard to this mortgage renders it unnecessary for us to consider the other mortgages mentioned in the judgments of the Courts below. The view we have now taken defeats the whole suit. The result is exactly what the learned Chief Justice and my brother Straight have said, *viz.*, that this appeal stands dismissed with costs.

Appeal dismissed.

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(1) 3 A. 24. (2) 8 A. 295. (3) 5 A.W.N. (1885) p. 300.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

PARMANAND MISR (*Defendant*) *v.* SAHIB ALI AND OTHERS (*Plaintiffs*).*
[23rd March, 1889.]

Mortgage, usufructuary—Redemption—Limitation—Pleading—Burden of proof—Civil Procedure Code, s. 50—*Act XV of* 1877 (*Limitation Act*), *s.* 28, *sch. ii, No.* 148 *Act I of* 1872 (*Evidence Act.*) s. 110.

There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In [439] each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property.

Philipps v. *Philipps* (1). *Dowkins* v. *Lord Penrhyn* (2), *Radha Gobind Roy Shab* v. *Inglis* (3), *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (4). *Rajah Kishen Dutt Panday* v. *Narendur Bahadur Singh* (5), *Ram Chandra Apaji* v. *Balaji Bhaurav* (6), and other cases referred to.

[R., 14 A. 193 = 12 A.W.N. 55; 18 A. 295 (296, 297); 18 A. 403 (406) = 16 A.W.N 132; 20 A. 182 = 18 A.W.N, 19; 27 B. 271 (278); 17 A.W.N. 129; 19 A.W.N. 132; L.B.R. (1893—1900), 360; 3. O.C. 173 (75); 6 O.C. 119 (123); 88 P.R. 1903; 11 P.R. 1909 = 51 P.L R. 1909.]

THE facts of this case are sufficiently stated in the judgment of Edge, C. J.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENTS.

EDGE, C.J.—The plaintiffs-respondents here, on the 2nd July, 1886, brought a suit in the Court of the Munsif of Azamgarh for redemption of an alleged mortgage and for surplus profits. In their plaint they alleged that the ancestor of the defendant No. 2 had, in the year 1242 fasli, that is to say, in 1835-36, mortgaged a one-anna four-pie share in Mauza Isapur to the grandfather of the defendant No. 1 for Rs. 150, that the mortgage was a usufructuary mortgage, and that the entire mortgage-debt had been discharged by the usufruct leaving a large surplus which they claimed. They alleged that they had purchased the rights of the defendant No. 2 in the property in question, and said that as they had not the mortgage-deed in their possession, they could not give the exact date of mortgage.

The defendant No. 1 in his written statement denied that any such mortgage was made or that any mortgage was made in 1242 fasli. He

* Second Appeal No. 916 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 15th March, 1887, modifying a decree of Babu Nihal Chand, Munsif of Azamgarh, dated the 21st September, 1886.

(1) L.R. 4 Q.B.D. 127. (2) L.R. 4 App. Cas. 51. (3) 7 C.L.R. 364.
(4) 9 I.A. 99. (5) 3 I.A. 85. (6) 9 B. 137.

further pleaded that, on the 31st August, 1820, the property in question had been mortgaged to his ancestor for Rs. 325, [440] and that to that mortgage four other bonds representing in amount Rs. 396 had been tacked on, and that the debt had not been discharged. He also pleaded that the claim of the plaintiffs was barred by limitation.

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The plaintiffs called two witnesses to prove that a mortgage for Rs. 150 had been made, and they put in evidence a *rubkar* of 1836.

The Munsif of Azamgarh, holding "that the mortgage-deed being with defendant No. 1, the burden of proving the time of mortgage, and the money for which the mortgage was made lay upon him," gave the plaintiff a decree for possession for Rs. 113-5-3, with interest and for costs. The defendant No. 1, the appellant here, appealed from that decree to the Court of the Judge of Azamgarh. In that appeal the then Judge of Azamgarh in his judgment found so far as is material as follows:—"The evidence on both sides is not very good. That the *rubkar* filed by plaintiffs merely shows there was a mortgage, but that is admitted and the oral evidence by itself is hardly sufficient to warrant decreeing the claim. On the other hand, the deed of mortgage, filed by defendant proves too much, for it refers to a mortgage of far more property than that claimed. Defendant No. 1 explains this by saying that perhaps part of the mortgage had been paid off, and so part of the property had been redeemed, but this is unlikely and there is no proof whatever of it.

Under the circumstances I agree with the lower Court that it is impossible to hold that the defendant's deed refers to the present mortgage or that the bonds he holds have been tacked on to the present mortgage. So I agree with the lower Court that the plaintiffs are entitled to recover the property, but I cannot agree with the lower Court in holding it clearly proved that the mortgage was for exactly Rs. 150, and that it is not only paid off by the profits, but that there is a large surplus; on the contrary, if this were really the case, the claim for redemption would have been preferred long ago, so I consider there is not sufficient evidence to prove that there is a surplus or how much it amounts to."

[441] The Judge of Azamgarh on that finding dismissed the claim, so far as it related to the alleged surplus profits, and ordered each party to bear their own costs in both Courts, and to that extent modified the decree of the Munsif.

From that decree of the Judge the defendant No. 1 has brought this second appeal.

Mr. *Jogindro Nath Chaudhri* on behalf of the defendant-appellant contended that, as the making of the mortgage alleged by the plaintiffs was in issue in the suit, it lay upon the plaintiffs to substantiate their case by at least some *prima facie* evidence of the making of the alleged mortgage, that no such *prima facie* evidence had been given, and consequently that the plaintiffs had failed to establish even a *prima facie* case that the mortgage alleged and relied upon by them in their plaint had been made, or that the suit was brought within the period of limitation prescribed by the Indian Limitation Act, 1877. He cited the following authorities;—*Rajah Kishen Dut. Panday* v. *Narendar Bahadur Singh* (1), *Ratan Kuar* v. *Jiwan Singh* (2), *Balaji Narji* v. *Babu Deoli* (3), *Ram Chandra Apaji* v. *Balaji Bhaurav* (4), *Nura Bibi* v. *Jogat Narain* (5), *Bhagwan Singh* v. *Mahabir Singh* (6), *Pandurang Govind* v. *Balkrishna*

(1) 3 I. A. 85. (2) 1 A. 194. (3) 5 B.H.C.R.A.C.J. 159.
(4) 9 B, 137 (5) 8 A. 295. (6) 5 A. 184.

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Hari (1), and an unreported judgment of mine, in which my brother Brodhurst concurred, in S. A. No. 289 of 1888.

Mr. *Abdul Majid* on behalf of the plaintiff's respondents, whilst admitting that it lay upon the plaintiffs to establish by *prima facie* evidence that the action had been brought within time, contended that such *prima facie* evidence had been given. Mr. *Abdul Majid* admitted that the Judge of Azamgarh in his judgment correctly represented the effect of the *rubkar* which was put in evidence. He referred to the following authorities:—*Radha Prasad Singh* v. *Bhajan Rai* (2), *Radha Gobind Roy Saheb* v. *Inglis* (3), *Sarsuti* v. [442] *Kunjbehari Lal* (4), and *Bhagwan Singh* v. *Mahabir Singh* (5), which had been cited by Mr. *Jogindro Nath Chaudhri*.

My brother Mahmood in the course of the argument suggested that as the defendant-appellant relied on limitation as a bar to the suit, it was on him to show that the suit was not brought within time and not upon the plaintiffs to show that it was, and he referred us to the case of *Rao Karan Singh, Rajah Bakar Ali Khan* (6).

It appears to me that this being a second appeal in which we must accept the opinion of the first appellate Court as to the oral evidence, and its conclusions of fact upon the documentary evidence before it, it is necessary in the first instance to consider what was the opinion of the Judge of Azamgarh as to the oral evidenee and what were his conclusions of fact upon the documentary evidence before him.

As I read his judgment, the late Judge of Azamgarh was of opinion that the oral evidence on each side was untrustworthy and unreliable, and I necessarily conclude that, holding that opinion, he discarded the oral evidence. As to the documentary evidence it is admitted that his opinion as to the *rubkar* of 1836, namely, that the *rubkar* showed no more than that there had been a mortgage, was correct.

The Judge below does not suggest that the mortgage-deed of 1820 produced by the defendants was not in fact a genuine deed.

For reasons which, if this was a first appeal, would be far from conclusive to my mind, he came to the conclusion that the mortgage-deed of 1820, by which a five and half-anna share in the same mouza Isapur was along with other property mortgaged, did not relate to the property in question.

He found as a fact that the plaintiffs had not proved the mortgage alleged by them, and consequently he disallowed their claim for the alleged surplus-profits, but nevertheless he confirmed that portion of the decree of the Munsif which decreed possession. With all respect for the late Judge of Azamgarh, his judgment, in [443] my opinion, betrays considerable confusion of mind, unless he was of opinion that the *onus* of proving the date of the mortgage alleged by the plaintiffs, that it had in fact been made, and that the plaintiffs' title and right to redeem were subsisting at the date of the suit was not upon the plaintiffs, but upon the defendant who, in his written statement, had specifically denied that any such mortgage had been made.

As I understand his judgment there was in his opinion no *prima facie* evidence of a reliable character that any such mortgage as that alleged and relied upon by the plaintiff had ever been made, and yet in the latter part

(1) 6 B.H.C.R.A.C.J. 125. (2) 7 A. 677. (3) 7 C.L.R. 364.
(4) 5 A. 345. (5) 5 A. 184. (6) 9 I.A. 99.

of his judgment in the passage which I have quoted he refers to the "present mortgage" as if such mortgage had been admitted or proved.

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It appears to me that there is a plain and clear distinction as to the *onus* of proof between a case like this in which a plaintiff sues to obtain possession of land by redemption of a mortgage, and that, in which the defence to a suit for the possession of land is twelve years' adverse possession by the defendant. In each case it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence.

In the second case, in which the defence is twelve ysars' adverse possession, the defendant whose title, if any, is twelve years' adverse possession, must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. As a matter of pleading, it is quite clear that a plaintiff suing for possession of land by redemption of mortgage must show in his plaint the title he intends or hopes to prove, and upon which he relies as entitling him to the relief which he asks.

By s. 50 of the Code of Civil Procedure it is enacted that the plaintiff in a suit must contain "a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose," and "if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the **[444]** plaint must show the ground upon which exemption from such law is claimed."

It is enacted by s. 28 of the Indian Limitation Act, 1877, that "at the determination of the period hereby limited to any person for bringing a suit for possession of any property, his right to such property shall be extinguished."

The plaintiff in such a suit as the present one must show in his plaint his title, and that involves his showing a title subsisting at the date of suit. In the present case the plaintiffs would not, in my opinion, have complied with the clear and specific requirements of s. 50 of the Code of Civil Procedure if in their plaint they had merely stated that a mortgage of the land in question had been granted to the defendant or his ancestors and that they as the assignees of the mortgagor's right were entitled to redeem on the ground that the mortgage-debt had been discharged by the usufruct. Such a plaint would not show the circumstances constituting the cause of action or when it arose or in fact that any cause of action or right to sue existed at the commencement of the suit.

The subject of the kind of averments which a plaintiff should make in his statement of claim, and what it should show under the orders relating to pleading in England, which are analogous to the provisions of our Code of Civil Procedure, was much discussed in the case of *Philipps* v. *Philipps* (1) which was a suit of ejectment on title.

Unless the plaintiff in a suit for redemption of mortgage shows in his plaint that *prima facie* he had at the commencement of the suit a title and a right to sue then subsisting, his plaint would not, in my opinion, comply with the requirements of s. 50 of the Code of Civil Procedure. It would, in my opnion in the result be as useless for such a plaintiff to allege in his plaint a date and circumstances of which there was no *prima facie* evience as to allege a date and circumstances which were false. I cannot better

(1) L.R. 4 Q.B.D. 127.

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illustrate what I consider to be the effect of art. 148 of the second schedule of the Indian Limitation Act, 1877, coupled with s. 28 of that Act, and of [445] the paragraphs which I have quoted from s. 50 of the Code of Civil Procedure, then by quoting from the judgment of Lord Cairns in *Dawkins* v. *Lord Penrhyn* (1), the following passages:—"My Lords, I consider that there can be, and ought to be, no doubt at all upon that point. The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicted beforehand that a defendant who may shelter himself under the Statute of Frauds desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the Statute of Frauds will be inapplicable. With regard also to the statute of limitations as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicted that the defendant will appeal to the statute of limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the statute of limitations or not. But with regard to real property it is question of title. The plaintiff has to state his title, the title upon which he means to rely, and the statute of limitations with regard to real property, says that when the time has expired within which an entry for a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way, he may have it. Therefore if upon the face of the will the plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless, indeed, he can bring himself within some of the exceptions under which the statute allows his title to continue."

It is true that in *Dawkins* v. *Lord Penrhyn*, (1) Lord Cairns was dealing with the English law as to limitation, and the rules in England as to pleading, but, in my opinion, his judgment as to the effect of the English statute of limitation relating to real property would be equally applicable to the article and section of the Indian Limitation Act, 1877, to which I have referred, and his observations [446] as to the English statute of limitation as to personal property are not uninstructive for us in India, who have to construe and apply the law as it is here.

The very nature of a suit for possession of land by redemption of mortgage presupposes that the defendant or those whom he represents in title had lawfully obtained possession of the land, and the plaintiff must show in his plaint, and must support his case by at least *prima facie* evidence showing his title to possession, and his right to disturb the possession of the defendant which had a lawful origin. If in such cases the mortgagor's title to the land and the right to redeem have become extinguished by lapse of time, such extinguishment was effected not by any overt act of the mortgagee, but by the mortgagor having failed to bring his suit within the time allowed by the Indian Limitation Act. Unless a plaintiff in a redemption suit gives *prima facie* evidence to show that his suit is brought within the time, allowed by the Indian Limitation Act, he, in my opinion, fails to show that he has a subsisting right to the property in suit, or in other words, he fails to prove his title.

On the other hand, in a suit against an alleged trespasser for possession, the plaintiff's case is that the possession of the defendant is and has

(1) L.R. 4 App. Cas. 58 and 59.

been from the date assigned in the plaint as the date of the alleged trespass unlawful.

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It would be a sufficient compliance with clause (*d*) of s. 50 of the Code of Civil Procedure for a plaintiff in such a case, for example, to state in his plaint filed on the 10th February, 1888, that he being possessed of one bigha of land in mauza Rajpur, &c., was on the 1st January, 1888, wrongfully dispossessed by the defendant. If the simple defence to such an action was twelve years' adverse possession by the defendant, it would, after the plaintiff had given *prima facie* proof of what amounted to a dispossession by the defendant within twelve years before suit, clearly be for the defendant to prove an adverse possession for twelve years, otherwise the plaintiff's title would stand admitted.

In my opinion, in all cases where the plaintiff's title is in issue, and adverse possession of twelve years is a defence, the plaintiff must [447] prove *prima facie* a title, and then the defendant, if he is to succeed, must prove in fact twelve years' adverse possession. In the case of *Radha Gobind Roy Sahab* v. *Inglis* (1), their Lordships of the Privy Council, at page 367, are reported to have said :—" The question remains, whether the disputed land, which must now be taken all to lie within the yellow line, had or had not been 'occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the statute of limitation ; on this question undoubtedly the issue is on the defendant. The plaintiff has proved his title ; the defendant must prove that the plaintiff has lost it by (reason of his) the defendant's adverse possession."

"It is to be observed that their Lordships in that case state that "the plaintiff has proved his title," and from other parts of their judgment I infer that the plaintiff had given at least *prima facie* evidence to show that the defendant there had not been in adverse or other possession of the land in question for twelve years before the suit. As was pointed out by Mr. Justice Oldfield in his judgment in the case of *Sarsuti* v. *Kunj Behari Lal* (2), *Radha Gobind Roy* v. *Inglis* (1), is an authority to show that when a plaintiff in a suit for possession of land has proved his title, it is for the defendant to prove the adverse possession on which he relies. In the case of *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (3) so far as this point is concerned, their Lordships of the Privy Council merely decided that although under the old law of limitation a plaintiff must have proved that he was in possession of the property in suit within twelve years before suit, yet under Act IX of 1871, he may sue within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to him. I fail to see anything in the judgments of their Lordships of the Privy Council in either of the two cases to which I have just referred, from which it can be argued that the *onus* is on a defendant in a suit for redemption of proving that the suit is not brought within time.

[448] It appears to me that their Lordships of the Privy Council in the case of *Rajah Kishen Dutt Pandey* v. *Narendar Bahadur Singh* (4), although they were then considering Act I of 1869, enunciated, if I may say so, the correct rule of law as to the *onus* of proof in suits for redemption of mortgage applicable to cases like the present. In that case which was one for redemption of mortgage, the then Officiating Judicial Commissioner of Oudh had held that there was a presumption of law in favour

(1) 7 C.L.R. 364 (2) 5 I.A. 354. (3) 9 I.A. 99. (4) 3 I.A. 85.

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of the plaintiff, and that the burden of proof lay, not upon the plaintiff, to prove that the term did not expire before the 13th February, 1856, which was the material date so far as limitation in that case was concerned, but upon the defendant to prove that it did. Their Lordships at pp. 88 and 89 of the report are reported to have said, "Their Lordships are not prepared to concur with the Judicial Commissioner in the view that he expressed, that the presumption of law is such as he described it. It appears to their Lordships that in such a case as the present it lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least. But in this, as in most other cases, where the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although the burden of proof *prima facie* in this case in their Lordships' view is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be *prima facie*, at all events more in his power to give accurate evidence of its contents than in that of the plaintiff," and further—"Now applying this view of the law to the present case, their Lordships have to see whether the plaintiff, in this view, did give such *prima facie* evidence as shifted the burden of proof on the defendant. Although it may be that the evidence of neither side is altogether satisfactory, nevertheless their Lordships, after giving their best consideration to the case, are of opinion that the plaintiff did give some such *prima facie* evidence. He was himself examined. He called seven or eight witnesses who deposed to the contents of the instrument, to its containing [449] the term which he contended for, and further, to the admission of the defendant or of his predecessors of the existence of some such term, and the Extra Assistant Commissioner believed the witnesses, having, as was before observed, the opportunity of seeing and observing their demeanour." It is quite plain to my mind that their Lordships held in that case that the *onus* of proving that the suit for redemption of mortgage was brought within time lay upon the plaintiff. They held that *prima facie* evidence to that effect amounted to proof sufficient to shift the burden upon the defendant of proving the contrary. It cannot be suggested that their Lordships in using the words "it lies upon the plaintiff to substantiate his case by some *prima facie* evidence at least" meant to suggest that evidence which is not believed or considered reliable by a Judge who has to find the facts would be sufficient to substantiate a plaintiff's case so as to shift the burden of proof from his shoulders to those of a defendant. In that case there was in addition to the evidence of the plaintiff the evidence of seven or eight witnesses "who deposed to the contents of the instrument, to its containing the term which he (the plaintiff) contended for, and further, to the admission of the defendant or of his predecessors of the existence of some such term." One piece of evidence in that case was that the defendant in certain settlement proceedings in 1857 corrected a statement that he was the purchaser of the property and described himself as a mortgagee, a statement which was *prima facie* inconsistent with the term of the mortgage having expired before the 13th February, 1856. Their Lordships in conclusion and after they had discussed at some length the evidence, such as it was, on the record say.—"Their Lordships therefore think that the evidence of the plaintiff is to some extent corroborated by an admission of the defendant, to the effect that there was in existence a mortgage in 1857. They

therefore think that the plaintiff gave some evidence calling upon the defendant for an answer. It may be that the evidence was not very strong, and that it would have been rebutted by evidence of any force on the other side. But their Lordships are of opinion that the evidence of the defendant, the main portions of which appear to have been disbelieved by all three Courts, [450] some documents connected with which have been treated by all three Courts as spurious, contains no answer to the case of the plaintiff, which must therefore prevail."

It has been contended here that the defendant having pleaded that he held an unsatisfied mortgage of 1820, and its having been found that the mortgage of 1820 did not relate to the land or share in question, such admission was an admission that the defendant-appellant was a mortgagee as alleged by the plaintiffs, and cast upon the defendant the *onus* of proving that the mortgage alleged by the plaintiffs, namely, one of 1836 for Rs. 150 had not been made. I have failed to see any force in that contention. I cannot see how the second line of defence of the defendant which failed, namely, that he held under an unsatisfied mortgage of 1820 can be twisted into an admissison or evidence of any kind that the mortgage alleged by the plaintiffs was made or that the plaintiffs are entitled to redeem on the basis of the mortgage alleged by them, the making of which was unequivocably denied and put in issue by the defendant in his written statement.

Accepting as we must in second appeal the conclusions of fact of the late Judge of Azamgarh, there was here in my opinion no *prima facie* evidence that the mortgage alleged by the plaintiff had been made in 1836 or at all, or that this suit, in which they claimed to redeem an alleged mortgage of 1836, for Rs. 150, was brought within time. It may very well be that the defendant in 1886 honestly but mistakenly believed, if he was mistaken, that the mortgage of 1820 did relate to the property in question, and it may also be that if that mortgage-deed did not relate to the property in suit he was unaware of what the origin of his title was. It is not suggested that the defendant was an original party to the mortgage of 1820 or to the alleged mortgage of 1836. I cannot understand upon what principle a defendant could be expected to produce or give evidence of the contends of an alleged mortgage-deed or other document, of the making or existence of which there was no *prima facie* evidence, particularly when the making and existence of the alleged document were in issue in the case and denied by the defendant, and when [451] the alleged document was not set up by him as the origin of his title.

In *Nura Bibi* v. *Jagat Narain* (1) my brothers Straight and Tyrrell put the same construction upon the judgment of their Lordships of the Privy Council in *Kishen Dutt Panday* v. *Narendar Bahadur Singh* (2) which I do. The case before my brothers Straight and Tyrrell was one of redemption of mortgage. At page 300 of the report they are reported to have said :—"The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin of such possession was conceded by him, it lay upon the plaintiff to give *prima facie* proof of the subsistence of his mortgage at the date of suit."

In *Balaji Narji* v. *Babu Deoli* (3) the Bombay High Court held in a

(1) 8 A. 295. (2) 3 I.A. 85. (3) 5 B.H.C.R.A.C. 159.

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redemption suit that the admission by the defendant that the plaintiff's ancestor had had proprietary possession of the land in suit, and the failure of the defendant to prove his plea that he held by purchase, did not relieve the plaintiff of the *onus* of giving *prima facie* evidence that the mortgage alleged by him had been made. To the same effect is the judgment of this Court in *Ratan Kuar* v. *Jiwan Singh* (1).

The case of *Radha Prasad Singh* v. *Bhajan Rai* (2) does not, I think, bear upon the present case. In the case of *Bhagwan Singh* v. *Mahabir Singh* (3) which was a suit for pre-emption, my brothers Brodhurst and Mahmood applied the rule as to the *onus probandi*, enunciated in *Kishen Dutt Pandey* v. *Narendar Bahadur Singh* (4) apparently with approval, to the case before them, and I think correctly.

In S. A. No. 289 of 1886 I held, my brother Brodhurst concurring with me, that the plaintiff who claimed as a mortgagor must prove his mortgage. I need hardly say that *prima facie* evidence [452] of a mortgage in such a case amounts to proof until it is rebutted.

It appears to me that that view of the law was in accordance with the authorities.

In conclusion, I shall quote a passage from a judgment of Mr. Justice West in *Ram Chandra Apaji* v. *Balaji Bhaurav* (5) which in my opinion is not only consistent with common sense, but so far as it deals with the law, is a correct exposition of the law on this point. The passage which I quote is to be found at p. 140 of the report and is as follows:—" We are thus left to the facts that Ram Chandra (the defendant in a suit for redemption of an alleged mortgage) has been in possession since 1854-55, apparently as owner, that he says he is owner, and that the plaintiff, on the contrary, says he is but a mortgagee, and has admitted that he is so. According to s. 110 of the Evidence Act, possession is *prima facie* evidence of a complete title; anyone who would oust the possessor must establish a right to do so; and possession unexplained, held for twelve years, would, according to *Sambubhai Karsondas* v. *Shivlaldas Sadashivadas Desai* (6), constitute a complete title not qualified by an assertion of the holder that he purchased from this or that person. The assertion of ownership at all implies some lawful acquisition of the title, and the effect of possession as owner cannot be impaired by the surplus statement that the holder acquired by the mode of acquisition most serviceable for holder for a short period. Here the defendant, Ram Chandra, had held undoubtedly for about thirty years, and in such a case anyone who after the lapse of so long a time comes forward seeking to make him a mere mortgagee must, according to *Sevaji Vajaya Raghunadha Vaoji Kristnan Gopalar* v. *Chinna Nayana Chetti* (7) prove his own right as mortgagor clearly and indefeasibly. Such statements as have been made in this case fall far short of satisfying this test. They fail to establish any particular mortgage at all, and are not of such a kind that, showing a definable or distinguishable mortgage to have been executed, they throw on [453] the mortgagee the *onus* of proving what the terms of it were, and his right under it to retain the property until he is paid off. No doubt a mortgagor, who has no document of acknowledgment from a mortgagee, may suffer from the difficulty of proving his title of fifty years ago; but, on the other hand, the owner of property is not to be deprived of it on mere vague intangible statements about a mortgage for which no one could

(1) 1 A. 194. (2) 7 A. 677. (3) 5 A. 184. (4) 3 I. A. 85.
(5) 9 B. 137. (6) 4 B. 89. (7) 10 M.I.A. 160.

be effectively brought to book in the event of their being proved false. In such cases the law leans in favour of possession and an apparent right exercised for many years. It requires the person who comes in to redeem on his own terms to make out a clear case, to succeed by the strength of the title he sets up."

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In my opinion the authorities and the law as it exists and has existed, are on the side of the defendant-appellant, and I would not have gone at this length into the authorities had it not been for the expression of opinion and doubts which my brother Mahmood threw out during the course of the arguments.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs in the Courts below.

BRODHURST, J.—I concur.

MAHMOOD, J.—I am also of the same opinion as the learned Chief Justice, and I agree with him in all that has fallen from him. But because I was one of the Judges who referred this case to a Bench consisting of more than two Judges, I wish to say that at the hearing of the case and throughout the argument, I did entertain considerable doubts as to what in a case such as this should be the rule of *onus probandi* upon which the case would turn. I confess now that after having had the advantage of hearing the judgment, which the learned Chief Justice has just delivered, I no longer entertain any doubts as to the requirements of the law and the rule which should be the rule of decision in cases such as these. It seemed to me of course at first sight that in a case where the property is sought to be redeemed by a mortgagor, and any particular mortgage is admitted by the defendant, the possession of the defendant upon his own admission must be taken to be a possession other [454] than adverse; and whether such possession is the possession of a trustee or not, it could not, as I then thought, be regarded as adverse to the plaintiff. These are the reasons why I doubted whether after an admission of mortgage it did not rest upon the defendant to show that the title which the plaintiff had asserted, namely, of having at sometime been the owner of the property, had or had not been defeated by lapse of the period of limitation.

I have mentioned all this to indicate how doubts did arise in my mind. But the judgment of the learned Chief Justice deals with the whole of those difficulties, and I do not wish to add anything to it beyond just indicating the manner in which my own mind is satisfied that I must adopt and agree in that judgment.

In the Courts of justice in England, if I remember the English law rightly, the plea of limitation is a plea which falls under the class of matters *ad litis ordinationen* and does not go to the essence of the right that is to say, matters *ad litis decisionem*.

Indeed, in England, if a understand the English law rightly, it rests upon the defendant to waive his plea of limitation, much in the same manner as a defendant in an action *ex contractu* would be entitled to waive a plea of minority. In India, however, the Legislature has interfered, and by the imperative terms of s. 4 of the Limitation Act, it has declared that every suit which falls beyond the limit of the period limitation provided by the statute, Act XV of 1877, shall be dismissed whether the plea be waived or not.

Here then the plea raised by the defendant was a plea under that statute, that is to say, under art. 148. That article relates to cases such as this, namely, cases against mortgages to redeem, and the clause

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provides that sixty years is the period of limitation, and that such period is to be calculated from the time when the right to redeem accrues.

The learned Chief Justice has pointed out why under conditions such as these the question whether the period of limitation has expired or not becomes under our law not merely a matter of plea [455] but a matter which goes to the root of the title of the plaintiff. His Lordship has pointed out in respect of the provisions of s. 110 of the Evidence Act, that the law presumes that when a person in long possession of property is required to move out of the property by one who alleges a mortgage for the object of extending the period of limitation, the ordinary presumption that ownership is to be presumed from possession does not vanish. I have no doubt that should be the law, and it is so as I interpret s. 110 of the Evidence Act.

I must also add in reference to what the learned Chief Justice has said, that in this connection my own mind has been materially assisted by what he said as to the effect of s. 28 of the Limitation Act which lays down a rule of substantive law. It declares that after the lapse of the period provided by that enactment the right itself is gone; it is not the remedy that is gone, but the title itself ceases to exist.

These considerations leave the matter in no doubt now. Therefore in a case such as this where the plaintiff came upon the allegation that the possession of the defendant was that of a mortgagee under a mortgage of 1836 and the defendant says that his mortgage was of 1820, it lay upon the plaintiff to prove that at the date of the filing of the suit he had a subsisting mortgage or at that date he had any title to the ownership of the property.

In reference to this matter I wish to refer to a ruling of this Court in *Sheo Ruttun Gir* v. *Doorga* (1) which supports the conclusions at which the learned Chief Justice has arrived. I may say that I feel indebted to the learned Chief Justice for having taken the trouble to prepare the elaborate and exhaustive judgment which he has done on account of the doubt which had arisen in my mind over the question of the burden of proof. I am happy to say that after having considered the matter I entirely agree in the order which he has made. *Appeal allowed.*

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11 A. 456 = 9 A.W.N. (1889) 109.

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[456] *Before Mr. Justice Straight and Mr. Justice Brodhurst.*

HASAN ALI AND ANOTHER (*Plaintiffs*) *v.* NAZO AND ANOTHER (*Defendants*).* [21st March, 1889.]

Limitation—Muhammadan Law—Inheritance—Gift—Suit by heir for share of donor's property by declaration of invalidity of gift—Act XV of 1877 *Limitation Act, sch, ii, Nos.* 91, 144.

A Muhammadan who in October, 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June, 1885, never having taken any steps to have the deed of gift set aside. In February, 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right

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* Second Appeal No. 1335 of 1887, from a decree of Munshi Manmohan Lal, Subordinate Judge of Azamgarh, dated the 1st June, 1887, confirming a decree of Maulvi Muhammad Amir-ud-din, Munsif of Muhammadabad, dated the 9th August, 1886.

(1) N.W.P.H.C.R. 1874, p. 36.

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of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit.

Held that the plaintiff had, during the donor's life-time, no reversionary or vested interest in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accured to the plaintiff, came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan* v. *Nuran Bibi* (1) and *Jagadamba Chowdhrani* v. *Dakhinan Mohun* (2) referred to.

[Appl., 30 B. 304=7 Bom. L.R. 742 ; R., 19 A. 593 (602) ; 24 B. 260 (284) ; 56 P. R. 94 ; 11 C.P.L.R. 49 : D., 74 P.R. 1904.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Abdul Majid*, for the appellants.

Mr. *Hameed-ullah* and the Hon. *Pandit Ajudhia Nath*, for the respondents.

STRAIGHT, J.—The following are the facts necessary to be stated in order to make the grounds upon which this second appeal will be disposed of intelligible.

[457] There were two brothers from whom the parties to the present suit come, as the subjoined tree shows :—

	Sadullah.	Ibadullah.
Musammat Nazo (Defendant 1).	Musammat Phola (Defendant 2).	Hasan Ali. (Plaintiff).

The plaintiff Sadruddin is a transferee from Hasan Ali under a deed of sale of the 29th September, 1885. On the 13th October, 1875, Sadullah made a gift of the property now in suit to his two daughters, the defendants, and on the 10th June, 1885, he died. The present suit was instituted on the 15th February, 1886, for a declaration of the plaintiff Hasan Ali's right by inheritance under the Muhammadan Law to one *seham* out of the three *sehams* into which the estate of Sadullah was divisible on his death, by declaring the deed of gift of the 13th October, 1875, ineffectual on the ground that it was obtained from Sadullah by the defendants "when he was very old and out of his senses." The first Court dismissed the plaintiffs' suit, holding them to have failed to establish their case upon all points. The lower appellate Court, though apparently finding that the deed of gift was perfected by possession given and taken thereunder, has upheld that decision upon the ground that the suit, being one for the invalidation of the deed of gift, is barred by art. 91 of the Limitation Act. The decree of the learned Subordinate Judge is assailed in second appeal upon this contention, that the suit being really one for the recovery of possession of immoveable property by declaration of the right of inheritance thereto of the plaintiff Hasan Ali, is governed by the twelve years' rule. I have very

(1) 12 I. A. 91.

(2) 13 I.A. 84.

1889 MARCH 21. — APPELLATE. CIVIL. — 11 A. 456 = 9 A.W.N. (1889) 109.

fully and carefully considered the arguments addressed to us at the hearing of the appeal, and in the result the matter appears to me to present itself thus. It is not denied that the property now in suit belonged to Sadullah Khan, and that so long as he lived it was competent for him to dispose of it by way of gift; in other words, he was the full and absolute owner and, as such, entitled to deal with it in that way. It is equally [458] clear that had he been induced by fraud, misrepresentation, undue influence or coercion to execute a deed of gift, he could have come into Court to avoid it upon that ground. But he did not do so, and as far as I understand the Muhammadan Law, his gift of his property to his two daughters was as effectual and binding against him from the time it was made, as if he had sold the property covered by it to a stranger vendee for good consideration. Then the question arises, could the plaintiff, Hasan Ali, have come into Court in the lifetime of Sadullah, his uncle, and asked for a declaration that the deed of gift was invalid upon the ground now asserted by him? I am clearly of opinion that he could not, and I think such a suit would have been open to that objection *in limine*, that his expectant right as a possible heir of his uncle, should he survive him, was, to use the words of my brother Mahmood in a judgment of his as Judge of Rae Bareli, approved by the Lords of the Privy Council in *Abdul Wahid Khan* v. *Nuran Bibee* (1)—"a mere possibility which, under the Muhammadan Law, is not regarded as a present or vested interest." In other words, if I understand the Muhammadan Law right, it does not recognise any reversionary inheritance or contingent interest expectant on the death of another, and till that death occurs which force of that law gives birth to the right as heir in the person entitled to it according to the rule of succession, he possesses no right at all. Consequently until his uncle Sadullah died, Hasan Ali had no right present or expectant, which, had he predeceased Sadullah, would, supposing him (Hasan Ali), to have had a son, have passed to such son. It seems to my mind therefore to follow that Sadullah having full disposing power over his property to the date of his death, and such death being the crucial point, the right which then accrued to Hasan Ali came to him through Sadullah subject to and affected by any act done or disposition made by Sadullah in the exercise of his undoubted rights as proprietor. No doubt had a will been then put forward by the defendants to justify their possession of the whole estate by way of bequest from Sadullah, he could have withheld his consent to it with the results provided by the Muhammadan Law, because he had then [459] acquired his right as heir. But it is to be observed that the principle underlying this rule is that it is only on the death of the testator that the right of the heir to assent or refuse assent to the bequests of a will comes into existence, and no assent given in the lifetime of the testator has any force or binding effect. But in the present case we have not to deal with a will, but a deed of gift made by the proprietor of an estate nearly ten years before his death, and neither revoked nor sought to be set aside by him. If Sadullah were alive now, and had come into Court with a suit to set aside his deed of gift, it cannot be denied that he would have been barred by the limitation of art. 91 of the Limitation Act. How then is the position of the plaintiff Hasan Ali better than that of the person through whom he claims? As I have before remarked, had Sadullah sold the property in suit to a purchaser for good consideration, such sale could not

(1) 12 I.A. 91.

1888 MARCH 21. APPELLATE CIVIL. 11 A. 205 = 9 A.W.N. (1889) 109.

be impeached by Hasan Ali; for it was fully within his uncle's powers, and the title the vendee acquired against Sadullah would hold as good against him. The deed of gift of October, 1875, in my opinion does not stand upon an inferior footing, and as it was binding on Sadullah, so is it binding on the plaintiff Hasan Ali. But it is said, this being a suit for the recovery of immoveable property by right of inheritance, the prayer for invalidation of the deed of gift is merely ancillary and incidental to the main purpose of the suit, and cannot affect the substantive relief sought. And the same contention was raised in *Jagadamba Chaodhrain* v. *Dakhina Mohun* (1) with regard to art. 129 of Act IX of 1871, which was a suit by reversionary heirs for possession of immoveable property in which the validity of the adoption of the defendants in possession came into question. Their Lordships held that in suits governed by that Limitation Act, where the plaintiff cannot succeed without displacing an apparent adoption under which defendants are in possession, must be brought within twelve years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father. In the present case it seems equally clear to me that the plaintiffs cannot dislodge the defend-[460]ants from the property, of which they are admittedly in possession without clearing out of their way the deed of gift of October, 1875, and that merely because they choose to call the suit one for possession of immoveable property, they cannot escape the obligation to do so. If then this be the true view of the matter, and the prayer to set aside the deed of gift is to be regarded as a substantial incident of their claim, what is the article of the limitation law applicable to such a suit? It is not denied that almost from the date of the deed of gift Hasan Ali was aware of its existence, and that had he possessed any right to maintain a suit for its cancelment, "the facts entitling him to have it cancelled or set aside" were known to him much more than three years before the present suit was instituted, and he is now barred. But as I have already ruled, he had no such right, and the grounds upon which he seeks relief from the deed are grounds which can only come to the plaintiff Hasan Ali through Sadullah. As time had run against Sadullah, so in my opinion it has run as against the plaintiffs, and the Subordinate Judge rightly held them barred by art. 91.

The appeal is dismissed with costs.

BRODHURST, J.—I concur. *Appeal dismissed.*

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11 A. 460 (P.C) = 16 I.A. 205 = 5 Sar. P.C.J. 433.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

MUHAMMAD MUMTAZ AHMAD AND OTHERS (*Plaintiffs*) v. ZUBAIDA JAN AND OTHERS (*Defendants*). [16th, 17th, 21st & 23rd May & 6th July, 1889.]

Claim to possession of property under deed of sale—Consideration—Muhammadan law—"Mushaa"—Effect of possession following upon gift to render it valid.

The law relating to the invalidity of gifts of "mushaa" *i.e.*, the prohibition of the gift of an undivided part in property capable of partition, ought to be

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(1) 13 I.A. 84.

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confined within the strictest rules; and the authorities on the Muhammadan law show that possession taken under a gift, even although that gift might with reference to "mushaa" be invalid without it, transfers effectively the property, given, according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not [461] invalidated, as regards its effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before them. *Held*, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs.

[**F.**, 18 A. 1 = 15 A.W.N. 123; 38 C. 518 = 13 C.L.J. 492 = 9 Ind. Cas. (636) = 15 C.W.N 541; 17 C.L.J. 85 (86); 91 P.R. 1894; 141 P.L.R. 1901; **Rel.**, 8 Ind. Cas. 38 (39) = 15 C.W.N. 328 (330); **Appl.**, 26 B. 577 (596) = 4 Bom. L.R. 180; **R.**, 21 A. 165 = 19 A.W.N. 8; 30 A. 250 = A.W.N. (1908), 104; 27 B. 31 (41); 29 B. 468 (478) = 7 Bom. L.R. 443; 36 B. 214 (219) = 13 Bom. L.R. 717 = 12 Ind. Cas. 225; 35 C. 1 (23) (**P.C.**) = 4 A.L.J. 572 = 11 C.W.N. 973 = 9 Bom. L.R. 872 = 17 M.L.J. 408 = 6 C.L.J. 695 = 4 L.B.R. 154 = 2 ML.T. 479; 16 M. 43 (49); 30 M. 519 = 17 M.L.J. 562 = 5 A.L.J. 566; 35 M. 120 = 14 Ind. Cas. 993 (997); 6 Bom. L.R. 983 (994); 6 Bom. L.R. 1034 (1050); 106 PR 1912; **D.**, 22 B. 489 (492); 86 P.R. 1910 = 171 P.L.R. 1910 = 8 Ind. Cas. 307 = 130 P.W.R. 1910]

APPEAL from a decree (22nd June, 1885), of the High Court, reversing a decree (1st May, 1884) of the Subordinate Judge of Mainpuri, and dismissing the appellant's suit.

The first of the two questions in the suit out of which this appeal arose, was as to the payment of the consideration upon a deed of sale, dated 16th December, 1882, in favour of the plaintiffs, who claimed possession upon it. The other, forming the second issue, related to the validity of a deed of gift, purporting to have been executed on 12th February, 1879, by a Muhammadan widow in favour of her daughter, now represented by the first six defendants, this gift disposing of the property the subject of the sale; and, if valid, effectually preventing any such subsequent transfer by the vendor, who made title as heir to the widow. By this sale-deed, which was registered, the vendor, Muhammad Usman, in consideration of Rs. 10,000, purported to transfer to two of the plaintiffs, and to another person, (through whom a third plaintiff claimed), three-fourths of his interest in the property left by his sister, Himayat Fatma, who died in January, 1882, he being her sole heir. The property was described as in greater part " zemindari villages together with all the appurtenances, perpetual maafi lands, and resumed maafi, milkiats and groves situate in Pargana Mahrera, the estate of Himayat Fatma Begum." The execution of this was [462] admitted by Usman, who stated in his defence that when he was before the sub-registrar he received Rs. 2,500; and acknowledged the previous receipt of Rs. 2,500; and his case was that, notwithstanding such acknowledgment, he had not, in fact, received the latter sum; having also handed back the Rs.2,500 after the registration.

The plaint also stated that the six other defendants, who were the heirs of the deceased daughter, Zahur, prevented the plaintiffs from getting possession, falsely setting up a deed of gift from Himayat to Zahur. These defendants, however, in their written statement maintained that

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the deed of gift was valid, and that under it Zahur had received possession of all the property claimed in the present suit. They further alleged that the plaintiffs' deed of sale had been obtained from Usman by collusion to deprive them of their rights, and without *bona fide* payment.

The Subordinate Judge found that the Rs. 7,500 were not paid, and that it was not proved that Usman returned the Rs. 2,500 which he received before the sub-registrar. As to the deed of gift, he disbelieved the evidence as to its execution, and held that, even if executed, it would have been invalid on the ground of "mushaa." He found that no possession had been delivered under this gift. Proportioning the property comprised in the sale to the part of the consideration which he found to have been paid, he decreed in favour of the plaintiffs for possession of one-fourth.

The plaintiffs appealed to the High Court for the whole claim to be allowed, on the grounds, first, that the whole consideration had been in fact, paid; and, secondly, that, even on the view of part payment only having been made, they were entitled to completion of the sale of the whole property by possession being given to them. The six defendants preferred a cross-appeal, to the effect that their property was being conveyed away collusively, inasmuch as the deed of gift of 12th February, 1879, was valid, and had been followed by possession. They alleged that the payment of the Rs.2,500 by the plaintiffs had not been proved, nor, in fact, made. But their case was that they were entitled by the gift prior in date, [463] which had been followed by delivery, and with which the doctrine of "mushaa," erroneously applied by the Subordinate Judge, had nothing to do.

The plaintiffs' appeal was dismissed by the High Court (PETHERAM C. J., and TYRRELL, J.). They refused to interfere with the conclusion of the Subordinate Judge.

The cross appeal of the six defendants was, however, decreed, and the suit was dismissed altogether, for reasons thus expressed in the judgment :—

"The plaint states that the plaintiffs bought this property by a deed, and paid Rs. 10,000 consideration. This is denied by the principal defendant, and upon this issue the case went to trial. It was the foundation of the whole case, and the Subordinate Judge decided that the deed was executed and the consideration was not paid. The plaintiffs' allegation was that they paid the entire consideration for the entire property, and their main proposition having failed, the Judge ought to have dismissed the suit as brought. But instead of doing this, he divided an indivisible consideration and an indivisible property, and said that because the plaintiffs had paid a part of the consideration, they were entitled to a part of the property. This was making a new contract for the parties, which the Subordinate Judge had no power to do. We decide the case upon this ground only, and we decide nothing as to the merits. The appeal must be allowed on the ground that the first Court has granted a relief which is not in accordance with the plaintiffs' claim, and that the plaintiffs have failed to prove the main allegation upon which their prayer for relief was based. We make no order as to costs in this case. In First Appeal No. 93 of 1884, the appeal is dismissed with costs."

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, for the appellants, argued that the decrees of the High Court should be reversed and that the whole claim of the plaintiffs should be decreed; or that they should

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receive such proportionate relief as had been decreed to them by the first Court.

[464] It was submitted that in regard to the Indian Registration Act, III of 1877, ss. 58 and 59, an admission of payment endorsed in accordance with s. 58, such as had been made in this case, was *prima facie* evidence against the executant; and, without evidence to the contrary, conclusive. This, and other facts, threw the burden of disproving payment on to Usman and the other defendants, who had not sustained it. On the other hand, it was sufficient to entitle the plaintiffs to a decree if the evidence, as to which the High Court had given its own opinion, should show that the Rs. 2,500 had been paid. The sale was complete under s. 54 of Act IV of 1882, whether the money was actually paid or not, if the agreement was for future payment. It was the right to the possession that was now in question, and the contention was that the transfer of a right of possession of the property would be none the less a transfer because the transferring vendor happened to be out of possession. They referred to Macnaghten's Principles of Muhammadan Law, Chap. III. Sale, paras. 12 and 18, Precedents of Sale, Case IV.

Mr. *J. H. A. Branson*, for the six respondents claiming under the gift to Zahur, contended that the dismissal of the suit was right, if not precisely on the grounds stated in the judgment of the High Court.

The concurrent findings of the Courts below were that the Rs. 7,500 were not paid, and even if the Rs. 2,500, contrary to the weight of the evidence, were to be taken as paid, the plaintiffs had failed to show themselves entitled to possession. Instead of performing, or being ready and willing to perform, their part of the contract, the plaintiffs were found alleging that they had made a greater payment than they had made, if not alleging a payment when they had made none.

He referred to *Kalee Pershad Tewari* v. *Raja Sahib Perhlad Sein* (1), *Rani Bhobosunderi Dassia* v. *Issarchunder Dutt* (2), *Kali Das Mullick* v. *Kanhaya Lal Pundit* (3).

[465] There was another, and it was submitted a complete, ground for the dismissal of the suit, as against the six defendants, *viz.*, that at the death of Himayat the estate which Usman purported to sell had been already transferred to others. The deed of gift of 12th February, 1879, was valid, all the reasons assigned by the Subordinate Judge, for its being invalid and inoperative, being inadequate. It was an error in the judgment of the first Court to assert that possession had not followed that deed of gift. He referred to the proceedings taken to obtain mutation of names, and the other evidence on the question of possession by Zahur; and argued that, in the case of a gift from a parent to a child, proof of the transfer of the possession was not required to establish it. He referred to *Musammat Ameer-un-nissa Khatoon* v. *Musammat Abed-un-nissa Khatoon* (4), in which case it was said that the general principle of Muhammadan law, that a gift is invalid where there is a want of

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(1) Reported with, and as part of, the case of *Raja Sahib Perhlad Sein* v. *Babu Budhoo Singh*, 12 M.I.A. 306, at p. 311; also 2 B.L.R.P.C. 111.

(2) 18 W.R. 140. (3) 11 I.A. 218 = I.L.R. 11 C. 121.

(4) 23 W.R. (P.C. Civ. Rul.) 208. As to "mushaa" the following is part of the judgment in the case cited ;— "A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of mushaa, or an undivided part in property capable of partition, was, by Muhammadan law, invalid. That a rule of this kind does exist in Muhammadan law, with regard to some subjects of gift, is plain. The Hedaya gives the two reasons on which it is founded ; first, that complete

[466] acceptance and seisin by the donee, is subject to the exception that where there is on the part of a father or other guardian a *bona fide* intention to make a gift, the law will be satisfied without change of possession. Here, however, the evidence showed that Zahur had, through her manager, her husband, Ahmad Husain, obtained possession. That being so, the gift to her, which she lived long enough to receive as a valid gift, was effective; and rendered Usman's subsequent deed of sale inoperative.

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Mr. J. *Graham*, Q. C., replied, contending that the deed of gift of 1879 had not been completed by delivery of possession to Zahur.

On a subsequent day, 6th July, their Lordships' judgment was delivered by SIR PEACOCK.—

JUDGMENT.

SIR BARNES PEACOCK.—The appellants, who were plaintiffs in the suit, claim as purchasers of three-fourths of a share in an estate to which they alleged that Muhammed Usman had succeeded by descent from Himayat Fatma. The first two appellants claimed as direct purchasers from Usman and the third as a sub-purchaser.

The estate originally belonged to Chaudhri Hafiz Husain, who died in 1865 without leaving male issue. After his death his widow, Hymayat Fatma, and his daughter, Zahur Fatma, by an award made with their mutual consent, obtained proprietory possession of the prpperty in equal shares, and Chaudhri Ahmed Husain, husband of Zahur Fatma, was entrusted with the managment.

The plaintiffs in their plaint (para. 4) alleged that upon the death of Himayat Fatma in the beginning of 1882, Muhammad Usman became her heir, and that according to the distribution of shares under the Muhammadan law Usman got 229 out of 390 sihams, and the heirs of Zahur, who died in December, 1879, in her mother's lifetime, got 161 sihams; that out of his right Usman sold theree-fourths, amounting to $171\frac{3}{4}$ sihams, to the plaintiffs, Mumtaz Ahmad and Firast Husain and

seisin being a necessary condition in case of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, *viz*, to make a division (see Book XXX, c. I, Vol. 3, p. 293). Instances are gvien by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

"In the persent case the subjects of the gift are definite shares in certain zemindaris, the nature of the right in them being defined and regulated by the public acts of the British Government. The High Court, after stating that 'the shares were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue,' and further, that the proprietor collected a definite sharo of the rents from the ryots and had a right to this definite share and no more, held that the rule of the Muhammadan law did not apply to property of this description.

"In their Lordships' opinion this view of the High Court is correct. The principle of the rule, and the reasons on which it is founded, do not, in their judgment, apply to property of the peculiar description of those definite shares in zemindaris, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. *Leith*, that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained 'mushaa.' But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves, and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to mushaa."

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Sahib Ali Khan, for Rs. 10,000 on the 16th December, 1882, and received the consideration money and got the deed registered; and that on the 3rd May, 1883, Sahib Ali Khan sold his interest to the appellant, Sheik Irshad Husain under a sale-deed. [467] They charged that the daughters, the grandson, and the son-in-law of Ahmad Husain had entered into a collusion with Usman, and interfered with their possession, and prayed that they might be put into possession of the claimed property, being 171¾ out of 390 sihams of the property detailed in the plaint, by proving the sale-deeds of the 16th December, 1882, and 3rd May, 1883, and setting aside the proceedings of the Revenue Court. They alleged that their cause of action accrued on the 4th January, 1882, the date of the death of Himayat Fatma, and they valued their claim at Rs. 10,000, the amount of consideration.

Usman was made a *pro forma* defendant.

The case of the first six defendants-respondents was that the sale-deed by Usman had been obtained by fraud without the payment or receipt of the consideration money only for the purpose of carrying on litigation, and further that Usman had no right to the property, inasmuch as Himayat Fatma had executed a deed of gift of her share to her daughter, Zahur Fatma, under which the latter had obtained possession.

Usman in his written statement said: "The plaintiffs obtained the sale-deed from the defendant by fraud. They got him to acknowledge before the Sub-Registrar the receipt of Rs. 7,500 without paying the same to him, and the Rs. 2,500 which they had paid to him was taken back by them after registration on the pretence that they would use it in meeting the costs of suit," and in para. 5 he stated that "Sahib Ali Khan, who is brother of defendant's wife, has, for fear of losing the good opinion of the brotherhood, sold his share for Rs. 100 to Irshad Husain."

The important issues of fact were—

1*st.*—Was the consideration for the sale by Usman paid, and was the sum of Rs. 2,500 paid at the time of registration taken back or not?

2*nd.*—Did the deed of gift in favour of Zahur Fatma become null and void, and was possession held in accordance therewith?

[468] *4th.*—Did Usman inherit the estate of Himayat Fatma, or had she no right left to her at the time of her death?

The Subordinate Judge of Mainpuri before whom the case was tried in the first instance found upon the first issue that the Rs. 7,500 were not paid, but that the Rs. 2,500 paid at the time of registration were not taken back. Upon the second issue, he found that the deed of gift in favour of Zahur Fatma was a fictitious document and was null and void. He said in the first place the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shows that some of them are joint. Such a gift is invalid under the Muhammadan law. Secondly, according to Muhammadan law the delivery of actual possession is necessary. But in the present case the donor was in possession of all the properties, and the donee died before she could obtain possession of them. He then gave his reasons for considering that Himayat Fatma continued in possession.

The result was that the Subordinate Judge considering that only one-fourth part of the alleged consideration for the sale by Usman had been paid, gave a decree for the plaintiffs for one-fourth of the property claimed in the plaint.

From that decision the plaintiffs appealed to the High Court, for, amongst others, the following reasons:—

1st.—Because the finding of the lower Court that Rs. 7,500 out of the consideration was not paid by the plaintiffs was against the weight of the evidence.

4th.—Because it being shown that the deed of sale was delivered to the plaintiffs, and that a portion of the consideration had been paid by the appellants, the whole claim ought to have been decreed.

The first six defendants appealed to the High Court, for, amongst others, the following reasons:—

1st.—Because the lower Court has erred in holding that the deed of gift, dated the 12th February, 1879, was **[469]** not valid, under the Muhammadan law, by reason of "mushaa."

2nd.—Because the Subordinate Judge's finding, that the gift in question was not followed by delivery of possession in favour of the donee, is against the weight of evidence, which proves that the gift was duly carried out on behalf of the donor while the donee was alive, and that the gift took full effect with the consent and free will of Himayat Fatma, the donor.

3rd.—Because it is established by sufficient evidence that the donor, on the demise of the donee, in confirmation of the gift, caused Ahmad Husain, the husband of the donee, to be placed in possession of the whole of the property previously conveyed by gift to Musammat Zahur Fatma, the deceased donee.

4th.—Because the finding of the lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper tranfer, are not well-founded.

6th.—Because the payment of Rs. 2,500 being a portion of the consideration money of the sale-deed set up by the respondents is not proved by the evidence on the record, and the finding of the Court below to the contrary is not correct.

Upon the appeal of the plaintiffs the High Court held that the plaintiffs' statement that the Rs. 7,500 were paid to Usman was false, and that the defendants' statement that the Rs. 2,500 were returned was also false. They gave their reasons for disbelieving the payment of the Rs. 7,500, but they did not examine the evidence as to the return of the Rs. 2,500, notwithstanding the defendants' sixth ground of appeal, in which they said that the payment of the Rs. 2,500 was not proved by the evidence on the record; nor did they give any reason for the conclusion at which they arrived that **[470]** the defendants' statement as to the return of that amount was false. Even as to the non-payment of the Rs. 7,500, they very much modify their opinion in a subsequent part of the Judgment of the Chief Justice, wherein he says: "It appears to me that we cannot in this Court say that the Subordinate Judge who tried the question of fact decided it wrongly. It is not necessary for us to say whether, supposing the case to have come before us in the first instance, we should have arrived at the same conclusion; it is sufficient to say that we do not feel called upon to interfere with the decision he has passed." Mr. Justice Tyrrell concurred with the Chief Justice and the appeal was dismissed with costs. Here then was a decision which, unless reversed by Her Magesty in Council, would be conclusive in any furture proceeding between the parties to the suit, including

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Usman and the purchasers, as to the non-payment of the Rs. 7,500, and the non-return of the Rs. 2,500. Their Lordships are now called upon to reverse the decision, and they are obliged to deal with the question, at least as to the non-return of the Rs. 2,500, without having the benefit of the reasons of the High Court with reference to it. This is unsatisfactory, and at variance with the rule of Her Majesty in Council, which requires the reasons of the Judges to be transmitted to the Judicial Committee.

The judgment of the High Court upon the appeal by the first six defendants is still more unsatisfactory. The second issue was the most important one as regards them, for the denial of the validity of the deed of gift of the 12th February, 1879, from Himayat to her daughter, and of possession being taken in accordance therewith, went to the very root of their title. That issue was found against them as regards both law and fact by the Subordinate Judge. Their first four grounds of appeal to the High Court were directed to the findings of the first Court upon the second issue, and they were fairly entitled to an expression of the High Court's opinion with reference to those four grounds of appeal. Yet the High Court, in their judgment upon that appeal, have left the findings of the first Court upon the second issue wholly unnoticed, and, without awarding to the defendants the costs of their appeal, have [471] dismissed the suit upon a mere subsidiary point not taken by the defendants in their grounds of appeal, *viz.*, the plaintiffs' failure to establish their right to stand in the place of Usman by reason of the non-payment of the Rs. 7,500. To use the words of the Chief Justice, the High Court decided the case upon that ground only, and decided nothing as to the merits, notwithstanding the opinion expressed by the Chief Justice that future litigation is likely to arise between the parties, a misfortune much more likely to be promoted than averted by abstaining from deciding the case upon the merits. Their Lordships therefore consider it to be their duty to determine the issue as to the defendants' title as well as upon that which raises the subsidiary point as to the plaintiffs' right to stand in the place of Usman. They see no reason for the fear entertained by the Chief Justice, that if the High Court had decided the case upon the merits, and given judgment upon all the points raised by the grounds of appeal, complications could have ensued which would make it uncertain what their decision was, and create difficulties in connection with the point of *res judicata*.

Their Lordships will now proceed to express their opinion upon the four principal issues raised in the case.

First, as to the non-payment of the Rs. 7,500 they concur entirely with the Subordinate Judge. It is very improbable that the purchasers would have paid Rs. 7,500 to Usman without taking any receipt or acknowledgment from him beyond the mere statement in the sale-deed that the Rs. 10,000 had been paid, especially as the deed itself would not have been admissible in evidence of the fact before registration. The evidence of the witnesses who were called to prove that the money was at the place named and there counted and paid to Usman was contradictory and very unsatisfactory. Even admitting that Rs. 7,500 were carried to the place named by the witnesses and there counted and ostensibly made over to Usman, a story which their Lordships do not believe, there is no reliable evidence as to where or from whom the money was collected, whence it was brought, or whither and by [472] whom it was carried away after the alleged payment of it to Usman. Whatever weight the admission made by Usman before the Sub-Registrar as to the receipt of the Rs. 7,500 might

have had against himself, it was of no weight as against the other defendants. Neither of the plaintiffs ventured to give evidence, nor did Usman appear as a witness. It might have been some corroboration of the fact of the purchase by the plaintiffs for Rs. 10,000 if it had been proved that Rs. 4,000 were *bona fide* paid by the plaintiff. Irshad Husain, to Sahib Ali Khan for the one-fourth share of the property which the latter had purchased from Usman. But there was nothing of the sort. No proof was given of any payment made by Irshad Husain except the payment of Rs. 100 in the presence of the Sub-Registrar, notwithstanding the written statement made by Usman that only Rs. 100 were paid. The admission in the deed of sale to Irshad Husain of the receipt of the whole of the alleged purchase-money of Rs. 4,000 is subject to the same remarks as those already made as to the admission by Usman of the receipt of the Rs. 7,500 and Rs. 2,500.

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As to the non-return of the Rs. 2,500, their Lordships cannot concur with the Subordinate Judge. He gives no sufficient reason for disbelieving the evidence of Fazl-ul-Rahman. All he says upon that subject is, "He" (meaning Usman) "has examined only one witness, Fazl-ul-Rahman, but what reliance can be placed on him and how can it be believed that the defendant took the money at the time of registration and afterwards returned it ?" It is not very clear that the money, although the Sub-Registrar was led to believe that Usman had received it in his presence, ever actually passed out of the control of those who brought it. Usman might, no doubt, have led the Sub-Registrar to suppose that the Rs. 2,500 which are said to have been there counted were placed under his control, notwithstanding a secret arrangement that the money should remain, under the control of, and be carried away by, those who brought it. This is not very incredible when Usman's acknowledgment as to the receipt of the Rs. 1,500 is disbelieved. No explanation is given why Rs. 2,500, and Rs. 2,500 only, of the Rs. 10,000 stated in the [473] deed as the consideration should be actually paid when Usman made a false statement as to the Rs. 7,500.

Fazl-ul-Rahman, whom their Lordships see no reason to disbelieve, says :—" I know Muhammad Usman and Mumtaz Ahmad. Muhammad Usman did not get the consideration-money of the sale-deed from Mumtaz Ahmad and others, in whose favour he executed it. I know this because I went with Sahib Ali Khan, my uncle, at the time of registration. When I went to the tahsil I saw Badulla, the servant of Sahib Ali Khan, and Nanhey Khan, the servant of Ali Ahmad, carrying the money in bags. I heard that there were Rs. 2,500. Mumtaz Ahmad and Sahib Ali Khan went inside, in presence of the Registrar. I heard the sound of the money being counted. After registration Muhammad Usman, Sahib Ali Khan and Mumtaz Ahmad came away. The money was with the same persons who carried it to the tahsil. These persons first took the money to the tahsil treasurer, and asked him to receive it on account of revenue due from Sahib Ali Khan and Ali Ahmad. I was present at that time. The treasurer said that the treasury was closed that day, and the money could not be received. These persons then went with the money to the house of Firasat Husain, and Sahib Ali Khan and I came to the house of Muhammad Haji, where we had put up. The servant of Firasat Husain came at 10 o'clock on the following day, and asked to have the money deposited in the tahsil. Sahib Ali Khan and I both came to the house of Firasat Husain, and stayed there for a short time. Sahib Ali Khan, Mumtaz Ahmad and I then went to the tahsil, the money being carried by the

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same persons. Some was received on account of revenue due from Sahib Ali Khan, and some on account of revenue due from Ali Ahmad. Mumtaz Ahmad is the brother of Ali Ahmad."

As to the second issue, the Subordinate Judge has found that the deed of gift of the 12th February, 1879, was a fictitious document and was null and void. It is not very clear whether he meant by the word fictitious that the deed was executed without the knowledge or consent of Himayat Fatma. That question is scarcely [474] raised by the issue "did the deed of gift become null and void, and was possession held in accordance therewith?" The finding of the Subordinate Judge on the third issue seems to assume that the deed was executed. Be this as it may, however, their Lordships see no reason to distrust the report of the commissioner who was deputed by the Sub-Registrar to examine the old lady, and to whom she admitted the execution. That report was dated the 22nd of February, 1879, it was believed by the Sub-Registrar, and upon the strength of it the deed was registered on that day.

The Subordinate Judge held that the deed was void as being a gift of undivided property. He adds, that some of the properties are joint, and that such a gift is invalid under the Muhammadan law. Upon this point their Lordships would have been glad to have the opinion of the High Court. In their opinion the gift and possession taken under it transferred the property of Himayat to her daughter.

The opinion of the Subordinate Judge, who was a Muhammadan must be taken in connection with his finding that the donee died before she could obtain possession; but, for the reasons given hereafter, their Lordships consider that that finding was erroneous.

The doctrine relating to gifts of mushaa was considered by this Committee in the case of *Ameeroonnissa* v. *Abedoonnissa* (1) and by the High Court in Calcutta, in *Mullick Abdool Guffoor* v. *Muleka* (2). The facts of those cases differ from the present, but they throw light upon the doctrine.

It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not, for it appears that, even if invalid, possession given and taken under it transferred the property.

The authorities relating to gifts of mushaa have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that [475] possession taken under an invalid gift of mushaa transfers the property according to the doctrines of both the Shia and Sunni schools, see page 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.

In the course of his judgment the Subordinate Judge cursorily remarks that Himyat was an old lady, and was not in the proper enjoyment of her senses.

There is nothing in the evidence to show that the latter portion of that assertion was well-founded, nor was there any issue upon the subject, nor anything in the report of the commissioner who examined her as to the execution of the deed, or in the statements of the relations who identified her, to raise an inference that she did not understand the nature and effect of the deed. There was nothing in the deed of a

(1) 23 W.R. 208. (2) 10 C. 1112.

complicated nature or which required the exercise of any great mental powers to comprehend the meaning of it. The disposition was a probable one. The old lady and her daughter and grand-daughters were living together; both mother and daughter were ill, and had been suffering from an epidemic. Usman, the mother's brother, was one of her heirs, and the daughter on the death of the mother would not have inherited any portion of the property, nor could the mother have devised the property to her by will. The property was small. Nothing could be more natural than that the mother should desire that in the event of her death her daughter and grand-daughters, if they should survive her, should continue in the same moderate degree of comfort which they had enjoyed in her lifetime.

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The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound), that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete [476] control of every kind in respect thereof. Ahmad Husain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect, no subsequent change of possession would invalidate it.

On the 24th April, 1879, Himayat Fatma by special power of attorney appointed Sheikh Himayat Ali, as her general agent to present and verify a petition for mutation of names, and on the 28th a petition was accordingly presented on her behalf by Himayat Ali, by which, after reciting the deed of gift and that Zahur Fatma had been put into proprietary possession of the property, she prayed that after expunging her name from the Collectorate papers the name of Zahur Fatma, the daughther, might be entered therein. The usual proceedings were adopted, and on the 5th June, 1879, a parwana was issued by the Assistant Collector to the Tahsildar, by which he was requested amongst other things to have the petition proclaimed and to cause an inquiry as to possession to be made. This was done, and on the 27th July the village patwari reported that Himayat Fatma had made a deed of gift of her own rights to her daughter, Zahur, and that the latter had obtained possession of the same in the place of Himayat Fatma, her mother. On the 28th July the Tahsildar reported that he had caused the notification to be proclaimed, and that it was evident from the report of the patwari that Zahur Fatma had obtained possession of the property specified in the gift in the place of Himayat Fatma.

Notwithstanding the proclamation, neither Usman nor any other person raised any objection, to the mutation, and accordingly on the 4th February, 1880, an order for the mutation of names was granted.

Zahur Fatma died on the 3rd of December, 1879, and Himayat Fatma, her mother, on the 4th January, 1882. The order for mutation was consequently after the death of Zahur. Mutation of names in the Collector's office was not actually necessary to com- [477] plete the transfer of possession under the deed of gift. But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari made during the lifetime of Zahur as to

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the execution of the deed of gift and of the transfer of possession under it which had been adopted by the Tahsildar was also adopted and acted upon by the Deputy Collector.

Their Lordships have no doubt that upon the evidence, and especially in the absence of any objection by Usman in the lifetime of Zahur, the Subordinate Judge ought to have found the second issue in favour of the defendants, and their Lordships do so now.

The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession, are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatma for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November, 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book. A similar remark applies to the order of the Assistant Collector in January, 1880, in which he speaks of Himayat Fatma as the person in possession. This order, it should be remarked, was made after the reports of the patwari and of the Tahsilder that Zahur was in possession, but before they had been adopted by the Assistant Collector and the order for mutation made. Then the Subordinate Judge makes a point of Himayat's continuing to occupy one of the pucka houses intended for females included in the deed of gift, as if the daughter, after she had obtained possession under the deed of gift, would, in order to complete her title, have turned her mother out of the premises altogether, and have refused to allow her to continue to occupy the house in which she had previously lived at a time when one moiety belonged to herself and the other to her daughter. Such an argument is as futile as the [478] following one, wherein he says: "The revenue receipt is filed as No. 128, and the order as No. 136, with the record. At the first page of the deed of gift, the last pucka house intended for females is entered as occupied by the donor, who, having made a gift of it, continued to occupy it herself. How can such a gift be valid? A very strong reason to believe the gift to be false is that, if Zahur Fatma had become the absolute owner and acquired possession under the gift, two things must needs have happened after her death, namely, in the first place, her husband, Ahmad Husain, would not have taken any proceedings tending to set aside the gift, because his object to acquire the property had been obtained. Some of the property would devolve on him and some on his daughters, and a sixth share only would go to the mother. So he would have contended himself to take steps to acquire only that one-sixth share, and would not have troubled himself about the rest. But he did not do so. He took steps to acquire the whole property."

As though a fraudulent attempt on the part of Ahmad Husain to acquire the whole property for himself instead of only a portion of it was a strong argument in the face of all the other evidence to prove that the deed of gift was false and had no existence at all. It is unnecessary to refer to the other arguments of the Subordinate Judge in support of his finding on the second issue. They are utterly valueless.

That Ahmad Husain was not the honest man that the Subordinate Judge treats him to have been, who would have contented himself to take steps to acquire the sixth share which went to the mother, and would not have troubled himself about the rest, is shown by the plaintiffs'

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(appellants') own case, for it is there said, "Ahmad Husain, alleging a parol gift, without date, from Himayat Fatma to himself, applied seven days after his wife's death, *i.e.*, on the 10th December, 1879, for the transfer of possession in a number of villages from Himayat to him in accordance with that alleged gift, and at the same time he applied, in fraud of his own daughters, for the transfer to him, as heir of his deceased wife, of her share, and obtained various collusive and false reports from **[479]** kanungos and other native local officers, and an order, dated the 19th November, 1880, for the registration of his own name in respect of the entire estates of Himayat and of Zahur. It is sufficient to say here, of those proceedings, that the first Court has found, and there is now, as is submitted, no question remaining, that the claims of Ahmad Husain to the properties now in suit were unfounded and 'improper.'"

The appellants rely on Ahmad Husain's having, from Himayat's death to the time of his own death, remained in possession under an order of the 10th November, 1880, for mutation of names, and on the first four defendants, his daughters, having, upon his death, applied for mutation of names to themselves as his heirs; but this argument does not assist the plaintiffs' case, for the order of the 19th November was obtained with the assent of the daughters of Zahur, and subject to the following proviso. In their petition of the 4th February, 1880, speaking of their father, Chaudhri Ahmad Husain, they say, "Husaini Jan and Hajira Jan having filed a petition in the tahsil of Etah for the entry of their names instead of that of their mother, Zahur Fatma, and having included therein our names also, we submit that we and the objectors are five own sisters, and are the heirs and proprietors of the property of our deceased mother, and with our consent our father, Ahmad Husain, continues, as usual, in possession of the village, and he too is an heir of the deceased, with right of inheritance to her property. The said Chaudhri and we are joint, and possession by him is our possession. We therefore have no objection to his name being, during his life, entered instead of ours; but with this proviso that such arrangement be now made that our shares be saved from other claimants, and that we do not thereby ever lose our rights; and he must, during his lifetime, provide for us properly. We accordingly submit that, with the above proviso, the name of Chaudhri Ahmad Husain be entered instead of ours."

Upon the whole their Lordships will humbly advise Her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court, to order the plaintiffs to pay to all the defend-**[480]**ants, except the representatives of Muhammad Usman, who is dead, their costs in the Courts below, that a finding be entered for the defendants on the first issue, that the amount of the consideration was not paid, and that the Rs. 2,500 were taken back; and upon the second issue, that the deed of gift in favour of Zahur Fatma was executed with the authority of Himayat Fatma, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property, and that upon those findings a decree be given for the defendants, and that it is unnecessary to record any finding upon the other issues.

The appellants must pay the costs of the appeal to Her Majesty in Council.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow and Rogers.*

Solicitors for the first six respondents: Messrs. *Watkins and Lattey.*

1889 MAY 30. — CRIMINAL REVISIONAL. — 11 A. 480 = 9 A.W.N. (1889) 162.

11 A. 480 = 9 A.W.N. (1889) 162.

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

RUKMIN (*Petitioner*) *v.* PEARE LAL (*Opposite party.*) [30th May, 1889.]

Husband and wife—Maintenance of wife—"Cruelty"—Criminal Procedure Code, s. 488.

The word "cruelty" in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly* v. *Kelly* (1) and *Tomkins* v. *Tomkins* (2), referred to.

[R., U.B.R. (1897—1901) 104 (105) Cr.]

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Allahabad. The facts are sufficiently stated in the judgment of the Court.

Babu *Jogindra Nath Chaudhri*, for the petitioner Musammat Rukmin.

Mr. *C. Dillon*, for Peare Lal.

JUDGMENT.

BRODHUST, J.—I concur with the Sessions Judge that this case, which has been brought by a wife against her husband, under s. 488 [481] of the Criminal Procedure Code, for maintenance, has been disposed of by the Magistrate in too summary a manner.

It is alleged that the Magistrate did not allow the examination-in-chief of the petitioner to be conducted by her pleader, that he himself asked her only a few preliminary questions, that he refused to examine any of her witnesses, and that he rejected her application "because she only alleges three occasions of ill-treatment, and the last of these was a year ago," but that if the petitioner, who is a native lady unaccustomed to appear in the Courts, was exmined with patience and consideration, she would be able not only to show that she still bears the scar of a wound inflicted by her husband, but that she with the assistance of her witnesses would prove that her husband has habitually treated her with cruelty.

If the petitioner can prove the latter allegations, she will be entitled under the provisions of s. 488 of the Criminal Procedure Code to receive an allowance from her husband.

The Magistrate appears to have thought that nothing except personal violence would constitute "cruelty" within the meaning of the section above mentioned; but that is not so. There can be legal cruelty without the use of actual physical violence by the husband towards the wife, as is shown in *Kelly* v. *Kelly* (1), where it was held,—" If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no physical violence such as would justify a decree, it is legal cruelty and entitles her to a judicial separation." And in *Tomkins* v. *Tomkins* (2) the Judge Ordinary observed that whether there had or not been cruelty was a question of fact. "The Court will direct the jury in cases coming before a jury, what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not"; and the question is whether " the husband has so treated his wife and so manifested his feelings towards her as

(1) L.R. 2 P.D. 59. (2) 1 S. &.T. 168.

to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured [482] health." I set aside the Magistrate's proceedings, and I direct that he take the evidence of the petitioner and her witnesses and otherwise dispose of the case in accordance with law and the above remarks, after having recorded a finding whether or not Lala Peare Lal has habitually treated his wife, the petitioner, with cruelty.

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11 A. 482 = 9 A.W.N. (1889) 186.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

BUDDHU LAL (*Decree-holder*) v. REKKHAB DAS (*Judgment-debtor*).*
[24th July, 1889.]

Execution of decree—Decree payable in instalments—Default—Waiver—Limitation.

A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years: and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default.

Held that the default, if it was one, had been waived by the decree-holder and that such waiver was a good defence to the present application. *Mumford* v. *Peal* (1) and *Asmutullah Dalal* v. *Kally Churn Mitter* (2) distinguished.

[R., 20 B. 109 (116).]

THIS was an appeal under s. 10 of the Letters Patent from the following judgment of Tyrrell, J.:—

TYRRELL, J.—This is is a very simple case. The parties agreed, and an order of Court was made, that the judgment-debtor should satisfy the decree-holder's claim against him by monthly payments of two rupees to be followed by the payment of such a sum in the twelfth year after the decree, as would clear off the entire claim of the decree-holder. The decretal order to this effect was made on the 16th May, 1881, and this decretal order did not state from what date to what date each instalment was to be reckoned: that is to say, it was not recorded whether the months were to be counted from the 16th May, 1881, to the 16th June, 1881 and so on for future time, or, whe-[483]ther the word "monthly" meant from the 1st of each month to the last day of each month subsequent to the 16th May aforesaid. The effect was that the judgment-debtor regularly on the 16th of each month paid his two rupees to the decree-holder down to the month of December, 1884. That instalment of two rupees for November-December, 1884, was not taken into his possession by the decree-holder until the 18th or 19th December, 1884. Subsequent to that month it is found by the lower appellate Court that the decree-holder continued to take his two rupees a month regularly from his judgment-debtor. Under the circumstances the lower appellate Court, agreeing with the Court of first instance, has found that the decretal order was ambiguous in respect of the precise date for the payment of the instalments, so that the Courts were unable to say with certainty whether the 16th of each month was the only date upon which the payment could be made in

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* Appeal No. 2 under s. 10 of the Letters Patent.

(1) 2 A. 857. (2) 7 C. 56.

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conformity with the decretal order; and the lower appellate Court further found that if there had been any irregularity in the payment for December, 1884, it would not disentitle the judgment-debtor to the advantages of the instalment arrangement, inasmuch as the decree-holder waived his right to execute the entire decree, and obtained a new agreement from his judgment-debtor, whereunder he continued to take monthly instalments from him as before the month of December, 1884.

The learned Judge in first appeal, therefore, decided that the application made by the decree-holder now long after the condoned irregularity of December 1884, to execute the entire decree because of the judgment-debtor's default to pay his instalments, should not be allowed. I entirely concur with the Court below. In the first place, I agree that there is no evidence that the 16th of each successive month was the only legal date for the payment of the instalment. In the second place, I cannot disturb the finding of the lower appellate Court on the fact of waiver. It is true that a question of law is involved in the finding of waiver, but that is no reason for thinking that the lower appellate Court has erred in arriving on the evidence before it at the finding it has come to. Thirdly, there is another reason for upholding the decision of the lower Court, [484] which is to be found in the circumstance that the Court executing the decree ascertained from the evidence before it that the payment of two rupees for December, 1884, was tendered by the judgment-debtor to the decree-holder, who designedly delayed acceptance of the same in order to build up for himself the materials for the pretension he now puts forward to break up the instalment arrangement and enforce the execution of his decree as a whole. I dismiss the appeal with costs.

From this decision the decree-holder appealed under s. 10 of the Letters Patent.

Pandit *Sundar Lal*, for the appellant.

Mr. *J. Simeon*, for the respondent.

JUDGMENTS.

EDGE, C.J.—In this case a decree by consent was made for payment of the decreed amount by monthly instalments running over twelve years. It was provided that on default the creditor might execute the decree as a whole, that is, for the balance then due. In 1883, what the appellant here, who was the creditor, calls a default was made.

Apparently he prevented the payment being made on the stipulated day. He subsequently received instalments on the day fixed, assuming that that day was the 16th of the month, or if not on some other day, at any rate, he received the instalments which were paid down to the date of the filing of the present application for execution on the 30th of January, 1887. The date of the default on which he relied was, we are informed, the 16th December, 1883. He had filed an application in 1884 for execution in respect of that default, but did not proceed with it. It is contended here that he can now rely on the default of the 16th December, 1883. In my opinion he waived that default if it was one. It is contended on his behalf that there could be no waiver. The case of *Mumford* v. *Peal* (1) has been cited, and also the case of *Asmutullah Dalal* v. *Kally Churn Mitter* (2). The case in this Court turned on the somewhat peculiar facts of the case, and does not, I think, apply. The case in the Calcutta Court was a question of limitation, and [485] looking to the judgment of the Judges there, I do not

(1) 2 A. 857. (2) 7 C. 56.

1889 JULY 24. APPELLATE CIVIL. 11 A. 482 = 9 A.W.N. (1889) 186.

think that they would have held there could be no such waiver as has been contended for here. I think that at page 59 can be gathered an indication of what those Judges would possibly have said in this case. In dealing with cl. (6) of art. 179, sch ii, Limitation Act (XV of 1877), they drew the distinction between the execution of a decree as a whole and the case of certain sums to be paid at dates certain. They say, "But the decree nowhere directs that the payment of the whole amount outstanding shall be made at a certain date. It only gives the decree-holder the option of applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments. Under the decree, therefore, the decree-holder had several courses open to him, subject, of course, to the rules of limitation." In cases of this kind I am of opinion that where there has been a default which would entitle the decree-holder to execute the decree as a whole he must do so within three years of the default. But if he does not choose to execute the decree as a whole, he can go on receiving the instalments at the time fixed for the receiving of the instalments, and if any of those instalments are not paid he can within three years, execute the decree for that instalment. I do not think that the Calcutta Court in the case to which I have referred is against the view of the law which I hold. I am clearly of opinion there was a waiver here, and that that waiver is an answer to the application to execute the decree as a whole, and that this appeal should be dismissed with costs.

STRAIGHT, J.—I am of the same opinion. My brother Tyrrell, before whom this appeal came from the decision of the Judge of Mainpuri, was of opinion that the decisions of the two lower Courts were right in holding that after the month of December, 1883, when the decree-holder had said the default was made by the judgment-debtor, the decree-holder had received from his judgment-debtor no less than three years' monthly instalments, and that while he had in fact, on the 2nd of January, 1887, accepted the last monthly instalment of two rupees, he nevertheless came into Court on the 3rd of the [486] same month with this application treating the matter as if nothing had been paid in the interim, and going back to the month of December, 1883, as the date of the default which had been the ground of the original application for the execution of the whole decree. If the argument of the learned Pleader for the decree-holder were carried to its logical conclusion, he might, by merely filing an application every three years, have gone on receiving instalments till the eleventh year, and then have come in and asked for the execution of the whole decree, which seems to me absurd. There is enough stated in the judgments of the two first Courts to satisfy me, as it satisfied my brother Tyrrell, and satisfies the learned Chief Justice, that there was a waiver by the decree-holder of his right to execute his whole decree in respect of the alleged default in December, 1883, I may, however, add that the two first Courts on the evidence came to the conclusion that there never was any real default at all. On that finding alone my brother Tyrrell was right. The appeal is dismissed with costs.

Appeal dismissed,

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APPELLATE CIVIL.

11 A. 486 = 9 A.W.N. (1889) 191.

11 A. 486 = 9 A.W.N. (1889) 191.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAJ SINGH AND ANOTHER (*Judgment-debtors*) v. PARMANAND (*Decree-holder*).* [5th August, 1889.]

Mortgage—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage—Act IV of 1882 (*Transfer of Property Act*), ss. 88, 89, 90.

The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.

[Diss., 33 C. 867 (874) = 4 C.L.J. 141; 1 N.L.R. 143 (145); R., 13 A. 356 (359); 14 A. 513 (516); 28 A. 365 (369) = 3 A.L.J. 171 = A.W.N. (1906) 44.]

THIS was an appeal from a decree of the District Judge of Aligarh reversing a decree of the Munsif of Haveli. The judgment of the District Judge was as follows:—

"In this case the appellant had obtained a decree against the respondents as legal representatives and heirs of a mortgagor under the terms of s. 88 of the Transfer of Property Act. The mortgaged [487] property was eventually brought to sale, but the proceeds were insufficient to satisfy the decree debt. The decree-holder then applied praying that the Court would pass a further decree under s. 90 of that Act for the balance due on the mortgage. The Munsif, relying on the case *Pran Kuar* v. *Durga Prasad* (1), refused the application. But that case is not to the point, the original decree having been issued in 1881 before the passing of the Transfer of Property Act. The respondents contend that as in the decree against them no order was passed that any other property than that charged with the debt should be sold, the provisions of ss. 13 and 43 do not allow the claim now made by the appellant. If the proceedings under s. 90 of the Transfer of Property Act could be described as a fresh suit, s. 43 would apply. But reading ss. 88, 89 and 90 of that Act together, it is clear that they contemplate a further decree in the same suit, when the proceeds of the sale are insufficient to satisfy the debt. The language of s. 88 of the Transfer of Property Act, and the form of a decree for the sale in a suit by a mortgage, No. 128 in sch. IV of the Code of Civil Procedure, and the form for a decree under s. 88 of the Transfer of Property Act as issued by the High Court, agree in omitting any reference to the relief to be granted to the plaintiff in the event contemplated by s. 90 of the Transfer of Property Act. The decree-holder is entitled to have a further decree, under s. 90 of the Transfer of Property Act if the balance is legally recoverable from the defendants. The case must therefore be remanded to the lower Court for the determination of this issue, and if it be determined in favour of the appellant, for the passing of a decree under s. 90 of the Transfer of Property Act. The appeal is admitted. The case is remanded under s. 562 of the Civil Procedure Code to be disposed of with reference to the remarks made above. The costs of this appeal will follow the costs of the application to the lower Court."

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* Second Appeal, No. 1099 of 1888, from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated the 4th July, 1888, reversing a decree of Maulvi Saiyed Akbar Hussain, Munsif of Haveli, dated the 21st March, 1889.

(1) 10 A. 127 = 8 A.W.N. (1888) 21.

The judgment-debtors appealed to the High Court. 1889 AUG. 5.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

APPELLATE CIVIL.

11 A. 486 = 9 A.W.N. (1889) 191.

JUDGMENT.

[488] EDGE, C. J., and TYRRELL, J.—The only point in this case is whether the decree contemplated by s. 90 of the Transfer of Property Act can be made in the suit in which the decree for sale was passed, or whether a fresh suit must be instituted to obtain such decree. There is nothing in the Act to suggest that a fresh suit is necessary; and there is everything to suggest that it is not. If it were intended that a fresh suit should be brought, that intention would have been given effect to by the introduction of appropriate words into s. 90.

We dismiss the appeal with costs (1). *Appeal dismissed.*

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11 A. 488 = 9 A.W.N. (1889) 188.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BANWARI LAL (*Plaintiff*) v. SAMMAN LAL (*Defendant*)*.
[14th August, 1889.]

Civil Procedure Code. ss. 562, 564—"*Suit.*"

S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point.

[Appl., 27 A. 163 (165) = 1 A.L J. 503 = A.W.N. (1904), 202; Appr., 12 A. 510 (F.B.).]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Amiruddin*, for the appellant.

Mr. *Simeon*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This is an appeal from an order of remand. The suit brought by the plaintiff-respondent was one in which he claimed two reliefs: first, he asked for an injunction to defendant, restraining him from interfering with his, the plaintiff's erection upon the roof of his own house of certain buildings; secondly, he claimed a right of easement over the roof of the defendant's house in order to give him access to the roof of his own house. The first Court decreed the plaintiff's claim for an injunction, but as to his second head of claim, it said, that upon the face of the plaint, the statement of the easement claimed was so inadequate and unsatisfactory that it was im-[489]possible for it to enter into the question thereby raised. Accordingly it decreed the plaintiff's claim in part and dismissed it in part. The plaintiff appealed to the Subordinate Judge and the defendant filed an objection as to the order of the first Court in the matter of costs. The learned Subordinate Judge upheld the decision of the first Court in regard to the first head of relief sought by the plaintiff; but he was of opinion as to the first Court's dismissal under the second head; that the reasons given were

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* First Appeal, No. 66 of 1889, from an order of Maulvi Saiyid Muhammed, Subordinate Judge of Saharanpur, dated the 20th April, 1889.

(1) See also *Sonatun Shah* v. *Ali Newaz Khan*, 16 C. 423.

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insufficient and unsatisfactory, and that it ought to have tried the case. Thereupon as regards this second head of claim the Subordinate Judge made an order under s. 562 of the Civil Procedure Code That order is assailed by Mr. *Amiruddin* for the defendant. His contention is that under the law the Subordinate Judge had no power to make a general order of remand, and that the *suit* had not been disposed of on a preliminary point, but that only a *part* of the suit had been disposed of on a preliminary point, and s. 562 was inapplicable. I think this contention is sound. We are told by s. 564 of the Civil Procedure Code that a case shall not be remanded "for second decision, except as provided in s. 562." We, therefore, have to look to see whether this case does fall within the four corners of that section. We must take the words of the statute as we find them ; and the words of that section are these :—" If the Court against whose decree the appeal is made as disposed of the *suit* upon a preliminary point, &c." Now the word used there is in distinct and precise terms the "*suit;*" it does not say any portion of the suit or any part of the relief claimed in the suit, but the word *suit* is used. I take it to mean that where a suit in its entirety has been thrown out by a first Court upon a preliminary point, under these circumstances, and these circumstances only, has the appellate Court power to remand it under s. 562 of the Civil Procedure Code. I hold, therefore, that Mr. *Amiruddin's* objection is a good one and must prevail, and that the order of the learned Subordinate Judge, in so far as it deals with the second head of claim and the question of costs, and directs a remand under s. 562 of the Civil Procedure Code, must be set aside. The consequence of this order will be that the appeal to that extent will be restored to the file of pending appeals in his Court, and he will take up and **[490]** dispose of it from the point where he dealt with the first head of the plaintiff's claim. If it becomes necessary to make a remand under s. 566 of the Civil Procedure Code or to exercise the powers conferred under s. 568, Civil Procedure Code, he will do so. The costs of this appeal will follow the result.

TYRRELL, J.—I quite concur. It seems to me that the law in s. 562 of the Civil Procedure Code assumes that there has been no trial, and that it authorizes a Court of first appeal to proceed with the trial. Now in the case before us, there has been a trial and a decree upon the merits in respect of a portion at least of the case.

Cause remanded.

11 A. 490 (F.B.)=9 A.W.N. (1889) 194.

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FULL BENCH.

11 A. 490 (F.B.)= 9 A.W.N. (1889) 194.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

ABDULLA (*Plaintiff*) v. MOHAN GIR AND OTHERS (*Defendants*).*
[12th November, 1889.]

Act XVII of 1886 (Jhansi and Morar Act)—Legislative power of the Governor-General in Council—Indian Councils Act (24 and 25 Vic., c. 67) s. 22—"Indian territories now under the dominion of Her Majesty"—"Said territories"—28 and 29 Vic., c. 17, preamble—32 and 33 Vic., c. 98, s. 1—Construction of statutes.

Act XVII of 1886 (the Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council; and the town and fort of Jhansi are subject to the jurisdiction of the High Court for the N.W. Provinces in the same manner as the rest of the Jhansi district.

The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 and 25 Vic., c. 67) received the royal assent (*i.e.*, the 1st August, 1861), were under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic., c. 17, and in s. 1 of the 32 and 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act.

Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature con[491]cerning the law does not make the law, yet it may be so declared as to operate in future. *The Postmaster-General of the United States* v. *Early* (1) referred to.

It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress* v. *Burah* (2) referred to.

[Appl., 18 B. 636 (655); R., 14 A. 226 (233)=12 A.W.N. 14.]

THIS was a reference to the Full Bench by Straight and Mahmood, JJ., of the question "whether the town and fort of Jhansi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhansi district."

The suit in which the reference was made was instituted on the 16th August, 1886, in the Court of the Extra Assistant Commissioner of Jhansi. It was brought to enforce an alleged customary right of pre-emption in respect of the sale of a house situate in the town of Jhansi where the parties resided. The Court of first instance, on the 5th January, 1887, decreed the claim. On appeal by the defendants, the Deputy Commissioner of Jhansi reversed the decree and dismissed the suit. The plaintiff presented a second appeal to the High Court.

The appeal came in the first instance, before Mahmood, J., who referred it to a Division Bench. At the hearing before the Bench (which consisted of Straight and Mahmood, JJ.) the question stated in the order of reference was raised. It involved the further question whether the Governor-General in Council had power to pass the Jhansi and Morar Act (XVII of 1886) by virtue of the provisions of which civil and criminal

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* Second Appeal, No. 1052 of 1887, from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhansi, dated the 4th April, 1887, reversing a decree of G. B. Crawley, Esq., Extra Assistant Commissioner of Jhansi, dated the 5th January, 1887.

(1) Curtis' Reports of Decisions in the Supreme Court of the United States, p. 86.
(2) 3 C. at p. 143; L.R. 3 App. Cas. at p. 907; 5 I.A. at p. 196; 4 C. at p. 193.

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jurisdiction was given to the High Court over the town and fort of Jhansi and adjacent lands, or whether the Act was in excess of the powers conferred on the Indian Legislature by s. 22 of the Indian Councils Act, 24 and 25 Vic., c. 67.

The territories of the Raja of Jhansi lapsed to the British Government on the death of the Raja without heirs male in 1853. From their annexation they formed part of the North-Western Provinces (1).

[492] By treaty dated the 12th December, 1860, the British Government ceded the town and fort of Jhansi in full sovereignty to the Maharaja Scindia. The transfer was completed on the 1st April, 1861 (2).

By *kharita*, dated the 24th February, 1836, the British Government restored to the Maharaja Scindia the cantonment of Morar, in exchange for which His Highness, on the 10th March, 1886, made over in full sovereignty to the British Government the town and fort of Jhansi (3).

By proclamation dated the 10th June, 1886, under the 28 and 29 Vic., c. 17, s. 4, the Governor-General in Council declared that the town and fort of Jhansi should be subject to the Lieutenant-Governorship of the North-Western Provinces (4).

On the 17th September, 1886, the Jhansi and Morar Act (XVII of 1886) received the assent of the Governor-General. The preamble to Part I of the Act recites, *inter alia*, the cession of the town and fort of Jhansi to the British Government and their incorporation in the North-Western Provinces.

Section 2 enacts that " the town and fort of Jhansi, and the lands which may be ceded to the British Government in accordance with the proposal referred to in the preamble to this Part, shall, in the case of the town and fort from the commencement of this Act, and in the case of any of the lands, from the date of the cession thereof, be deemed to be part of the Jhansi district."

Section 3.—" All enactments which at the commencement of this Act, or at the date of the cession of any of the lands referred to in the last foregoing section, are or shall be in force in the Jhansi district and not in the town and fort of Jhansi or in those lands shall then come into force in the town and fort or in those lands as the case my be."

Section 4.—" On and from the commencement of this Act, or the date of the cession of any of those lands, as the case may be, the [493] town and fort of Jhansi and the lands, shall be deemed to from part of the district of Jhansi mentioned in Part IV of the first schedule to the Scheduled Districts Act, 1874."

Among the enactment which at the commencement of the Act were in force in the Jhansi district were the Jhansi Courts Act (XVIII of 1867) and the Codes of Criminal and Civil Procedure. It was not disputed that the High Court had jurisdiction over the Jhansi district generally.

The doubt raised at the hearing of the appeal in regard to the validity of Act XVII of 1886, and consequently in regard to the jurisdiction of the High Court in cases coming from the town and fort of Jhansi, had reference to the terms of s. 22 of the Indian Councils Act which (so far as they need be referred to) are as follows :—

(1) Aitchison's Treaties, vol. ii, p. 190 ; Hunter's Gazetteer, vol. vii, p. 219 ; Whalley's Law of the Extra-Regulation Tracts, p. 306, *et seq.*
(2) Aitchison, vol. iii, pp. 262, 316. *N. W. Provinces Gazetteer*, vol. i, p. 439.
(3) "Administration of the N. W. Provinces and Oudh, 1882-87," p. 124.
(4) *Gazette of India*, June 12th, 1886, Part I, p. 376.

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"The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in *the Indian territories now under the dominion of Her Majesty* and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within *the said territories*, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council or the Governor or Lieutenant-Governor in Council of any Presidency or other territory for which a Council may be appointed with power to make laws and regulations under and by virtue of this Act."

It was suggested that the words here litalicized limited the legislative powers of the Governor-General in Council to making [494] laws and regulations for the Indian territories which at the date when the Indian Councils Act received the royal assent (*i. e.*, the 1st August, 1861), formed part of the dominions of Her Majesty ; and that he had consequently no power to pass an Act such as Act XVII of 1886 for the town and fort of Jhansi which did not (after December 1860) form part of those dominions until 1886.

This led to the reference to the Full Bench of the question above stated. Several other cases, both civil and criminal, which raised the same question, were subsequently included in the reference. The Court, in view of the importance of the point raised, directed that notice should be given to the Government of India, so as to afford the Government an opportunity of being heard by counsel.

Mr. *A. Strachey*, for the Government of India, as *amicus curiæ*.—It will not be disputed that the Government of India has power to acquire territory by conquest or cession.

[STRAIGHT, J.— If the Governor-General in Council has power to cede territory, and to take other territory in exchange, it hardly seems going much further to say that he has power to make laws for the territory so acquired (1).]

That is what I shall contend. But in the first place, s. 22 of the Indian Councils Act cannot be construed as limiting the legislative powers of the Governor-General in Council to the territories which, when that Act was passed, were under the dominion of Her Majesty. [495] The effect of s. 22 is recited in the preamble to the 28 and 29 Vic., c. 17,

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(1) See, in reference to this point, the observations of the Supreme Court of Calcutta in *Ouseley* v. *Plowden* (Boulnois, p. 145, decided in 1857 on the construction of the 3 and 4 Wm. IV, c. 85, s. 43 of which was worded in terms similar to those of s. 22 of the Indian Councils Act, 1861. The Court following the opinion of Sir Barnes Peacock, then Law Member of Council), held in substance that the statutory powers of the Governor-General in Council of making war and contracting treaties carried with them by implication power to acquire territory by conquest or cession, and that the power to acquire territory by conquest or cession carried with it the power to govern such territory. See also *American Insurance Company* v. *Canter* (Curtis, 685; 1 Peters, 511) decided by the Supreme Court of the United States of America; Kent's Commentaries, vol. i, p. 432, *note* ; Story's Constitution of the United States, vol. ii, pp. 166,170,171; Gardner's Institutes, pp. 39-40.

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where the words used are "within the Indian territories under the dominion of Her Majesty." the word "now" being omitted (1).

Again, the 32 and 33 Vic., c. 28, s. 1, expressly gives power to the Governor-General in Council after the 11th August, 1869, to make laws and regulations "for all persons being native Indian subject, without and beyond as well as within the Indian territories under the dominion of Her Majesty" (2). Here again the word "now" is omitted. See also the preamble.

These provisions amount to a legislative declaration by Parliament that the effect of s. 22 of the Councils Act is not to be limited by the word "now" to territories acquired by the Crown at any particular time, and that the Governor-General in Council may make laws for any part of British India whenever annexed. The 32 and 33 Vic., c. 98, s. 1, is more than a mere recital of existing law; it is a substantive enactment and must be treated as making the law such as it declares it to be. Where a matter of fact or of law is recited in an Act of Parliament, the recital, though not conclusive, is very strong evidence that the fact or law is as stated. And even if a recital is incorrect as a statement of existing law, it may be so expressed as to operate as law in future. This is so even where only an opinion as to existing law, and not an intention to make new law, is expressed: *The Postmaster-General of the United States* v. [496] *Early* (3); Wilberforce on Statute Law, pp. 15, 16. This is the case with the 32 and 33 Vic., c. 98, s. 1, assuming even, for the sake of argument that the construction which it placed upon s. 22 of the Indian Council's Act was erroneous. The difficulty arising from the use of the word "now" in that section has therefore been removed by later legislation.

[Edge, C.J.—If s. 22 of the Councils Acts were read literally there might be this result, that territory which, on the 1st August, 1861, when the statute received the royal assent was under the dominion of Her Majesty, but which was subsequently ceded to a foreign power, would

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(1) "Whereas by an Act passed in the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter sixty-seven, it was among other things enacted that the Governor-General of India in Council shall have power, at meetings for the purpose of making laws and regulations, to make laws and regulations for all persons, whether British or native, foreigners or others, within the Indian territories under the dominion of Her Majesty, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty; and whereas it is expedient to enlarge the said power by authorising the Governor-General of India in Council to make laws and regulations for all British subjects of Her Majesty within the dominions of such Princes and States," &c.

(2) "From and after the passing of this Act, the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations, to make laws and regulations for all persons being native Indian subjects of Her Majesty, Her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty."

(3) Curties' Reports of Decisions in the Supreme Court of the United States, p. 86. The effect of this decision is stated in Wilberforce, at p. 16. The question was whether a particular class of suits would lie in the circuit Courts of the United States; and the jurisdiction was based on an enactment which provided that the district (or state) courts should have cognizance of such suits "concurrent with the circuit courts of the United States." Marshall, C.J. (at p. 91 of the report) said:—It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the ligislature concerning the law does not make the law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The Legislature may pass a declaratory Act, which though inoperative on the past may act in future. This law expresses the sense of the Legislature on the existing law as plainly as a declaratory Act, and expresses it in terms capable of conferring the jurisdiction."

still be a territory within the description, and the Governor-General in Council might make laws for it though it had ceased to be part of British India or to belong to the Crown.]

The agreement contained in the treaty of the 12th December, 1860, for the cession, of the town and fort of Jhansi to Scindia was not completely given effect to until the first April, 1861. If the transfer had been delayed for another four months, the territory would have fallen within the terms of s. 22.

The argument based on the preamble to the 28 and 29 Vic., c. 17, and s. 1 of the 32 and 33, Vic., c. 98, is much strengthened by a consideration of the objects of those statutes. By s. 22 of the Councils Act, the Governor-General in Council was authorized to make laws for all servants of the Government of India in Native States. The 28 and 29 Vic., c. 17, s. 1, enlarged this power by extending it to all British subjects in Native States, whether servants of Government or otherwise; and by s. 2 this provision is to be read as part [497] of s. 22 of the Councils Act. Under the Councils Act itself, therefore, the Governor-General in Council can, to the extent stated, make laws having force in (*e.g.*) the State of Gwalior.

Further, the 32 and 33 Vic., c. 98, s. 1, authorized him to make laws for all Native Indian subject at places beyond as well as within the Indian territories of Her Majesty. To this extent he can make laws having force in Afghanistan or Persia.

Hence, if the Governor-General in Council cannot legislate for portions of territory ceded by or conquered from Native or foreign States. Parliament must have intended that cession or conquest should, *pro tanto*, diminish his powers; that he should have greater extra-territorial than intra-territorial authority. Upon this supposition, he can make laws having force in Hyderabad, or even in China or Japan, which he cannot make for parts of Bombay and the Punjab. Upon the same supposition, although Parliament trusted him to make laws for Bengalis in the town of Jhansi, or for Englishmen in Mandalay in 1885, it no longer trusts him to make laws for the same persons when, in 1886, the same places have become wholly subject to his executive government. By bringing certain territory within the limits of British India, the powers of the Indian Legislature over that territory are abolished. And if such territory should again be ceded to a Native State, or otherwise cease to form part of British India, the powers of the Indian Legislature over it would *ipso facto* revive. Parliament can never have intended that s. 22 of the Councils Act should be construed in a manner which involves these results.

[STRAIGHT, J.—You can reduce the idea to an absurdity. Suppose the case of a piece of land in British India which juts out into a Native State, and a part of that State, on which ten or a dozen squatters, who are British subjects, are settled, projects into British territory. An exchange of the two pieces of land is effected. Is it reasonable to suppose that the Governor-General in Council cannot without an Act of Parliament passed for the purpose, legislate for the handful of squatters, for whom he could undoubtedly legislate before the exchange?

[498] An intention so unreasonable cannot be attributed to Parliament unless it is expressed in unequivocal language.

[EDGE, C.J.—Between the passing of the Indian Councils Act in 1861 and the passing of the 32 and 33 Vic., c. 98, did not legislation by the Governor-General in Council take place for terriories acquired during the same period?]

Yes. See Act XIX of 1867, relating to the district of Darjeeling,

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including a portion conquered in 1864 (1); Act XXII of 1868, for mauza Kheria, ceded by the Maharana of Dholepur in 1866 (2); and Act XVI of 1869 for the Bhutan Duars, acquired by conquest and cession from the Rajas of Bhutan, under treaty dated the 11th November, 1865 (3). Many subsequent Acts have dealt with territories acquired since 1861 (4).

All laws and regulations passed by the Governor-General in Council must be laid before both Houses of Parliament: 3 and 4 Wm. IV., c. 85, s. 51; compare 53 Geo. III, c. 155, s. 66. Parliament must be presumed to have knowledge of such laws and regulations: *Empress* v. *Burah* (5), per Sir Richard Garth, C.J., in the High Court of Calcutta, and Lord Selborne in the Privy Council. It has treated the legislation of the Governor-General in Council for territories acquired subsequently to 1861 as valid both by leaving such legislation undisturbed, and by using language in the 28 and **[499]** 29 Vic,, c. 17, and 32 and 33 Vic., c. 98, which is only consistent with the supposition that such legislation was not *ultra vires*. [He also referred to the 39 and 40 Geo. III, c. 79, s. 20.]

[He was then stopped.]

None of the counsel or pleaders appearing in the cases to which the reference applied desired to contend that the Court had not jurisdiction.

The following judgment was delivered by the Full Bench:—

JUDGMENT.

EDGE, C.J., and STRAIGHT, BRODHURST, TYRRELL and MAHMOOD, JJ.—The question raised by the reference in these cases to the Full Bench is whether the town and fort of Jhansi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhansi district, or, in other words, whether the Governor-General in Council had power to legislate for the town and fort of Jhansi and to pass Act XVII of 1886. The question appeared to us of such importance that we considered it advisable to give notice to the Government that it had been raised, as also to afford the Government an opportunity to instruct counsel to assist us to elucidate the question which, in the opinion of the majority of the Court as then advised, was by no means free from doubt and difficulty. With this object the Government instructed Mr. *Arthur Strachey* to appear as *amicuscuriæ*, and we think it only right to say that we are very much indebted to him for the great pains with which he prepared himself for the able argument which he has addressed to us.

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(1) Aitchison's Treatise, vol. i, pp. 151, 159, 165; Hunter, vol. iv., pp. 131-132.

(2) Aitchison, vol. iii, p. 183.

(3) Preamble; Aitchison, vol. i, pp. 151-152, 162, 165.

(4) *e.g.*, Acts VIII of 1174 and I of 1882, for the Eastern Duars (part of the Goalpara district), acquired under the treaty of the 11th November, 1865, and Shillong (Khasia and Jamtia Hills), acquired by cession on the 10th December, 1863; the Scheduled Districts Act (XIV of 1874) for the tract between the railway station at Satna and the eastern boundary of the Jabalpur district, ceded by the Maharaja of Rewah in 1863 (see s. 10, and Aitchison's, ii, 410, 427). Little Aden, purchased in 1868, the Bengal Duars, the Nicobar Islands, Shillong, the Eastern Duars, Nong-bah (in Assam), and Merar Cantonment; The Laws Local Fxtent Act (XV of 1874); Act IX of 1879 (Nicobar Islands); Acts X of 1880 and XIII of 1883, for lands ceded by the Nawab of Bahawalpur in 1879 and 1882, and annexed to the Multan district; Act XX of 1886 (Upper Burma Laws Act). XV of 1887, and XVIII of 1888 for Upper Burma Act XV of 1888, for the Shan States.

See also s. 2 (8) of the General Clauses Act, I of 1868 (which was passd prior to the 32 and 33 Vic., c. 98), defining "British India" as "the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., c. 106"

(5) 3 C. at p. 143; 3 App. Cas. at p. 907; 5 I. A. at p. 196; 4 C. at p. 183.

By a treaty dated the 12th December, 1860, the British Government ceded the town and fort of Jhansi in full sovereignty to the Maharaja Scindia. The transfer was completed on the 1st April, 1861. On the 10th March, 1886, the Maharaja Scindia, in exchange, for the cantonment of Morar, made over in full sovereignty to the British Government the town and fort of Jhansi. On the 1st August, 1861, the Indian Councils Act, 1861 (24 and 25 Vic., c. 67), received the Royal assent. The difficulty has arisen by reason of the wording of the twenty-second section of that Act which, so far as [500] is material, is as follows :—"The Governor-General in Council shall have power of meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty, and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in anywise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, or the Governor or Lieutenant-Governor in Council of any Presidency or other territory for which a Council may be appointed with power to make laws and regulations under and by virtue of this Act," &c.

It was contended that on the true principle of construction as applied to that section, the words "the said territories" in that section were limited by the preceding words "Indian territories now under the dominion of Her Majesty." If it had not been for the subsequent legislation of the Imperial Parliament taken in conjunction with the subsequent legislation of the Governor-General in Council, to which Mr. *Starchey* has drawn our attention and to which we shall refer, we would have felt ourselves constrained to hold that the Governor-General in Council had exceeded his jurisdiction in passing Act XVII of 1886, inasmuch as the town and fort of Jhansi were not, on the 1st August, 1861, as Indian territory or Indian territories under the dominion of Her Majesty.

We have, however, to see whether the Imperial Parliament has not, by its legislation, subsequent to the 1st August, 1861, put a wider construction upon s. 22 of the Counclis Act, 1861, which excludes the narrower construction of the wording of the section to which [501] we have referred, and whether the Imperial Parliament has not conferred more extensive legislative powers on the Governor-General in Council than were apparently conferred by s. 22 of the Indian Councils Act, 1861. On the 9th May, 1865, the Act 28 and 29 Vic., c 17, received the Royal assent. There is a recital in the following terms :—"Whereas by an Act passed in the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter sixty-seven, it was among other things enacted that the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations to make laws and regulations for all persons whether British or native, foreigners or others, within the Indian territories under the dominion of Her Majesty, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty;

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and whereas it is expedient to enlarge the said power by authorizing the Governor-General of India in Council to make laws and regulations for all British subjects of Her Majesty within the dominions of such Princes and States."

That recital taken in conjunction with the fact, of which we must presume the Imperial Parliament was aware, that in 1864 a portion of the district of Darjeeling had been acquired by conquest and had then first become part of Her Majesty's dominions in India, shows that the Imperial Parliament construed in 1865, s. 22 of the Indian Councils Act as if the words 'the said territories' in that section were not limited to the Indian territories which, on the 1st August, 1861, were under the dominion of Her Majesty. On the 11th August, 1869, the Act of the Imperial Parliament, 32 and 33 Vic., c. 98, received the Royal assent. In the preamble to that Act it is recited that whereas doubts have arisen as to the extent of the power of the Governor-General of India in Council to make laws binding upon Native Indian subjects beyond the Indian territories under the dominion of Her Majesty, and whereas it is expedient that better provision should be made in other respects for the exercise of the powers of the Governor-General in Council. That recital in our opinion assumes that no doubts had arisen as to [502] the power of the Governor-General in Council to make laws binding upon the Native Indian subjects of the Crown within the Indian territories under the dominion of Her Majesty, no matter when such territories had been acquired. By s. 1 of 32 and 33 Vic., c. 98, it was enacted that—"From and after the passing of this Act the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations to make laws and regulations for all persons being Native Indian subjects of Her Majesty, Her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty."

The Imperial Parliament in that section assumed that the Governor-General in Council had power to make laws binding upon the Native Indian subjects of the Crown within the Indian territories under the dominion of Her Majesty, and in that sense interpreted s. 22 of the Indian Councils Act, 1861. Such an interpretation is inconsistent with a construction of s. 22 of the Indian Councils Act, 1861, which would limit the powers of the Governor-General in Council to making laws binding upon all persons, whether Native Indian subjects or others, within the territories which on the 1st August, 1861, were under the dominion of Her Majesty. It could not have been the intention of the Imperial Parliament that, *quoad* the power of the Governor-General in Council to legislate for Native Indian subjects with the Indian territories under the dominion of Her Majesty, a different construction should be put upon s. 22 of the Indian Councils Act, 1861, to that which should be put upon that section, *quoad* the power of the Governor-General in Council to legislate for persons other than Native Indian subjects within the Indian territories under the dominion of Her Majesty.

Between the 1st August, 1861, and the 11th August, 1869, not only had territories in India been acquired, but legislation by the Governor-General in Council for such territories had taken place. In 1864 part of the district of Darjeeling had been acquired by conquest, and on the 8th March, 1867, Act XIX of 1867, which applied to the district of Darjeeling, including the part of that district which had been acquired by conquest in 1864, was passed [503] by the Governor-General in Council. In 1866 mauza Kheria had been ceded to the British Government

by the Maharana of Dholepur, and on the 10th September, 1868, Act XXII of 1868, which related amongst other things to the administration of civil and criminal justice in mauza Kheria, was passed by the Governor-General in Council. In 1865 the Bhutan Duars were acquired by conquest and cession, and on the 23rd July, 1869, Act XVI of 1869, relating to that territory, was passed by the Governor-General in Council. It was obligatory by statute* to lay before both Houses of Parliament copies of all laws and regulations made by the Governor-General in Council. Consequently, prior to the passing by the Imperial Parliament of the 32 and 33 Vic., c. 98, it must be assumed that that obligation had been complied with, at least so far as Act XIX of 1867 and Act XXII of 1868 were concerned. We must presume that Act XIX of 1867 and Act XXII of 1868 "were known to and in the view of the Imperial Parliament" when the 32 and 33 Vic., c. 98, was passed. A similar presumption in respect of the legislation in India prior to the passing of the Indian Councils Act, 1861, was made by Sir Richard Garth, C.J., and subsequently by their Lordships of the Privy Council in the case of *Empress* v. *Burah* (1). We should not overlook the fact that the Imperial Parliament has not interfered with any of the numerous legislative enactments of the Governor-General in Council which were passed between 1867 and 1886 inclusive, in relation to Indian territories which were not, on the 1st August 1861, under the dominion of Her Majesty, and which since the 1st August, 1861, have been acquired by conquest or cession.

Even if the interpretation which has been put by the Imperial Parliament on s. 22 of the Indian Councils Act, 1861, was erroneous, we are of opinion that that interpretation has been so declared by the Imperial Parliament as to make it obligatory upon us to adopt it in this case. In the case of *The Postmaster-General of the United States* v. *Early* (2), the Supreme Court of the United **[504]** States decided that though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. Whether the word "now" was intentionally or by inadvertence introduced into s. 22 of the Indian Councils Act, 1861, it is difficult to say. To hold that the Governor-General in Council has not power to legislate except in respect of Indian territories which were on the 1st August, 1861, under the dominion of Her Majesty, would, as has been pointed out by Mr. *Strachey* lead to anomalous results which the Impreial Legislature must have foreseen and could not have intended. If we were to construe that section strictly, we would have to hold not only that the Imperial Parliament gave power to the Governor-General in Council to legislate in relation to all Indian territories which were on the 1st August, 1861, under the dominion of Her Majesty, irrespective of the question whether at the date of the legislation by the Governor-General in Council such territories had or had not ceased to be under the dominion of Her Majesty but that a long series of legislative enactments of the Governor-General in Council, although *ultra vires*, had in effect been treated by the Imperial Parliament as *intra vires*.

In the result we are of opinion that the Governor-General in Council had power to pass Act XVII of 1886, and that the town and fort of Jhansi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhansi district.

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*3 & 4 Wm. IV c. 85, s. 51, *cf.* 53 Geo. III, C. 155, s. 66.

(1) 3 C. at p. 143; 3 App. Cas. at p. 907; 5 I.A. at p. 196; 4 C. at p. 183.

(2) Curtis' Reports of Decisions in the Supreme Court of the United States, p. 86.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

THE COLLECTOR OF GORAKHPUR AND ANOTHER (*Defendants*) v. PALAKDHARI SINGH (*Plaintiff*). [2nd April, 1889.]

Act I of 1872 (*Evidence Act*), ss. 8, 9, 13, 40, 43—*Admissibility in evidence of judgments not* inter partes—*Judgment in Criminal case.*

P brought a suit against *K*, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to *K*'s husband, and to have it declared that her husband died childless, and that *K* had falsely put forward a child of unknown parentage as her husband's son. *K* was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After *K*'s death *P* brought a suit against D whom the Collector as Manager of the Court of Wards had accepted as the minor son of *K* and against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit.

Held by the Full Bench that the judgment of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (BRODHURST, J., dissenting on this point) that they were admissible in evidence in the present suit.

Per EDGE, C. J., and TYRRELL, J.—The judgments were admissible under s. 8 or s. 9 of the Evidence Act (I of 1872), nor was either of them a "transaction" or a "fact" within the meaning of s. 13. But the record, and not the judgments alone, in the former suit was, admissible under s. 13 (*b*), independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both clauses (*a*) and (*b*) of s. 13 including a right of ownership, and not being confined, as [2] held by the majority in *Gujju Lall* v. *Fatteh Lall* (1), to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit.

Per STRAIGHT, J.—Under s. 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact; but though s. 43 declared judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 irrelevant *qua* judgments, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a "transaction" or "instances" within the meaning of s. 13; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of *K*'s husband to obtain proprietary possession of his father's estate was claimed and recognised, and to establish that such a transaction or instance took place, they were the best evidence.

Per BRODHURST, J.—That for the reasons given by Garth, C.J., and Jackson and Pontifex, JJ., in *Gujju Lall* v. *Fatteh Lall* (1), the judgments in the former suit were not admissible in evidence.

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(1) 6 C. 171.

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Per MAHMOOD, J.--That for the reasons given in the dissentient judgment Mitter. J., in *Gujju Lall* v. *Fatteh Lall* (1), the former Court was admissible in evidence.

It having been alleged that the defendant was in reality one *R*, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as *R* for causing simple hurt, and in which the Court had found that *R* had died some time before the date of the alleged offence, and expressed an opinion that the present plaintiff (who was not the prosecutor) had got up the case.

Held by EDGE, C.J., and BRODHURST and TYRRELL, JJ.; that the judgment of the criminal Court was not admissible in evidence.

Held by STRAIGHT. J., with doubt, and on the principle that in cases of doubt a Judge should decide in favour of admissibility rather than of non-admissibility, that the judgment was a fact which went to establish the identity of the defendant with the person he alleged himself to be, or at any rate, to show that he was not the person the plaintiff said he was, and that it was therefore admissible under s. 9 of the Evidence Act.

Held by MAHMOOD, J., that the judgment was admissible under s. 8 and, if not, under other sections of the Evidence Act.

[R., 25 A. 546 (576) = A.W.N. (1903) 137; 27 A. 37 (44) (P.C.) = 1 C.L.J. 46 = 2 A.L.J. 237 = 32 I.A. 17 = 8 Sar. P.C.J. 727; 24 B. 591 (598) = 2 Bom. L.R. 386; 6 A.L.J. 693 (696); 14 Ind. Cas. 66 (67) = 105 P.W.R. 1912 = 142 P.L.R. 1912.]

THE facts of this case were as follows :—One Hanuman Singh, who died on the 24th May, 1872, was formerly owner of the pro-[3]perty in suit, certain villages in the district of Gorakhpur; and he left a widow, Musammat Pan Kuar, who obtained possession of his estate. She also obtained from the Civil Court of the district a certificate of guardianship of a minor named Dalip Narain Singh, whom she alleged to be her son by the deceased Hanuman Singh, and to have been born on the 31st January, 1873.

On the 9th June, 1873, the plaintiff, Palakdhari Singh, who was first cousin to Hanuman Singh, instituted a suit against Pan Kuar in the Court of the Subordinate Judge of Gorakhpur. The object of the suit was to establish the plaintiff's right of inheritance to the villages which had belonged to Hanuman Singh, and to have it declared that Hanuman Singh died childless, and that the defendant Pan Kuar had falsely put forward a child of un-known parentage as Hanuman Singh's son. The defendant maintained that Dalip Narain Singh was her son by the deceased Hanuman Singh.

On the 23rd January, 1874, the Subordinate Judge dismissed the suit on the ground that the plaintiff had not satisfactorily proved his allegation that Dalip Narain Singh had been falsely put forward as the son of Hanuman Singh. From this decision the plaintiff appealed to the High Court. On the 7th December, 1874, the High Court (Turner and Brodhurst, JJ.,) dismissed the appeal, concurring with the conclusions drawn from the evidence by the Subordinate Judge.

Musammat Pan Kuar died in October, 1879. After her death the plaintiff Palakdhari Singh applied for a certificate of guardianship of the minor, empowering him to manage the property, under Act XL of 1858. Ultimately, however, this application was struck off, and in July, 1880, the property was placed under the management of the Court of Wards. At that time claims were put forward on behalf of two different boys to be Dalip Narain Singh, the son of Hanuman Singh. Inquiries were made by the Collector, and he eventually accepted as Dalip Narain Singh, and as heir to Hanuman Singh, the minor whose claim was put forward by Rukmani Sewak Singh, a cousin of Musammat Pan Kuar.

(1) 6 C. 171.

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[4] This led to the present suit, which was instituted in the Court of the Subordinate Judge of Gorakhpur by Palakdhari Singh, on the 15th September, 1886. The reliefs claimed by the plaintiff were :—"1. That by ejectment of the defendant, the plaintiff may be put in the possession of the property specified below," *i.e.*, the villages left by Hanuman Singh. "2. That it may be declared that the defendant is not the genuine Dalip Narain Singh." He alleged in his plaint that Hanuman Singh had died childless, that Musammat Pan Kuar had falsely alleged Dalip Narain Singh to be her son by Hanuman Singh, and that moreover the boy whom the Collector had accepted as Dalip Narain Singh was not so in fact, but Dalip Narain Singh, whose parentage was in question in the suit of 1874, was dead. He alleged further that the boy who had been accepted was in reality one Radha Kishen, son of Nar Singh Sewak, a first cousin of Musammat Pan Kuar. The defendants to the suit were described as "the Collector of Gorakhpur, as Manager on the part of the Court of Wards of the Bansgaon estate, and Radha Kishen, who calls himself Dalip Narain Singh, under the guardianship of the Collector."

The issues fixed by the Subordinate Judge were :—" 1. Whether the defendant in the present case is the same Dalip Narain Singh whom Pan Kuar, widow of Hanuman Singh, had alleged to have been of born of her, or whether he is dead and the defendant in this case is in reality Radha Kishen, son of Nar Singh Sewak. 2. If the first part of the above issue is proved, is the present suit barred as *res judicata*? 3. Whether, after the death of Hanuman Singh, any son was born of Musammat Pan Kuar, or not?"

The allegation that the minor defendant was not Dalip Narain Singh, but Radha Kishen, was met by the defence with the allegation that Radha Kishen was dead. In support of this statement, a judgment of the Deputy Magistrate of Azamgarh, dated the 31st March, 1884, was put in and was treated by the Subordinate Judge as evidence. It related to a charge brought by one Musammat Sheoraj Kuari of causing simple hurt under s. 323 of the Penal Code, against the defendant as Radha Kishen, son of Nar Singh Sewak, and one Ramanuj Sewak. The Deputy Magistrate in that case [5] found that Radha Kishen had died before the alleged assault took place. In the course of his judgment he observed :—"Babu Palakdhari Singh has taken a deep interest in this case, and I have a strong conviction that it is he who is moving in the background, and that Sheoraj Kuari is simply an instrument in his hands, playing the part set by him. Babu Palakdharisingh's interest will be clearly seen when it is remembered that he would inherit a large landed estate if it were established that the boy in existence is not Dalip Narain, son of Musammat Pan Kuar, but Radha Kishen son of Nar Singh Sewak. It was to obtain a declaration that the boy is Radha Kishen that the present complaint has been brought."

In the present case the Subordinate Judge found that the plaintiff had proved the allegations contained in the plaint, that the minor defendant was Radha Kishen, the son of Nar Singh Sewak, and that the boy whose parentage was in question in the suit of 1874 was not the same person as the present minor defendant.

In regard to the effect of the judgments of the Subordinate Judge and of the High Court, the Court held that, inasmuch as it had been found that the present defendant was not Dalip Narain Singh, no question of *res judicata* could arise, but that even if he were the same person as the minor whose parentage was in issue in the former suit, the present suit

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would not be barred, inasmuch as the parties in the two suits were different, and the present defendant could not be regarded as claiming under Musammat Pan Kuar. Upon the third issue the Court observed:—"It is proved that the boy who is really referred to in this case is Radha Kishen, and not Dalip Narain. Regarding the boy who was held to be the son of Pan Kuar, the plaintiff cannot say more than this, that he is dead or has been concealed. It is impossible to draw from the entire evidence produced in this case the conclusion that any son was born of Pan Kuar."

The Court accordingly decreed the claim.

The defendants appealed to the High Court. Their first ground of appeal was:—" Because with reference to s. 13 of the Code of [6] Civil Procedure, it was illegal for the lower Court to try the first and third issues framed by the Court."

The appeal came for hearing before Straight and Mahmood, JJ., who made the following order of reference to the Full Bench:—

STRAIGHT, J.—A question has arisen in the course of the hearing of this appeal as to the admissibility of certain evidence under the following circumstances:—

The plaintiff-respondent in the present suit alleged in his plaint that one Musammat Pan Kuar, the wife of one Hanuman Singh, who died in the year 1872, was never pregnant by her husband, nor did she give birth to a son born to him, subsequent to the date of his death. It is unnecessary for me to go into the other questions which arise out of the plaint and the statement of defence; but the primary point put forward in the judgment which is under appeal and by the learned counsel for the plaintiff-respondent, is that Musammat Pan Kuar never gave birth to a child. In reference to this question, we have had our attention called by Mr. *Ross*, the learned Counsel on behalf of the appellant, to a judgment of this Court delivered upon the 7th December, 1874, in a suit in which the present plaintiff-respondent was the plaintiff, and Musammat Pan Kuar was the defendant, and the object of that suit was to have it declared that Musmmat Pan Kuar had not, as alleged by her, given birth to a child in the month of January, 1873, subsequent to the death of her husband Hanuman Prasad Singh. It is objected by Mr. *Conlan*, on behalf of the respondent-plaintiff, that this judgment is wholly inadmissible and that neither this Court nor any Court in the trial of the present litigation has any right to refer to it for the purpose of treating it as evidence of the fact of whether Pan Kuar had or had not a child in the month of January, 1873. In support of Mr. *Conlan's* contention, which was fully argued on the plaintiff-respondent's side Mr. *Sundar Lal*, two Full Bench Rulings of the Calcutta High Court were referred to, the first of which is *Gujju Lall* v. *Fatteh Lall* (1), and the second which follows and adopts the ruling I have referred to is [7] *Surender Nath Pall Chowdhry* v. *Brojo Nath Pal Chowdhry* (2). There is also a ruling of the Bombay High Court *Ranchhoddas Krishnadas* v. *Bapu Narhar* (3) which adopts a similar view. Mr. *Conlan* has very frankly stated that if it is held that the ruling of the Calcutta High Court is an erroneous one, then he would not further contest the question as to the fact that Musammat Pan Kuar had a child, and consequently a great deal of our time would be spared from a discussion of that question. I have had the opportunity of consulting the learned Chief Justice with reference to the difficulty that has arisen. He agrees with my brother Mahmood and myself that it would

(1) 6 C. 171. (2) 13 C. 352. (3) 10 B. 439.

be out of respect to the rulings of the Full Bench of the Calcutta High Court that this question should be considered by a Full Bench of this Court, and he has intimated to me further that he approves my suggestion that this matter should be dealt with to-morrow morning at a sitting of the Full Bench. I have already indicated what the point is that arises with regard to the admissibility of the judgment of this Court of the 7th December, 1874, and of the Subordinate Judge from which appeal was preferred. But a question also arises in this case which may as well be considered at the time of this reference being taken up, *viz.*, whether a judgment of the 31st March, 1884, delivered by Pandit Sundar Lal, Deputy Magistrate, upon a charge against Ramanuj and Radha Kishen is admissible in the present trial as evidence to show that in the year 1884 the plaintiff was taking certain steps through the instrumentality of a nominal prosecution to make it appear that one Radha Kishen was then living at the date of the alleged assault with which that judgment dealt.

The questions above stated are referred to the Full Bench for its opinion

MAHMOOD, J.—I agree in the order made by my learned brother.

Mr. *G. E. A. Ross* and Munshi *Ram Prasad*, for the appellants.

The Hon. *T. Conlan*, Pandit *Sundar Lal* and Munshi *Juala Prasad*, for the respondent.

[8] Mr. *G.E.A.Ross*, for the appellants:—The judgment of the Subordinate Judge dated the 23rd January, 1874, and that of the High Court dated the 7th December, 1874, are admissible in evidence in this case. I contend, in the first place, that they operate as *res judicata*. The question at issue in the former suit was whether the plaintiff or Dalip Narain Singh was entitled to succeed to the estate of Hanuman Singh, and whether Hanuman Singh died childless or had a son. In that suit Pan Kuar was in reality sued as representing her son. Between them they represented the whole estate of Hanuman Singh. The defendant ought to have been formally made a party to the former suit. His mother was merely a defendant as representing him. Substantially he was a party to that suit. If the former suit had been brought against Hanuman Singh for a declaration that the defendant was not his legitimate son, the present suit would clearly be barred. The present position is practically the same. There is a substantial identity of parties, and the matter is therefore *res judicata* and the judgments are admissible under s. 40 of the Evidence Act. In determining the question of *res judicata* the substance of the two suits and of the causes of action must be looked to. This was held, with reference to s. 2 of Act VIII of 1859, by the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1), and it is applicable to s. 13 of the present Code of Civil Procedure.

[MAHMOOD, J.—The former suit was not framed as against Pan Kuar as guardian of her son, or as representing him. No such allegation was made.]

In the second place, the judgments in the former suit, if not operating as *res judicata*, are admissible in evidence under s. 43 of the Evidence Act. I rely on the judgment of Mitter, J., in *Gujju Lall* v. *Fatteh Lall* (2). The reasoning of the majority of the Full Bench in that case is not applicable to the circumstances of the present case. Here s. 9 of the Evidence Act it applicable ; the judgments and decrees of 1874 are relevant

(1) 11 C. at pp. 307-8. (2) 6 C. 171.

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under that section within the words " which establish the identity of any thing or [9] person whose identity is relevant." The question is whether the defendant is the son of Hanuman Singh or a mere changeling, and this is a question of identity.

[EDGE, C. J.—The judgments may have established the parentage of Dalip Narain Singh, but that is not a question of " identity."]

S. 11 of the Evidence Act is also applicable.

The judgments are also admissible under s. 13. They constitute a "transaction" within the meaning of that section. See *Naranji Bhikabhai* v. *Dipa Umed* (1).

[EDGE, C. J.—What is the right " claimed" or " denied " here ?]

The plaintiff's right to succeed to Hanuman Singh's estate if there is no son of Hanuman Singh living, and the defendant's right as legitimate son of Hanuman Singh. [He referred to *Neamut Ali* v. *Gooroo Doss* (2), *Gurdayal Mal* v. *Jhandu Mal* (3), *Ganga Nand* v. *Balgobind Das* (4), *Surender Nath Pal* v. *Brojo Nath Pal Chowdhry* (5), *Hira Lal Pal* v. *Hills* (6).]

The Hon. *T. Conlan*, for the respondent :—The question as to *res judicata* has not been referred to the Full Bench. The only question is whether these judgments have been properly admitted in evidence. Further, s. 40 of the Evidence Act refers only to suits ; it says nothing about particular issues,

[EDGE, C. J.—We are all agreed that the judgements do not fall within s. 40.]

The present defendant was not a party to the suit of 1874, which was brought against Pan Kuar alone. In that suit she did not represent him in any sense. There is no mutuality, and the judgments are therefore inadmissible. [He referred to the following authorities :—*Gujju Lall* v. *Fatteh Lall* (7), *Kanhya Lall* v. *Radha Churn* (8), *The Baroness Wenman* v. *Mackenzie* (9), *Hira Singh* [10] v. *Ganga Sahai* (10), *Ganga Sahai* v. *Hira Singh* (11), *Gangadhur Roy* v. *Umasoonderi Dassee* (12), *Jogendro Deb Ray Kut* v. *Funindro Deb Roy Kut* (13), *Muhammd Ali* v. *Shurum Ali* (14), *Lalla, Mahadeo Dyal Singh* v. *Chundee Pershad* (15), *Ram Narain Rai* v. *Ram Koomar Chunder Poddar* (16), *Mahendra Lal Khan* v. *Rosomoyi Das* (17) and Taylor on Evidence (8th ed.), ss. 1480, 1495, 1497.]

Mr. *G. E. A. Ross*, for the appellants, in reply.

JUDGMENTS.

EDGE, C. J.—In this suit the plaintiff claims certain property as the heir of one Hanuman Singh, alleging that Pan Kuar, who was the wife of Hanuman Singh, never had a son to Hanuman Singh ; and further that if she did, then the defendant Dalip Narain Singh is not that son, but is one Radha Kishen, the son of Narsingh Sewak.

The defendant Dalip Narain Singh, on the other hand, alleges that he is the son of Pan Kuar by Hanuman Singh, and has tendered in evidence in support of that case a judgment of this Court of the 7th December, 1874 which was delivered in a suit between the present plaintiff and Pan Kuar relating to the property, in which suit Pan Kuar

(1) 3 B. 3. (2) 22 W.R. 365. (3) 8 A.W.N. (1888), 242.
(4) 4 A.W.N. (1884), 61. (5) 13 C. 352. (6) 11 C.L.R. 528.
(7) 6 C. 171. (8) 7 W.R. 338. (9) 5 E. & B. 447.
(10) 6 A. 322. (11) 2 A. 809. (12) 7 W. R. 347.
(13) 14 M.I.A. 376. (14) 8 W.R. 422. (15) 25 W.R. 57.
(16) 11 C. 562. (17) 12 C. 207.

defeated the plaintiff's claim by showing that she had had by Hanuman Singh a son called Dalip Narain Singh who was then living. Dalip Narain Singh was not a party to that suit.

The defendant Dalip Narain Singh also tendered in evidence a judgment of an Azamgarh Criminal Court of the 31st March, 1884, in a suit in which he was prosecuted as Radha Kishen, the son of Narsingh Sewak, and in which the Criminal Court found that the Radha Kishen, the son of Narsingh Sewak, and died sometime before the date of the alleged crime; and expressed an opinion that the now plaintiff, who was not the prosecutor, had got up the case.

[11] Mr. *Ross*, on behalf of the defendant, contended that the judgments in question were admissible under s. 40 of the Indian Evidence Act, 1872, as evidence of the defence of *res judicata*, or, if not admissible on that ground, then that they were admissible under s. 43 of the Indian Evidence Act, 1872, coupled with s. 9, 11 or 13 of that Act.

Mr. *Conlan*, on behalf of the plaintiff, contending that they were not admissible, objected to their admission as evidence on the record for any purpose. In the course of the arguments before us reference was made by Counsel to cases decided in England on the English law of evidence, to cases decided on appeal from India by the Judicial Committee of the Privy Council, and to cases decided in India and others subsequent to the passing of the Indian Evidence Act, 1872. It was suggested from the Bench that a discussion as to what was the Muhammadan law of evidence, which it was said formerly prevailed in the district of Gorakhpur, would throw some light on the questions before us. As it is the Indian Evidence Act, 1872, which alone, in my opinion, we have to consider and construe in this reference, it appears to me to be unnecessary to express any opinion as to whether or not these judgments or either of them would be admissible if we had to apply the English or the Muhammadan law of the evidence, and that an enquiry into what may or may not have been the law of evidence in the district of Gorakhpur at a time or times more or less remote prior to the passing of the Indian Evidence Act, 1872, would throw no light on the construction of the sections to which reference has been made, and would be irrelevant. It would, it appears to me, be still more irrelevant to enter upon a discussion as to whether or not the law of evidence as it is or was administered in England is or was consistent with common sense and justice, or to consider whether or not the Muhammadan law of evidence would commend itself to one who had to act according to equity and good conscience.

No doubt cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England [12] or of other countries. In such cases we have to see how far such law was founded on common sense and on the principle of justice between man and man, and may safely afford guidance to us here, but this is not in my opinion one of those cases.

As all of us on the Bench are clearly of opinion that neither the previous civil or criminal proceedings can operate as *res judicata* in the suit, I shall proceed to consider the second ground on which it has been contended that the judgments in question are admissiable in evidence.

As I read s. 43, a judgment which does not come within s. 40 or s. 41 or s. 42 is irrelevant unless either the existence of the judgment is in issue in the case, or the existence of the judgment is relevant under some other provision of the Act. It is admitted here on all hands that the existence of neither of the judgments in question is in issue in the suit.

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In my opinion the judgment in the criminal case is not a relevant fact within the meaning of s. 8 of the Indian Evidence Act. So far as that judgment referred to Palakdhari Singh it is merely the expression of the opinion of the Magistrate as to the conduct and motives of a person who was not a party to the proceeding before him, and was not entitled to be heard in the case.

I shall now proceed to deal with s. 9 of the Indian Evidence Act, and I propose to consider whether either of these judgments are necessary in this suit, for any of the purposes referred to in s. 9. If they are not necessary in that sense they are not relevant under that section. I cannot see any fact in issue or relevant fact to explain or introduce which either of these judgments is necessary. What inference is suggested by any fact in issue or a relevant fact here which is either supported or rebutted by the existence of either of the judgments in question?

The facts in issue are, is the defendant the son of Pan Kuar by Hanuman Singh, or is he Radha Kishen, the son of Narsingh Sewak? I fail to see how the existence of either of these judgments is an inference suggested by either of those facts or by any relevant [13] facts in the suit. These judgments might possibly suggest an inference as to the truth or otherwise of the plaintiff's case, but that alone would not bring them within the words in s. 9 which I am now considering.

Can either of those judgments be said to "establish the identity" of the defendant? I think not. The judgment of this Court of the 7th December, 1874, at the furthest merely shows that in the opinion of Mr. Justice Turner and my brother Brodhurst, Pan Kuar had a son by her deceased husband Hanuman Singh, who in her pleadings in that case was called Dalip Narain Singh. Even if that judgment was evidence of *res judicata*, it would not, so far as I can see, establish the identity of the present defendant, Dalip Narain Singh, with the son of Pan Kuar by Hanuman Singh. Nor can I see how the judgment of the Azamgarh Criminal Court of the 31st March, 1884, establishes for the purposes of this suit the identity of the defendant. It has not been suggested that any portions of s. 9 other than those to which I have referred could apply to either of these judgments. I entirely agree with the opinion of Sir Richard Garth, C.J., and Mr. Justice Jackson in *Gujju Lall* v. *Fatteh Lall* (1) that a judgment is not a fact within the meaning of s. 11, and I have nothing to add to the reasons given by them on that point.

As to s. 13, I entirely agree with the majority of the Full Bench of the Calcutta Court in *Gujju Lall* v. *Fatteh Lall* (1) and with Sir Arthur Collins, C. J., and Muttusami Ayyar, J., in *Ramasami* v. *Appavu* (2), that a judgment as to whether a certain person was or was not the heir to another is neither a transaction nor a fact within the meaning of s. 13. I think, however, as did Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (3), that the majority of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1), put too narrow a construction on the word "right" in s. 13, and that "right" there includes not only incorporeal rights but a [14] right of ownership. There are no words in s. 13 which could, not be applied to a right of ownership, but it is difficult to see what could within the meaning of s. 13, clause (*a*), be a "transaction by which the right" of a man to have it declared that he is the son of another man out of a particular woman, or that he is not some other man, could be said to be

(1) 6 C. 171. (2) 12 M. 9. (3) 10 B. 439.

"created" or "modified." Whatever be the meaning of the word "right" in clause (*a*) of s. 13, the meaning of the word "right" in clause (*b*) must according to the principles of construction be the same. 1889 APRIL 2.

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In my opinion a previous litigation, although not between the same parties, may be a particular instance within the meaning of s. 13 (*b*) in which the right or custom in question in the subsequent litigation "was claimed, recognised or exercised, or in which its existence was disputed, asserted or departed from." The right which was not only asserted but disputed in the suit between the present plaintiff and Pan Kuar, in which the judgment of the 7th December, 1874, was given, was the alleged right of ownership of the then and present plaintiff in the property now in suit. Whether or not that right then existed depended on the question whether Pan Kuar had not a son then living by Hanuman Singh. She said she had, and that his name was Dalip Narain Singh.

It appears to me that the proper evidence of that particular instance is the record in that suit, and not the judgment alone of the 7th December, 1874, and that the record in that case may be admitted in evidence under s. 13 (*b*), quite independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed. I think, however, that the reasons given in the judgments in that suit for the decree then cannot be considered in this suit; otherwise it might be necessary in this suit to try the former suit over again in order to see what value should be attached to the conclusions of fact or law of the learned Judges in that case. Indeed, if their reasons for the judgments which they delivered had to be considered, it might be necessary to go further. Assume that Mr. Justice Turner and my brother Brodhurst had based their **[15]** conclusions on facts on the evidence of two witnesses in that suit, and these two witnesses were subsequently convicted of perjury in respect of the evidence on which Mr. Justice Turner and my brother Brodhurst solely relied, it might be necessary also to try over again the supposed perjury case.

I have felt myself compelled to dissent from much of the judgment of the majority of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1), and I have done so although I feel the highest respect for the opinions of the Judges who constituted that Full Bench. The case of *Surender Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (2) does not, I think, directly bear upon the case now before us, but I may say that if I had had to decide the question there, I would probably have come to the conclusion that the decree, the admissibility of which was then under consideration, was not admissible in evidence in that case. In some of the cases decided since the passing of the Indian Evidence Act, 1872, in which decrees, judgments or evidence of judicial proceedings not *inter partes* have been admitted, I can only hazard a surmise as to the section or sections of the Indian Evidence Act, 1872, under which they were admitted.

In the case of *Rameshur Persad Narain Singh* v. *Kunjbehari Patuk*(3), which was an appeal to Her Majesty in Council from a decree of the Calcutta High Court of the 18th August, 1874, reversing a decree of the Subordinate Judge of Gya of the 31st July, 1873, the Judicial Committee of the Privy Council admitted in evidence the proceedings in a case in the criminal Court of zila Berar in which the owners of Chabal had prosecuted some ryots of Mahool in consequence of their having closed a *khanwa*

(1) 6 C. 171. (2) 13 C. 352. (3) 6 I.A. 33.

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from Mahool to Chahal, which led to a *razinamah* being come to between the taluqdars of the two mauzas.

One of the questions in the appeal before the Judicial Committee was as to the character of the reservoir and watercourses then in dispute, and the circumstances under which they had been presumably created and actually enjoyed. As to the *razinamah* the Judi-[16] cial Committee said: "It was objected that this *razinamah* does not bind the proprietor of Mahool, but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water." Apparently those proceedings and the *razinamah* in which they resulted would be admissible under s. 9 as evidence of facts necessary to explain or introduce a fact in issue there.

The record of the proceedings in the Criminal Court in 1884 which the Judicial Committee admitted in evidence might be admissible, under s. 9 or under s. 13 (*b*).

In *Raja Run Bahadur Singh* v. *Musammat Lucho Koer* (1), the Judicial Committee would possibly have held that the record in the rent-suit, of which the judgment referred to at page 38 formed part, was admissible under s. 13 (*b*). In *Hunsa Koer* v. *Sheogobind Raut* (2) Glover and Mitter, JJ., in 1875 admitted two decrees in rent suits in which the plaintiff in the suit before them had sued certain ryots. One of those decrees was an *ex parte* decree.

It could not have been the intention of the Legislature in framing s. 13 that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, unless he showed that the other party to the suit had recognised or had exercised or had had exercised against him that custom, or that such party could not give in evidence the record of a suit in which such custom had been claimed and recognised without showing that the former suit was *inter partes*. It might possibly be suggested that a custom, to come within s. 13, must be a public custom and not a quasi-private custom, such as the custom of an estate, or, to take an example from England, the custom of a particular manor. If such a suggestion were well founded, then, according to the principles of construction, a right to be within s. 13 must also be a public right, which was not the opinion of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (3). Although I always have a feeling of diffidence in referring to judgments delivered by me or to which [17] I was a party as authorities, still I may say that my brother Tyrrell, and I, having s. 13 (*b*) in our minds, held in *Gur Dayal Mal* v. *Jhandu Mal* (4) that evidence could be given of instances in which a purely local custom was recognised in suits not *inter partes*. If we there correctly interpreted the law, I cannot see why a different rule should be applied when an incorporeal right or a right of ownership is in question. If the Legislature intended that there should be any such distinction, I would have expected such distinction to have been made patent in s. 13.

As was pointed out by Sir Michael Westropp, C. J., in *Naranji Bhikhabhai* v. *Dipa Umed* (5) Sir Richard Couch, C. J., had in *Neamut Ali* v. *Gooroo Doss* (6) referring to s. 13 of the Indian Evidence Act, 1872, held that "the word transaction is certainly large enough to allow the

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(1) 11 C. 301. (2) 24 W.R. 431. (3) 6. C. 171.
(4) 8 A.W.N. (1888), p. 242. (5) 3 B. at p. 5. (6) 22 W.R. at p. 366.

proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such a weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used."

I shall now refer very shortly to the other Indian cases which have been pressed upon our attention, although some of them were prior to the passing of the Indian Evidence Act, 1872.

In *Kanhya Lal* v. *Radha Churn* (1) it was contended on the part of the defendants there that the judgment then under consideration was a judgment *in rem* as to the adoption. That it clearly could not have been. The question, however, which was submitted to the Full Bench of the Calcutta Court was a wider one, and the Full Bench held that the judgment was not admissible in evidence at all. That case was decided before the passing of the Indian Evidence Act, 1872. That case was much pressed upon our attention as showing what the views were of Sir Barnes Peacock, C. J., for whose decisions we all hold the highest respect. It was also contended here that that Full Bench judgment was approved by the Judicial Committee of the [18] Privy Council in *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (2). That is hardly a correct view of the judgment of the Judicial Committee. The questien before the Judicial Committee was whether a judgment in former suit not *inter partes*, in which issues of legitimacy and a particular form of marriage were involved, was a judgment *in rem* and as such pleadable in bar of the subsequent suit which was before the Judicial Committee. The Judicial Committee adopted with approval so much of the judgment of the Full Bench in *Kanhya Lall* v. *Radha Churn* (1) as decided that the decree in question was in no way binding upon the plaintiff in the Full Bench case. The Judicial Committee confined themselves to the consideration of the question whether the judgment in question could operate as a judgment *in rem*, and apparently expressed no opinion as to whether that judgment was or was not admissible in evidence on other grounds and for what it was worth.

In *Mohamed Ali* v. *Shams Ali* (3), Phear and Dwarkanath Mitter, JJ., excluded a judgment in a previous suit not *inter partes* apparently on that ground. That case was also before the passing of the Indian Evidence Act, 1872. Those learned Judges, although they rejected that judgment as evidence, pointed out that that judgment did not support the inference which had been drawn from it. In any case they were bound by the judgment of the Full Bench of their own Court reported in *Kanhya Lall* v. *Radha Churn* (1) and may have been following it.

In *Ram Narain Rai* v. *Ram Coomar Chunder Podder* (4), Tottenham and Agnew, JJ., held that the Full Bench decision in *Gujju Lall* v. *Fatteh Lall* (5) precluded them from holding that the decrees in question before them were admissible, and in *Mahendra Lall Khan* v. *Rosomoyi Dasi* (6) they followed the Full Bench decision of their own Court in *Gujju Lall* v. *Fatteh Lall* (5).

In *Hira Singh* v. *Ganga Sahai* (7) all that the Judicial Committee of the Privy Council decided was that an award did not [19] confer on a person who was not a party to the arbitration a right which he did not possess by law, and that he could not avail himself of that award.

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(1) 7 W. R. 338. (2) 14 M. I. A. 376. (3) 8 W. R. 422. (4) 11 C. 562.
(5) 5 C. 171. (6) 12 C. 207. (7) 6 A. 322.

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For the reasons already stated, I am of opinion that the record of the previous suit in which the judgment of this Court of the 7th December, 1874, was delivered, but not the judgment alone, is admissible under s. 13 (*b*) for the purposes and to the extent already indicated.

As to the judgment of the Azamgarh Criminal Court of the 31st March, 1884, I fail to see how it can be brought within any of the sections to which I have referred.

I would not have referred to any of the cases decided prior to the coming in force of the Indian Evidence Act, 1872, if it had not been that great stress was laid upon them in the course of the arguments.

STRAIGHT, J.—The first of the two questions to be determined under this reference to the Full Bench, putting it in its broadest aspect, is whether in the present suit between the plaintiff Palakdhari Singh, claiming the estate of Hanuman Singh, deceased, as his heir, by ejectment of the defendant Dalip Narain Singh therefrom, the judgments and decrees of the Subordinate Judge of Gorakhpur and of this Court in appeal in a suit in which Palakdhari Singh was plaintiff and Musammat Pan Kuar was defendant, are relevant facts and as such admissible in evidence against Palakdhari Singh. In other words, is the defendant, who was no party to such former suit, entitled to use those judgments and decrees against the plaintiff? For the purpose of determining this question it must be taken that Dalip Narain Singh, the defendant, *is* the son of Musammat Pan Kuar by Hanuman Bakhsh Singh, and *is* the same Dalip Narain Singh whose name was mentioned in the former litigation. I may premise by saying that, although the argument of this point before the Full Bench took a much wider scope, it seems to me that the decision of it must be looked for and found in the Evidence Act in force in this country, and that we really have nothing to do with the principles of the English, or of any [20] other law, which might apply, if that Act were not in force and binding upon us. We must take that Act as we find it and none the less give effect to it, because upon a rational and ordinary construction of its provisions according to well-recognised rules of interpreting statutes they appear to sanction something Courts in England or other systems of law would not permit, or to depart from principles adopted by those Courts or the Courts of other countries.

Before dealing with the legal question which I have already stated, it will be convenient very briefly to state the facts that show the mode in which it arises. It is conceded that but for the existence of a son born to Hanuman Bakhsh Singh by his widow Musammat Pan Kuar, the plaintiff Palakdhari Singh was, during the lifetime of Musammat Pan Kuar, the immediate next reversioner to the estate of Hanuman Bakhsh Singh, and, she now being dead, is the present heir thereto. The suit brought by Palakdhari Singh in 1873 was in his character of next presumptive reversioner to the estate to Hanuman Bakhsh Singh, and he sought, on the strength of his right as reversioner, to have it declared that the defendant Pan Kuar was not pregnant at the death of Hanuman Bakhsh Singh, and that she had not, as alleged by her, given birth to a male child begotten by his seed. In passing, I may observe that had the Specific Relief Act been in force at that time, I do not think it could be denied that such a suit was of the nature contemplated by s. 42, just as much as if Musammat Pan Kuar had asserted an adoption of a son to her deceased husband and the plaintiff had sought to have such adoption declared invalid. The allegations and claim of Palakdhari Singh were met by Musammat Pan Kuar by a defence, wihch according to my view

in substance came to this: "You are not a reversioner and cannot obtain the declarations you ask, because a son has been born to Hanuman Bakhsh Singh, whose existence precludes you." In other words, and to put my view into more specific form, Musammat Pan Kuar asserted the right of Dalip Narain Singh as the living son of Hanuman Bakhsh Singh to defeat the plaintiff's suit just in the same way as she might, pursuing the [21] analogy of an adoption, have alleged the existence of an adopted son and the validity of such adoption for a similar purpose. It is to be noted that in the former suit the second issue framed for trial by the Subordinate Judge was "Is Dalip Narain Singh the son of Hanuman Bakhsh Singh or not?" and that upon this issue both he and this Court found that the plaintiff had failed to establish his claim to a declaratory decree, because it was proved that Musammat Pan Kuar had had born of her body to her deceased husband a son named Dalip Narain Singh. So much for the former suit, and now let me turn to the one with which we are more immediately concerned. Musammat Pan Kuar died in October, 1879, and Palakdhari Singh now comes into Court against Dalip Narain Singh (I so call him as a matter conceded for the purpose of argument) and he asserts in substance—I only state what is material to this discussion:—"I am the heir to the estate of Hanuman Bakhsh Singh, his widow, Musammat Pan Kuar, now being dead, for he never had any son, and the defendant states what is false when he says he had and that he is such a son; therefore eject him and give me possession of Hanuman Bakhsh Singh's estate." The Subordinate Judge, whose judgment is under appeal, laid down among others the following issue:—"Whether after the death of Hanuman Singh any son was born of Musammat Pan Kuar or not," by which I understand him to mean born of Pan Kuar by Hanuman Singh, and he has found that there was not. I do not think I am misstating the matter therefore when I say that the main question common to the suit of 1873 and the present suit was and is, did Musammat Pan Kuar bear a son to Hanuman Bakhsh Singh, whose right as such son excluded and excludes the plaintiff from any interest in the estate of Hanuman Singh?

It is in respect of this question in issue between the parties that the defendant seeks to put in as part of his evidence the judgments and decrees in the suit of 1873 between Palakdhari Singh, the persent plaintiff, and Musammat Pan Kuar. It was argued primarily for the defendant that they consituted matterials sufficient to support the plea of *res judicata* taken in the statement of [22] defence, and of themselves were a conclusive answer to the suit. This point is not directly before us under this reference, but I can only repeat here what I said in the Division Bench, that, accepting s. 13 of the Civil Procedure Code as embodying the rule to govern in such matters, I cannot hold that the present defendant can in a legal sense be said *to claim under* his mother, Musammat Pan Kuar; on the contrary, if his case is true, he has all along had a full proprietary estate as heir of his father, and his mother Pan Kuar never had any interest therein. Upon the plea of *res judicata* therefore I cannot hold in favour of the defendant, and in this view anything more than incidental reference hereafter to the terms of s. 40 of the Evidence Act becomes unnecessary. It has not been contended for the defendant that s. 41 of the same Act has any application, which is obvious from its terms, and a like remark applies to s. 42, which is concerned with matters alien to those involved in the present litigation. The whole point for determination finds down to this, as the judgments and decrees of 1874 within the proviso to s. 43, that is to say, is the *existence* of those judgments and decrees a fact in issue, or is it relevant

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under some other provision of the Evidence Act? The existence of the judgments and decrees is not a fact in issue, because it is conceded; indeed, the plaintiff himself in his examination as a witness for the defendant has admitted the insitution of the suit of 1873, the objects he contemplated by it and the result of the litigation, so that even were I driven to hold that the judgments and decrees of 1874 were themselves inadmissible, the fact would remain that the plaintiff has himself admitted that he brought a suit in 1873, in which he sought to prove that Musammat Pan Kuar had not been delivered of a child by her husband Hanuman Singh, and that he was worsted. As I said when the appeal was orginally before my brother Mahmood and myself, I very much doubt whether in face of the plaintiff's own admissions there was any necessity for the defendant to press to have the judgments and decrees of 1874 themselves made part of the evidence in the cause, for it is to be observed that the question under s. 43 is not whether those judgments and decrees in themselves are relevant, but whether their *existence* is relevant. Now the plaintiff [23] having, without objection to the propriety of the question put to him, admitted their existence, the defendant had according to my view got from him all that he could get from the judgments and decrees themselves, and their production will carry his case no further. In passing, it will be convenient to look at the plaintiff's own admission, apart from any consideration as to the admissibility of the judgments and decrees, and see what value and bearing it has upon the questions of fact involved in the present litigation. Now it seems to me that it might have been fairly urged for the plaintiff that it was competent to prove on his behalf, and as a fact he did say so, that immediately he ascertained Musammat Pan Kuar was asserting that she had been delivered of a posthumous child to her deceased husband, he took measures to challenge her assertions in a Court of law, as showing conduct on his part which was consistent with the allegations put forward by him in his present suit and as indicating his *bona fides* in again coming into Court. But it seems to me, if I am right in this view, then it was equally competent for the defendant to dilute the effect of this statement by eliciting the result of such former litigation. Consequently I am not prepared to say that the statements of the plaintiff in these respects made in the course of his examination in the Court below are irrevelant to the matters in issue, apart altogether from the further question whether the defendant was entitled to make the judgment and decree of 1874 part of his evidence. It does not appear to me to inflict any hardship on the plaintiff, who was a party to those former proceedings, that, if he is allowed to appeal to his action in 1873 as indicating his vigilance, expedition and *bona fides* in questioning Pan Kuar's proceedings, he should, while having the benefits so far, be subjected to the disadvantage of the fact that two Courts of law found that Pan Kuar had had a child. But the exigencies of this reference and the view expressed by my brother Mahmood in the Division Bench require that I should go further and determine, first, whether the judgments and decrees of 1874 are themselves revelant, and secondly, if they are, to what extent may they be used. As to the first I have already pointed out that so far as s. 43 is concerned it is the [24] *existence* of the judgments, which must be a fact in issue or relevant fact under some other provision of the Act. In the case here the existence of the judgments and decrees of 1874 is not a fact in issue, and consequently I have to see whether there is any other section of the Act which applies to them and makes them relvelant. The argument at the hearing was mainly confined to a discussion of whether they fell within

the term "transaction" or "instance" as used in s. 13. For the defendant it was contended that they represented a transaction, and in support of this view a ruling of Couch, C.J., *Neamut Ali* v. *Gooroo Doss* (1), to which I may add another of the same learned Judge at page 457 of the same volume and of Westropp, C.J., *Naranji Bhikabhan* v. *Dipa Umed* (2), were relied upon; a judgment of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (3) and more particularly a passage at page 310 was also referred to as showing that matter of a similar kind had been treated as part of the evidence in a case. These I may supplement by a ruling of Madras Court in *Ramasami* v. *Appavu* (4). On the other hand, the following cases were cited for the plaintiff as deciding to the contrary: *Gujju Lall* v. *Fatteh Lall* (5), *Surender Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (6), *Ranchhodas* v. *Bapu Narhar* (7), and the first two no doubt go to the fill extent contended for by his learned Counsel. The case in 6 Calcutta is no doubt entitled to the most respectful consideration, and I have read it with the greatest care, and more particularly the judgment of Garth, C. J. I regret I am unable to agree with that learned Chief Justice either in the restricted meaning he attaches to the word "right," as used in s. 13, and in this I am supported by the view of Sargent, C.J., or as to the mode in which he treats the term "transaction." I say it with the most profound respect to him that in that case, as in the argument of the one before us, there has been some confusion in the method in which the question has been discussed. It seems to me the true point is, not that the judgments [25] and decrees themselves are the "transaction" but that the suit in which they were made was a transaction, and that to establish that such a transaction took place they are the best evidence. Garth, C. J., remarks by a somewhat strained use of the word the proceedings in a suit might also be called "transactions." Yet it is worthy of notice that Sir William De Grey, C.J., in the commencement of the written opinion of himself and the Judges in the well-known *Duchess of Kingston's Case* (8), uses the word as if it were a natural and proper expression in connection with such a matter, thus:—"What has been said at the Bar is certainly true as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding on a third." In my opinion the suit of 1873 between the plaintiff and Musammat Pan Kuar was a "transaction," in which the right of the defendant as the living son of Hanuman Singh was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction. I should also have no difficulty, if it were necessary to do so, in holding that the defendant is entitled to put forward the suit of 1873 as an "instance" in which the right of which I have spoken was claimed and recognised. I do not think that in taking this view I am doing any violence to the language of s. 43 of the Evidence Act, which, if I understand it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections *qua* judgments, orders and decrees. But I do not take this to make them absolutely inadmissible, when they are the best evidence of something that may be proved *aliunde*. As I have remarked before, the question is not as to the *existence* of the judgments and decrees of 1874 as a fact in issue or a relevant fact under

(1) 22 W.R. p. 365. (2) 3 B. 3. (3) 11 C. 301. (4) 12 M. 9.
(5) 6 C. 171. (6) 13 C. p. 352. (7) 10 B. p. 439.
(8) 1 Smith's L. C. 760.

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some other provision of the Evidence Act, but whether there was a "transaction" or "instance," in which the right of the defendant was asserted and recognised, of which transaction or instance they are the best evidence.

[26] For this purpose and this purpose only I hold that they may be admitted in the present case, and in this view I am supported by Westropp and Couch, C.JJ., in the cases I have referred to at an earlier stage. No doubt it may be said, as was remarked by Garth, C.J., that in the Bombay case s. 40 of the Evidence Act met the facts there; but be that as it may, the observations of Westropp, C.J., with regard to s. 13 are none the less valuable. As to the case in 22 W. R., 365, it seems to me that the view of Couch, C. J., was directly in accordance, with that I am now expressing. I am accordingly of opinion that the suit of the plaintiff against Pan Kuar was a "transaction," in which the right of the defendant as the living son of Hanuman Singh to proprietary possession of his estates was asserted to defeat the plaintiff's claim, and was recognised by judicial tribunal for that purpose, and that the judgments and decrees are evidence of that transaction. It is enough for the purposes of this reference to decide that they are admissible for the purpose I have mentioned; as to the value to be attached to the evidence, that will have to be determined by the Division Bench disposing of the appeal on the merits.

As to the second question referred with regard to the finding of the Criminal Court in 1874, that Radha Kishen, son of Rai Narsingh Sewak, was dead when that decision was passed, I have had great difficulty in determining this point to my own satisfaction, and it is not without considerable hesitation I have come to a conclusion upon it. But as I think that where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non-admissibility, I have decided to answer the second question in the affirmative. It is clear that no question was put to the plaintiff to elicit from him that he was directly or indirectly responsible for the proceedings in the Deputy Magistrate's Court, nor indeed is there any evidence to show that he was. Moreover, no right was claimed, asserted or recognised in those proceedings, and there is nothing to bring them within s. 13 of the Evidence Act. What actually happened was that one Ramanuj and a person stated to be Radha Kishen, son of Rai Nar-[27] singh Sewak, having been charged by one Sheoraj Kueri with voluntarily causing hurt to him under s. 323 of the Penal Code on a particular day, it was found by the Deputy Magistrate that Radha Kishen, the son of Rai Narsingh Sewak, was dead at the time of the commission by him of the alleged offence, and that the person before him charged as Radha Kishen, son of Rai Narsingh Sewak, was not that person but a person named Dalip Narain Singh. There can be no question that the Radha Kishen, son of Rai Narasingh Sewak, then found to be dead, is the same person the plaintiff in the present suit represents the defendant to be, and one of the crucial questions of facts to be decided by this Court in the first appeal is as to whether the plaintiff has established the identity of the defendant with that person. It will be conceded that if Radha Kishen, son of Rai Narsingh Sewak, is now dead, the defendant cannot be that Radha Kishen, and it seems to me from the way in which the facts shape themselves in this case, the fact of his being dead, if made out, goes to establish the identity of the defendant with the Dalip Narain Singh, who was asserted by Pan Kuar to be her son by Hanuman Singh. If then I may regard the opinion of the Deputy Magistrate that Radha Kishen, son of Rai Narsingh Sewak, was dead at

the time of the inquiry in his Court in March, 1874, as a fact, which I think I may, looking to the terms of s. 3 of the Evidence Act, then pursuing the matter by the light of the facts I have already stated, with regard to the particular facts of the present case, I think I may hold that such fact is one which goes to establish the identity of the defendant with the person he alleges himself to be, or at any rate, it goes to show that he is not the person the plaintiff says he is. I, however, have come to this conclusion with very grave doubt as to its soundness.

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Such are my answers to the two points referred.

BRODHURST, J.—My opinions on the points that have been referred to the Full Bench in this case are in accordance with the judgments of Garth, C.J., Jackson, Pontifex and Morris, JJ., in the Full Bench case of *Gujju Lall* v. *Fatteh Lall* (1), the head-note of which is as follows:—

[28] "A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as a *res judicata*, or as proof of the particluar point which it decides, unless between the same parties or those claiming under them."

In a suit between A and B, the question was, whether C or D was the heir of A. If C was the heir of A, then A was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by X against A and decided against A; and this former judgment was admitted in evidence in the suit between A and B, and dealt with by the Courts below as conclusive evidence against A upon the point so decided."

"*Held* (Mitter, J., dissenting) that the former judgment was not admissible as evidence in the suit between A and B, either as a transaction under s. 13 or as a fact under s. 11 or under any other section of the Evidence Act."

This ruling was followed by the majority of another Full Bench of the same Court, *viz.*, by Petheram, C. J., Wilson, O'Kinealy and Macpherson, JJ., (Mitter, J., alone again dissenting) in *Surender Nath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (2).

All the rulings on either side were apparently considered by the Full Benches of the Calcutta Court, as they now have been considered by the Full Bench of this Court. For the reasons that have been given by Garth, C. J, and Jackson and Pontifex, JJ., I concur in their conclusions, and I therefore hold that neither the judgment of the 31st March, 1884, by the Deputy Magistrate, Pandit Sundar Lal, nor the judgment of this Court of the 7th December, 1874, is admissible in evidence for the purposes mentioned in the referring order.

TYRRELL, J.—I have had an opportunity of reading the judgment in answer to the points referred to the Full Bench, prepared by the learned Chief Justice, and I concur with it entirely.

MAHMOOD, J.—This case is a reference made by my brother Straight with my concurrence to the Full Bench of this Court for determination of two questions of law which arose in the course of [29] the hearing of the case in the Division Bench. Both those questions relate to the rules of the law of evidence now in force in British India as to the admissibility of judgments in evidence, and under the peculiar circumstances of this case are especially important. They have been stated in the order of

(1) 6. C. 171. (2) 13 C. 352.

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my brother Straight dated the 8th January, 1889, I understand those questions to be the following:—

(1) Whether the judgment of this Court, dated the 7th December, 1874, is or is not admissible in evidence as to the question whether or not Musammat Pan Kuar gave birth to a legitimate child by and after the death of her lawful husband, Hanuman Singh.

(2) Whether a judgment of the 31st March, 1884, delivered by Pandit Sundar Lal, Deputy Magistrate, upon a charge against "Ramanuj and Radha Kishen is admissible in the present trial as evidence to show that in the year 1884 the plaintiff was taking certain steps through the instrumentality of a nominal prosecution to make it appear that one Radha Kishen was then a living person or was living at the date of the alleged assault with which that judgment dealt."

These then are the questions referred to the Full Bench, but before it is easy to understand the exact bearing which they have upon the facts of this case, it is necessary to bear in mind the relative position of the parties concerned or referred to as indicated by the following genealogical table:—

- Dilmardan Singh.
  - Balwant Singh (childless).
  - Mahipal Singh.
    - Sarabjit Singh.
      - Hanuman Prasad Singh.
        - Pan Kuar, wife.
          - Dalip Narain Singh (the boy in question).
  - Dirapal Singh.
    - Tej Partab Singh.
      - Palakdhari Singh. (plaintiff).

Hanuman Singh, whose name appears in the above table, was admittedly the owner of the property to which this suit relates, and his permanent residence was in mauza Bansgaon, pargana Sidhwa [30] Zohna, zila Gorakhpur. In 1859 he was married (as the learned Subordinate Judge has found) to Pan Kuar, daughter of Har Sewak Singh, in mauza Sarehri, zila Azamgarh, and her genealogical tree as accepted by the lower Court is the following:—

- Rai Reoti Singh.
  - Rai Beni Dayal Singh.
    - Janki Sewak Singh.
      - Rukmani Sewak Singh.
    - Narain Sewak (childless).
  - Rai Ajudhia Singh.
    - Rai Rago Sewak Singh.
      - Ram Anuj Sewak Singh.
    - Rai Narsingh Sewak Singh (Acharj Kuari, wife).
      - Radha Kishen Singh (son).
      - Sri Newas *alias* Jai Ram.
      - Bankteshar Sewak Singh.
      - Another minor son.
  - Rai Har Sewak Singh. (Musammat Ati Kuar, wife)
    - Pan Kuari, (daughter).

It is also admitted and proved that the aforesaid Hanuman Singh died childless at Bansgaon on the 24th May, 1872, and that upon his death his widow, Musammat Pan Kuar, obtained possession of his estate. She did so upon an allegation that subsequent to the death of her husband she

gave birth to a son by the aforesaid Hanuman Singh on the 31st January, 1873, and that the name given to the child was Dalip Narain Singh. It was indeed upon this state of things that she obtained a certificate of guardianship of the boy sometime before the present plaintiff instituted his former suit.

I have been unable to discover from the record the exact date when this certificate of guardianship was granted, but that certificate must have been granted under Act XL of 1858, because, dealing with the facts of the case, that must be the law in existence applicable to the district of Gorakhpur for purposes of obtaining such certificate. The former suit which was instituted in connection with property left by the deceased Hanuman Singh was instituted by the present plaintiff, Palakdhari Singh on the 9th May, 1873, in which he impleaded Musammat Pan Kuar alone as defendant to the cause, and he did not implead her alleged son, whose name [31] was stated to be Dalip Narain Singh, who is the present defendant-appellant, whose interests are represented by the Collector of Gorakhpur as the Manager of the Court of Wards.

The object of the former suit was to establish the plaintiff's right of inheritance to the estate of the deceased Hanuman Singh upon the allegation that no son of the name of Dalip Narain Singh or any other son was born to the deceased. The suit was dismissed by the Court of original jurisdiction on the 24th January, 1874, it being held in that trial that the birth of a posthumous son to the deceased Hanuman Singh was proved, and that decision was upheld on appeal by this Court by a judgment of the Division Bench of this Court consisting of Turner, J., and my brother Brodhurst, dated the 7th December, 1874.

The first question in the case as enunciated by me relates to the admissibility of this last judgment in evidence in this cause for the purpose of proving that Musammat Pan Kuar, after the death of her husband Hanuman Singh, gave birth to a legitmate child who was named Dalip Narain; and it seems to me clear that if that judgment is held to be admissible in evidence, for exactly the same reasons, the judgment of the first Court in that case dated the 24th January, 1874, should also be admissible in evidence in this present litigation. For, in this litigation the most important issue is whether or not Musammat Pan Kuar gave birth to a posthumous son of legitimate descent from the deceased Hanuman Singh.

I intend to deal with this question first because much of what I have got to say thereupon will also apply to the conclusion at which I arrive upon the second question as enunciated by me.

Taking this view of the matter, and considering the difficulty which has arisen in consequence of the case-law to which my brother Straight in his order of reference to the Full Bench has alluded, I think it is due to the respect which this Court should show to the two Full Bench rulings of the Calcuttu High Court and to the ruling of the Bombay High Court mentioned by my brother Straight, that I should, before expressing any opinion other than that held or indicated in those cases, resort to a full statement [32] of the steps of my reasoning which will render my conclusions intelligible upon the points referred to the Full Bench in this case.

Now I hold it true, as a sound doctrine of international law, that the acquisition of territory, whether by conquest or cession, does not abrogate the law of the land *ipso facto*, whether such law is the substantive law or the adjective law as understood by jurists. So far as I am aware, no civilized nation has ever dissented from this doctrine of the comity of

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nations. The present litigation has arisen in connection with property situate in the district of Gorakhpur, which at one time formed the territories of the Nawab Vazir of Oudh, over which he had full sovereignty. It was not till 1801 that by a treaty, into which His Highness entered, this territory came under British sovereignty. That treaty is printed in a book published by authority of which I sitting here can take judicial notice, *viz.*, Aitchison's Treatise, vol. II, p. 100. The treaty is dated the 10th day of November, 1801, corresponding with the 2nd Rajab, 1216 Hijri. Up to the date of the cession therefore, there can scarcely be any doubt that the law of evidence in judicial tribunals was the Muhammadan law of evidence, and that if that law is not abrogated it would be that law which would govern this case. Such abrogation can take place after acquisition of sovereignty by any legislative authority appointed by the sovereign authority, and we have to discover whether there has been such abrogation.

If there had been no such abrogation or modification of the law, I should have had very little hesitation, as I have already indicated, in applying the Muhammadan law of evidence to the admissibility of the two judgments to which this reference relates.

I am, however, not called upon to do so because since the acquistion of sovereign rights by the East India Company to whom the Nawab Vazir of Oudh ceded this territory, there has been legislation which has altered the rules of evidence relating to the matters of the kind involved in this case.

The history of the legislation which has taken place is best described in Mr. Whitley Stokes' edition of the Anglo-Indian Codes, [33] vol. II, page 111, etc., and in the Introduction to Mr. Field's Commentary on the Evidence Act. He says at page 17 of the Introduction, in reference to the historty of the law of evidence in British India :—

"For the Courts outside the presidency towns and not established by royal charter, no complete rules of evidence were ever laid down or introduced by authority. There were indeed a few occasional directions, partly as to procedure, partly as to evidence, to be met within the old Regulations; and some few rules embodying the most striking reforms then recently introduced in England were inserted in Act XIX of 1853, the operation of which was, however, restricted to the Bengal Presidency. Two years afterwards Act II of 1855 was passed. This Act reproduced with some additions all the reforms advocated by Mr. Bentham and carried out in England by Lords Denman and Brougham: but nearly all its provisions pre-supposed the existence of that body of law upon which these reforms and amendments were ingrafted ; and yet it was authoritatively laid down that the English law of evidence was not the law in the mufassal. It was also further decided that the rules of evidence to be found in the Hindu and Muhammadan law were not binding on the mufassal Courts.

"The real state of the case would then seem to have been this. All persons admitted that the Muhammadan law of evidence was not to be followed. The whole of the English law of evidence had never by any general enactment been rendered applicable to India, though some portions of it, in a modified shape or otherwise, had been expressly incorporated in the statute law of this country, Act II of 1855 being the largest entire specimen of this fragmentary legislation, while other fragments were to be found scattered through the statute book, more especially in the Codes of Civil and Criminal Procedure. Where the statute law was silent it

devolved upon the higher Courts to supply the deficiency with case-made law, from which, as is well known, nearly the whole of the English unwritten code has been constructed. In laying down preccedents and settling disputed points, these higher Courts [34] carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country and their modifying effect on principle of general application: and where, with due regard to these considerations, they found themselves able to follow the English law of evidence, they were generally willing to take it as their guide. The whole of the Indian law of evidence might then have been divided into three portions, *viz.*, one portion settled by the express enactments of the Legislature; a second portion settled by judicial decision; and a third or unsettled portion, and this by far the largest of the three, which remained to be incorporated with either of the preceding portions."

I do not wish to go further into the history of that legislation because the Evidence Act, I of 1872, in s. 2, clause (1), distinctly states that all rules of evidence shall be repealed if not contained in any statute, act or regulation in force in any part of British India.

In this part of British India of course the Evidence Act, I of 1872, is in force, and I hold that the questions raised in this case must be determined according to the provisions of that enactment.

In interpreting those provisions, however, I confess that so far as this case is concerned, my difficulty arises not so much from the statute itself as from the case-law upon the subject of this reference.

In this case of *Gujju Lall* v. *Fatteh Lal* (1) the majority of a Full Bench of the Culcutta High Court held that a former judgment which is not a judgment *in rem*, nor one relating to matters of a public nature, was not admissible in evidence in a subsequent suit, either as a *res judicata* or as proof of the particular point which it decides, unless between the same parties or those claiming under them, and the main reason was that the former judgment was not admissible in evidence either as "*a transaction*" under s. 13, or as "a *fact*" under s. 11, or under any other section of the Evidence Act. From this conclusion Mr. Justice Romesh Chander Mitter dissented. Similar is the effect in principle [35] of another Full Bench ruling of the same Court in *Surender NathPal Chawdhry* v. *Brojonath Pal* (2), which has been relied upon on behalf of the respondent in this case. On the same side of the argument a ruling of the Division Bench of the Bombay High Court in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (3) has been cited.

I have no desire to criticise minutely the *ratio decidendi* of the rulings to which I have referred out of respect for the eminent Judges who took part in them both in Calcutta and Bombay. But I think it is nothing more nor less than a duty which I owe to my position here as a Judge of this Court to explain the reasons why I find it impossible to agree in the conclusion at which those Courts arrived.

In order to do so I am afraid it is necessary to refer to the elementary principles upon which the receptive power of Courts of Justice in British India must depend, for purposes of receiving in evidence, adjudications upon questions of fact with reference to which such statements may be desired to be produced before such tribunals.

I am of opinion that by dint of s. 2 of the Indian Evidence Act (I of 1872) the rules of evidence recognized either by the common law of

(1) 6 C. 171. (2) 13 C. 352. (3) 10 B. 439.

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England, or by the statute law of that country, or by the Muhammadan law of evidence existing at the date of the cession of the Gorakhpur district in the year 1801, have ceased to exist as the law of the land. The rules of evidence which we are bound to administer are contained in the Evidence Act (I of 1872), and I say so because of the preamble to that enactment, which shows that it is not merely a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of s. 2 of that enactment.

But notwithstanding this opinion I cannot help holding that in cases of doubt or difficulty over the interpretation of any of the sections of that enactment we should refer for help both to the case-law of the land which existed before the passing of the Act, and also **[36]** to juristic principles, which only represent the common consensus of juristic reasoning.

It is in this aspect of the case that I am afraid that I shall take up some of the time of my colleagues, and I feel myself called upon to do so because I cannot help thinking that the two Full Bench judgments of the Calcutta High Court and the Division Bench judgment of the Bombay High Court abovementioned have been much too much influenced by the doctrines of the English law of evidence applicable to such points.

Now as I understand the English law, that system of the law of evidence has by its special technicalities rendered judgments such as those involved in this case inadmissible in evidence for reasons better known to English lawyers who have founded the doctrine than to me who can only claim a slight knowledge of those doctrines. But however slight that knowledge may be, I know enough of that system to feel sure that it does not permit of the admissibility of the evidence furnished by judicial adjudications except when such previous adjudication operates either as *res judicata* or relates to a custom or right of a public nature. Judgments of that character cannot of course operate as *res judicata* in the English system of law or any other unless they are between the same parties or those whom they represent. But the question arises as to judgments which are not between the same parties but which represent solemn adjudications by Courts of justice as to the facts in issue in the trials which result in the judgments sought to be produced as evidence in later trials where the same or similar questions arise, but where the absolute identity of the opposing parties is wanting.

The English law says as to the admissibility of judgments what the Latin adage intends—*aut Caesar aut nullus*, *i. e.*, either the judgments sought to be produced in evidence should be conclusive *inter partes* or they should not be admitted in evidence at all, unless they relate to a public custom or right, or the *factum* of judgment be a matter in issue.

If this is a right interpretation of the English law of evidence, I am of opinion that that law, so far as this point is concerned, is **[37]** probably an unreasonable law, and certainly not fitted to be imported into this country in the absence of express legislative authority.

I have asked myself the question more than once where such legislative authority exists. To that question no answer is to be found in the argument which was addressed at the Bar, or in the statute law of the land, beyond the dicta of the learned Chief Justice of Bombay in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (1), where he said :—

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(1) 10 B. 439.

"It is true that although the Code is, in the main, drawn on the lines of the English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it; but in any case, had such an important and radical change been intended, as Couch, C. J., in the case of *Neamut Ali* v. *Gooroo Doss* (1) admits is the necessary result of construing 'transaction' in s. 13 as including judgments, we should have expected it to be carried out by a special section framed for that purpose amongst those relating to judgments."

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Now with profound respect for the learned Chief Justice of Bombay I find myself wholly unable to agree with him in his assumption that the English law of evidence was ever the law of the mufassal in British India. And it follows that no express legislation was necessary to abrogate that which never was the common law of the land. In the absence of express legislation the rule of justice, equity and good conscience would be the doctrine, but certainly not the common law of England, since the common law if any would be the Muhammadan law as I have already indicated. What then were the requirements of the rule of justice, equity and good conscience before the Evidance Act? They were rules of common sense, not of the common law of England so far as this part of the country is concerned unless those rules appeal to the sense of justice, equity and good conscience which the Judges hold conformable to that doctrine.

This being my view, I cannot describe the requirements of the doctrine to which I have just referred better than by appealing to [38] common sense as best represented by Bentham, the father of English Jurisprudence as he is well called, and read out, even at the risk of prolixity, a long passage from his writings with all the greater pleasure because those writings are not easily accessible to the Courts subject to the jurisdiction of this Court or others interested in this question.

At page 127 of the seventh volume of the complete edition of his works, in dealing with the *rationale* of evidence, *viz.*, the principles upon which matters relating to the admissbility and the weight of evidence must depend, he defines or rather explains what the words "adscititious evidence" mean. He says at page 127:—"What is meant by adscititious evidence, as also in what its characteristic infirmity consists, has been seen in the preceding chapter. It remains to show what is the part which ought to be taken in relation to it by the legislator and by the Judge.

"Adscititious evidence divides itself into two kinds which are not indeed mutually exclusive of one another, but which, for reasons that will appear as we advance, require to be distinguished.

"(1) Evidence *inter alias*: evidence already exhibited *coram judice*, in the character of judicial evidence, but in a cause between other parties, *i.e.*, in which the list of the parties on both sides was (either in the whole, or as to some one or more of the persons contained in it) different from the list of the cause in question, the posterior cause.

(2) Evidence *alio in foro*: evidence already exhibited in the character of judicial evidence, but in a cause which (whether carried on by the same list of parties, or by a list in any respect different) was carried on before a different tribunal: understand, by a tribunal in which the rules of evidence are known or suspected to differ more or less from those observed in the tribunal in qestion."

After having so described the department of adscititious evidence, I have to quote a passage of some length from Bentham again, which will,

(1) 22 W.R. Civ. Rule. p. 365.

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I hope, not be considered too prolix, or at least not [39] regarded as not important enough to have been read out. The learned author says at page 170 of the same volume :—

"Few questions have been more agitated in English law than those which relate to the admissibility of and the effect to be given to different articles of adscititious evidence. The subject occupies sixty closely printed nominal octavo, real quarto pages, in Phillipps' Exposition of the Law of Evidence. Of a subject thus extensive, more than a very general view cannot be expected to be given in the present work: nor is it necessary for our purpose to go beyond the more prominent features.

"One remarkable circumstance is that the whole body of the rules of law relating to the subject are with a very small number of exceptions, exclusionary. Either the decision given in a former cause is said not to be evidence, and then it is that decision which is excluded: or it is said to be conclusive evidence, and then an exclusion is put upon the whole mass of evidence however constituted, which might have been capable of being presented on the other side.

"In saying this enough has already been said to satisfy any one who has assented to what was said in a former chapter concerning adscititious evidence, that nearly the whole of the established rules on this subject, except to the extent of the single and very limited case in which it was there seen that exclusion is proper, are bad. Accordingly the rule that a judgment directly upon the point is conclusive in any further cause between the same parties is a good rule ; it is almost the only one that is.

"Even this rule is cut into by one exception, that verdicts in criminal proceedings are not only not conclusive, but are not even admissible evidence, in civil cases. For this exception two reasons are given, the one founded on a mere technicality, the other on a view, though a narrow and partial one, of the justice of the case. The first is, that it is *res inter alios acta*: the parties in the civil cause cannot, it is said, have been also the parties in the previous criminal one, the plaintiff in a criminal proceeding being the king. It is obvious, however, that the king's being plaintiff is in this case a mere [40] fiction. Although the party in whose favour the previous verdict is offered in evidence was not called the plaintiff in the former proceeding, there is nothing whatever to hinder him from having been the prosecutor who is substantially the plaintiff. Now if he was the prosecutor and his adversary the defendant, it is evident that the cause is between the same parties, that it is not, in reality, *res inter alios acta*, and that if it be treated as such, justice is sacrificed, as it so often is, to a fiction of law. The other reason is 'that the party in the civil suit, in whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution'. This is true. He might have been a witness, and the previous verdict might have been obtained by his evidence. But it might be, that the contrary was the case. Whether he was a witness or not is capable of being ascertained. If he was not a witness, why adhere to a rule which cannot have the shadow of a ground but upon the supposition that he was ? But suppose even that he was a witness, and that the verdict which he now seeks to make use of, was obtained from the jury by means of his own testimony. This will often be a very good reason for distrust but it never can be a sufficient reason for exclusion. Under a system of law, indeed, which does not suffer a party to give evidence directly in his own behalf, it is consistent enough to prevent him from doing the same thing in a roundabout way. A proposition, however, which will be maintained in the sequel of this work, is, that in no case

ought the plaintiff to be excluded from testifying in what lawyers indeed would call on his own behalf, but which, by the aid of counter-interrogation, is really, if his cause is bad, much more his adversary's behalf than his own. Should this opinion be found to rest on sufficient grounds, the reason just referred to for not admitting the former verdict as evidence will appear to be, on the contrary, a strong reason for admitting it.

"Thus much may suffice as to the first rule relating to this subject in English law, a rule which has been seen to be as reasonable as the above-mentioned exception to it is unreasonable. We shall find few instances in the succeeding rules of an approach even thus near to the confines of common sense.

[41] "For, first, a judgment is not evidence, even between the same parties, "of any matter which came collaterally in question nor of any matter incidentally cognizable, nor of any matter to be inferred by arguments from the judgment." By the words *not evidence* lawyers sometimes mean one thing, sometimes another: here, however, not admissible in evidence is what is meant. That it ought not to be conclusive as to any fact, but such as the judgment, if conformable to law, necessarily supposes to have been proved, is no more than we have seen in a former chapter: that, however, because it ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing. A common man's actions are received every day as circumstantial evidence of the motive by which he was actuated: why not those of a Judge?

"The next rule is that a verdict or judgment on a former occasion is not evidence against any one who was a stranger to the former proceeding; that is, who was not a party nor stood in any such relation to a party as will induce lawyers to say that he was privy to the verdict. The reason why a judgment under these circumstances is not evidence, is that is *res inter alias acta*. But we have seen already that its being *res inter alios acta* though a sufficient action for receiving it with suspicion is no reason for excluding it.

"The more special reason, by which, in the case now under consideration this general one is corroborated, is that the party had no opportunity to examine witnesses or to defend himself, or to appeal against the judgment. This being undeniable, it would be improper, no doubt, to take the judgment for conclusive. On this ground what is the dictate of unsophisticated common sense? A very obvious one. As the party has not had an opportunity to examine witnesses, to defend himself, or to appeal against the judgment, at a former period, let him have an opportunity of doing all these things now: let him have leave to impeach the validity of the grounds on which the former judgment was given, and to show by comments on the evidence or by adducing fresh evidence, that it [42] was an improper one; but do not shut out perhaps the only evidence which is now to be had against him, merely because it would be unjust on the ground of that evidence to condemn him without a hearing. In the nature of a judgment is there anything which renders a jury less capable of appreciating that kind of evidence than any other kind at its just value? But it is useless to argue against one particular case of the barbarous policy which excludes all evidence that seems in any decree exposed to be untrustworthy. The proofs which will be hereafter adduced of the absurdity of the principle, are proofs of its absurdity in this case as in every other.

"Another curious rule is that as a judgment is not evidence *against*

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a stranger the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one the reason given for it is still more so:—'Nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary': a maxim which one would suppose to have found its way from the gaming table to the Bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice is not equally clear. This rule of mutuality is destitute of even that semblance of reason which there is for the rule concerning *res inter alias acta*. There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his case in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B seems the very height of absurdity. The only fragment of a reason which we can find in the books, having the least pretension to rationality, is this, that C, the party who gives the verdict in evidence, may have been one of the witnesses by means of whose testimony it was obtained. The inconclusiveness of this reason we have already seen.

[43] "The rule that a judgment *inter alias* is not evidence, which like all other rules of law is the perfection of reason, is in a variety of instances set aside by as many nominal exceptions, but real violations, all of which are also the perfection of reason. To the praise of common sense, at least, they might justly lay claim, if they did no more, in each instance, than abrogate the exclusionary rule. But if the rule be bad in one way, the exceptions, as usual, are bad in the contrary way."

I have quoted this passage at such length not only out of reverence for Bentham, whose views must always be considered with respect by tribunals wherever the British rule prevails, but also because the reasons stated in those passages answer the question here.

As to the first question, of course, as I have already indicated, there being no English common law of evidence antecedent to the Evidence Act, the only manner in which these judgments of 1874 could be excluded would be by reason of that Act itself. In s. 3 of that statute a definition is given as to what are relevant facts and what are not, and in s. 5 of that enactment it is laid down that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others." So that this last section renders exclusive everything which is not covered by the purview of some other section which follows in the statute. Here the case rests not upon applying any principle which is to be found in the English common law of evidence, but upon knowing whether this statute in s. 5 ever contemplated the alteration of the law as it stood at the time when the statute was passed. For the reasons stated by Mr. Justice Mitter in his dissentient judgment in the Full Bench case of *Gujju Lal* v. *Fatteh Lall* (1), I hold that the law of the land before the passing of the statute (I of 1872), was that a judgment such as that of Mr. Justice Turner and my brother Brodhurst of 1874 would be admitted in evidence. I do not wish to add anything to those reasons, because

(1) 6 C. 171.

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[44] I adopt them fully. This indeed is the conclusion at which, I understand, the learned Chief Justice and my brothers Straight and Tyrrell have also arrived.

My difficulty here lies principally with reference to the second point in the case; whether the judgment of the 31st March 1884, delivered by Pandit Sundar Lal, the Deputy Magistrate of Gorakphur, is admissible in evidence or not under any one of the sections, of this Code of evidence. Upon this second point I have some difficulty because I understand that the Bench is not agreed as to the point involved as to its admissibility. I have already repudiated in this judgment the opinion that the English law of evidence is applicable to this case. I have now to consider whether the law which has now placed the matter upon a solid basis of legislative enactment. (Act I of 1872) makes any provision to render that judgment admissible. I have already said that it would not be admissiblo because of s. 5, unless some provision of that Act itself renders it admissible.

In dealing with judgments we have to consider certain specific provisions of the Act. They begin with s. 40 of the enactment. That section simply renders admissible judgments which operate as pleas in bar of the action of the kind known as pl as or *res judicata* or otherwise under some other rule of law. That section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of *res judicata* is not plea as a matter of evidence, but only a plea barring the action as a matter of precedure as distinguished from the rules of evidence. In other words, I have before now in the case of *Sita Ram* v. *Amir Begam* (1), stated my view for thinking that it is not an estoppel in matters of evidence, but a plea barring the action.

The next section is s. 41, which relates to judgments *in rem*, and that section is not applicable to the present case.

The third section is 42, which relates to the relevancy of judgments relating to matters of public nature relevant to the inquiry, [45] and the only other section occurring in that sub-division of the Act is 43, which says—

"Judgments, orders or decrees other than those mentioned in ss. 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act."

I have then to consider whether the judgment of the criminal Court of the 31st March, 1884, to which this reference relates, is relevant under such other part of the statute. It seems to me that, from what I have already said, there is no reason to exclude this judgment; because s. 8 of the Evidence Act lays down, "any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

Now here this judgment of the criminal Court shows one most important point which, whether the technical law describes it as a fact in issue or not, is whether or not the present defendant Dalip Narain Singh is or is not Radha Kishen whose name appears in the second pedigree. What I have got to deal with is whether upon the date of the trial which terminated in the judgment of the 31st March, 1884, there was or was not such a person as Radha Kishen existing and alive. To my mind it is perfectly relevant to know whether that was a fact or not. That a person should be prosecuted for having committed an assault and be so treated, surely it would be a fact of some consequence whether he

(1) 8 A. 324.

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was alive or not. A finding one way or the other would be a relevant fact as to knowing whether this person was capable of committing the assault. I am perfectly aware that the proof of identity is wanting, but I also feel sure that if the Evidence Act in the sections of its second chapter which deal with questions of relevancy of facts be searched, this judgment will be relevant under some section or another. It is a relevant fact that at the date this prosecution was commenced either Radha Kishen who is supposed to be Dalip Narain Singh was or was not alive. It is unnecessary for me to go further into this matter. At any rate, under s. 8 of the Evidence Act, it is shown that the fact of prosecution having been com- [46] menced by the present plaintiff Palakdhari Singh against an alleged person of the name of Radha Kishen was a relevant fact as showing a motive or preparation within the meaning of s. 8. I think I may say that even if that section did not apply, there would be other sections within the scope of Chapter II to render that judgment admissible.

I regret very much that I should have had to take up so much of the time of my hon'ble colleagues over the delivery of my judgment in this case, but at the same time having had the advantage of reading the judgments prepared by my hon'ble colleagues, I regret I have not been in a position to say that I concur in any one of them. My answer to both the questions is in the affirmative, *viz.*, that the judgment of this Court, dated 7th December, 1874, is admissible in evidence; also that the judgment, dated 31st March, 1884, delivered by Pandit Sundar Lal is also admissible in evidence.

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12 A 46=18 A W N, (1888) 43.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

LACHHO AND ANOTHER (*Defendants*) *v.* HAR SAHAI (*Plaintiff*).*
[21st July, 1887.]

Evidence—Burden of proof as to ownership—Possession—Suit for ejectment—Act I of 1872 (*Evidence Act*), s. 110.

It is usually for the plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership.

In a suit for possession of immoveable property and other reliefs, it was proved that the plaintiff and his predecessors-in-title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged, but failed to prove, that the plaintiff had paid him rent as tenant-at-will of the premises. The lower appellate Court, upon the finding that the plaintiff's possession was that of a licensee, modified the first Court's decree, which had allowed the claim in full.

[47] *Held*, with reference to s. 110 of the Evidence Act, that although in the first instance the burden of proving his title was on the plaintiff, it was shifted by his proving long-undisturbed possession; that the defendant's failure to prove the alleged payment of rent went far to prove that the plaintiff's possession was adverse; and that the Court below, in acting upon the theory that such possession

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* Second Appeal, No. 1808 of 1886, from a decree of T.R. Wyer, Esq., District Judge of Meerut, dated the 8th July, 1886, confirming a decree of Maulvi Maula Baksh, Munsif of Khurja, dated the 3rd June, 1886.

was that of a licensee, had wrongly set up for the defendant a defence which he had not set up for himself.

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[R.,—U.B.R. (1905), 4th Qr., Evidence 7 ; Con., U.B.R. (1897—191), Vol. II, 421 (423).]

THE facts of this case are stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.
Mr. *G. T. Spankie*, for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts necessary to elucidate the question of law argued before me in second appeal are as follows:—The plaintiff Har Sahai is the son of Shankar, who is the son of Balkrishen, and belongs to the Brahman caste. The defendant No. 1, Musammat Lachho, is the daughter of Debi Das, and she on the 28th April, 1886, representing herself to have inherited the shop and the site in dispute from her father Debi Das, executed a deed of sale in favour of Nathu Mal, the defendant No. 2. These facts are admitted.

The plaintiff came into Court upon the allegation that his grandfather Balkrishen, had acquired the shop originally, that upon his death the property devolved upon Shankar, and upon the latter's death he, the plaintfff, inherited it. The period of their continuous, undisturbed and peaceful possession is stated to be half a century. It is further alleged that in consequence of a heavy fall of rain the shop fell down, and the plaintiff in exercise of his proprietary right began to rebuild, but was obstructed by the defendants on the 2nd May, 1886, when they entered into wrongful possession and began to build in spite of obstruction to such trespass by the plaintiff. The relief sought was recovery of possession and some minor reliefs as to removal of certain materials, and recovery of price of some materials which the defendants had wrongfully appropriated.

The suit was resisted on the allegation that the plaintiff and his ancestors had no title, that their possession was as mere tenants-at-will, that the rent they paid consisted of a quarter *seer* of milk [48] every morning, that this was subsequently commuted to payment of rent at 8 annas *per mensem*, and that the shop having been demolished, the plaintiff could not maintain the action.

The first Court held that considering the long and continuous possession of Har Sahai extending over forty years and other circumstances, he had proved his title, that the defendants had not succeeded in proving any title, and that their action was pure trespass, and furnished the cause of action for the plaintiff's suit. Upon these grounds that Court decreed the claim for land, and declared the sale-deed of the 28th April, 1886, void against the plaintiff, but dismissed the portion of the claim for the value of the materials.

On appeal, the learned Judge in a judgment which in some material matters differs from the conclusion of the first Court, had upheld the decree.

This circumstance has given rise to this second appeal, because while on the one hand, Mr. *Sundar Lal* on behalf of the appellants pleads that upon the finding of the lower appellate Court this suit should have been dismissed, Mr. *Spankie* on behalf of the respondent in supporting his objections under s. 561, contends that the lower appellate Court was not justified in holding that the plaintiff's possession was not that of a full

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owner. What the lower appellate Court has found is, that the defendants had totally failed to prove their allegation as to payment of rent, in the shape of a quarter *seer* of milk or 8 annas per month, and that apparently Debi Das had allowed the plaintiff, his *parohit*, to occupy, without payment of rent, but as a matter of favour, and on these grounds that Court has dismissed the appeal with costs, without specifying in the decree the exact modifications which its conclusions necessitated, as contemplated by cl. (*d*) of s. 574 of the Civil Procedure Code. It is, however, obvious that whilst the first Court decreed the claim, the Judge has in effect modified that decree by holding that the plaintiff's possession was that of a licensee from Debi Das, and that such license was limited to the plaintiff's life-time. It appears to me that the judgment of the lower appellate Court is unsatisfactory, because [49] practically it is not a judgment upon the merits, and it is silent upon some of the most vital questions involved in the case. In the first place, it was necessary to consider whether in an action of this character the burden of proof regarding title to the property in suit lay upon the plaintiff or the defendants. The learned Judge has found, concurring with the first Court, that the plaintiff and his predecessors-in-title had been in continuous possession for forty years without payment of rent, and upon this finding Mr. *Spankie* relies in support of his objections under s. 561 of the Civil Procedure Code, and argues that the interference by the lower appellate Court with the judgment of the Court of first instance was erroneous because long possession without payment of rent must be presumed to be proprietary and adverse. Mr. *Sundar Lal* contends that the Judge having found that it was as a favour that Debi Das allowed the plaintiff to live in the house, and his possession therefore was that of a licensee, the defendants' appeal should be decreed. In either view I am unable to dispose of the case finally.

The first point is whether the plaintiff was the owner of the property in suit or the defendant Lachho or her father Debi Das under whom she claims, and which title she conveyed to the other defendant, Nathu Mal. The question of onus in such cases is regulated by the principle formulated in s. 110 of the Evidence Act, I of 1872, a principle which only gives effect to a well-known principle of law common to all systems of jurisprudence, that possession is, *prima facie* evidence of title. It is conceded by Mr. *Sundar Lal* that if in this case the plaintiff had been at that date of suit in possession of the shop in dispute, and had been sued by the present defendants, these latter appearing as plaintiffs to the action, the onus would have been on the present defendants, namely, Lachho and Nathu Mal; but the learned pleader contends that because the position of parties is reversed. and the plaintiff seeks to oust the defendants, the onus is on him, and the possession of forty years anterior to his alleged dispossession on the 2nd May, 1886, shifts the burden of proof upon the plaintiff, and renders it necessary for him to prove his title. In support of this contention he relies on the following [50] cases:—*Dadabhai Narsidas* v. *The Sub-Collector of Broach* (1), *Debi Churn Boido* v. *Issur Chunder Manjee* (2), *Ertaza Hossein* v. *Bany Mistry* (3), which cases I need not reconsider in detail. Their general effect is that in a suit for possession the mere circumstance that the plaintiff succeeds in proving that he had been in possession at some time within twelve years previous to the suit is not sufficient to throw the onus on the defendant, and in such action the plaintiff must succeed by

(1) 7 B.H.C.R. 82. (2) 9 C. 39. (3) 9 C. 130.

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force of his title, unless the suit is possessory, as contemplated by s. 9 of the Specific Relief Act (1 of 1877). Mr. *Spankie* relies upon the well-known case of *Asher* v. *Whitlock* (1) for the proposition, to use the words of Cockburn, C. J., "that it is clearly established that possession is good against all the world except the person who can show good title;" and upon the following Indian cases, *Kawa Manji* v. *Khowaz Nussio* (2); *Mohabeer Pershad Singh* v. *Mohabeer Singh* (3). The effect of these Indian cases broadly stated is that when there is wrongful ouster of the person in possession, the person who comes into Court to oust such tortfeasor need not prove more than his possession of the lands in dispute, and that he had been ousted by the defendant, and that the plaintiff's prior possession was *prima facie* evidence of his title. It seems to me that the question as to the burden of proof belongs to that department of procedure which relates only to ascertainment of facts, and being such a doctrine it is not affected by array of parties or accidents which necessitate that A should sue B or B should sue A, but by facts which in themselves furnish evidence of title or of other facts. Among other facts is the fact of possession as used in s. 110 of the Evidence Act. It seems to me that usually it is for the plaintiff who seeks ejectment to prove his title. But I also hold that when possession for thirty or forty years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law, that the plaintiff's long possession indicates his ownership of the property. In this view of the matter it was [51] for the defendant Lachho to have proved that Debi ever owned the property in suit, that it descended to her by inheritance, that it was ever let to the plaintiff, or that the latter ever recognised her rights. The Courts below have found that she has failed to prove the receipt of any rent from the plaintiff, and this would go far to show that the plaintiff's possession of thirty or forty years' standing was adverse. But the learned Judge (upon what evidence it is not clear) has arrived at the conclusion that the plaintiff was only a licensee of Debi Das. There was no such allegation, either by Mussammat Lachho or her vendee Nathu Mal, or by the plaintiff, and this being so, Mr. *Spankie* on behalf of the respondent rightly complains that the Judge has set up a case for the defendants which they themselves never set up.

Under these circumstacces I cannot regard the case as properly disposed of, and I therefore decree the appeal of the lower appellate Court and remand the case to that Court for disposal on the merits under s. 562 of the Civil Procedure Code, with reference to the observations made above. Costs to abide the result.

Cause remanded.

(1) L.R. 1 Q.B. 1. (2) 5 C.L.R. 278. (3) 7 C. 591.

1889 JULY 20. — PRIVY COUNCIL. — 12 A. 51 (P.C.) = 16 I.A. 186 = 5 Sar. P.C.J. 448.

12 A. 51 (P.C.) = 16 I.A. 186 = 5 Sar. P.C.J. 448.

PRIVY COUNCIL.

PRESENT :

LORD WATSON, SIR B. PEACOCK AND SIR R. COUCH.

[*On appeal from the High Court for the North-Western Provinces.*]

SUNDAR (*Plaintiff*) *v.* PARBATI (*Defendant.*)

[30th May and 20th July 1889.]

Possessory title—Possession of and partition between co widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.

Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee; also, that the estate, being jointly held by them, was partible, and that either widow might maintain a suit for partition.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would, probably, have [52] had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son.

[**F.**, 33 A 443 (448) = 8 A.L J. 220 = 9 Ind. Cas. 498 ; **Appl**, 24 A. 157 (159) ; 23 M. 504 (509) ; 13 C.W.N, 611 = 9 C.L.J 421 ; **R.**, 14 A. 53 (56) ; 17 A. 294 (**F.B.**) ; 18 A. 334 (335) ; 29 A. 52 (60) = 3 A.L.J. 775 = A.W.N. (1906) 204 ; 16 B. 29 (38) 31 B, 560 (564) = 9 Bom. L.R. 1049; 33 C. 1079 (1089); 23 M.179 (182) ; 26 M. 514 (517); 10 Ind. Cas. 469 (470) = 13 C.L.J. 649 ; 9 O.C. 161 (162); 78 P.R. 1902 = 137 P.L.R. 1902; **Expl.**,8 C.W.N. 658 (663); **D.**,29 A. 52 (55) = 3 A.L.J. 775 = A.W.N. (1906), 264; 31 C. 79 (82).]

[N.B. See 8 A. 1. whereon this appeal has arisen.]

APPEAL from two decrees (12th June, 1885) of the High Court (1) reversing a decree (27th February, 1884) of the Subordinate Judge of Saharanpur, and dismissing the appellant's suit.

The principal matter now disputed was as to the right to possession and partition, between the plaintiff and defendant, of two widows of Baldeo Sahai, a Bohra Brahman properietor of Muzaffarnagar, in the Saharanpur District. Baldeo, having no child by either wife, adopted, in 1875, his sister's son, Premsukh, to whom he also bequeathed his estate. Baldeo died in 1878, the widows taking the management of his property and maintaining the minor adopted son, who died in the following year 1879.

The widows' names were entered as joint proprietors of the village lands which had been Baldeo's, by orders of the revenue authorities of 3rd, 5th and 21st April, 1880.

On 15th May, 1883, Sundar, the junior widow, sued the elder, Parbati, for a decree for partition, and complete possession, of a half share in houses and land in Muzaffarnagar, for half of the income of certain shops in the town, for an equal share of the value of an elephant, and of other moveable property. The elder widow denied the plaintiff's right to separate possession, alleging that she herself, as the elder, was entitled to be manager of the whole estate, partition not being allowed.

The Subordinate Judge fixed issues as to the adoption, and as to the will : also as to the rights of the widows. He then found that Baldeo Sahai, being doubtful as to the sufficiency of the adoption of his nephew

(1) 8 A. 1.

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Premsukh, had made him his successor by will. This legatee died a minor, while the widows were in possession, managing the property, and their rights were not affected, whatever might be the claims of third parties, through the deceased, in consequence of the will in his favour. He decreed the claim, directing partition.

Appeals from both parties were heard by a Division Bench, (PETHERAM, C.J., and BRODHURST, J.) and the judgment is reported [53] in I.L.R., 8 All. 1. The plaintiff's suit was dismissed without costs: the ground of the decision being that the widows could not maintain a suit founded on their possessory right to the property, not having obtained any possession in their own right as widows of Baldeo Sahai.

On this appeal.

Mr. *W. A. Raikes*, for the appellant, argued that the widow who claimed, being in possession, or joint possession, had, as a matter of right, a good title against all persons except the heirs of Premsukh, who had not come in to assert their title, and who, for aught that appeared, might not exist. She could maintain a suit for possession, when wrongly deprived of it, and her claim for separate possession, and for partition, as against the respondent, was eqeally valid. He referred to *Asher* v. *Whitlock* (1), *Pemraj Bhavaniram* v. *Narayan Shiaram Khisti* (2), *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (3). It was true that in the judgment of the Court below, the plaintiff's case was referred to as false, but this only implied "legally non-existent," as the context showed; and the facts had not been misrepresented. The contention was that the widow's right had a real existence, she having established that she had an actual interest, and sufficient possession as against the other widow. In the absence of any better title, proved against her, she had a valid claim.

The respondent did not appear.

Their Lordships, having reserved judgment, it was afterwards delivered on 20th July by LORD WATSON.

JUDGMENT.

LORD WATSON.—In this case, the Subordinate Judge of Saharanpur and the High Court for the North-Western Provinces, though arriving at different results, did not differ as to the facts, which may be shortly stated.

The appellant is the junior and the respondent the senior widow of Baldeo Sahai, a Hindu zemindar who died without issue [54] in the year 1878. The deceased had formally adopted a boy named Premsukh, who was his sister's son, and, possibly because he entertained doubts, as to the validity of the adoption, he made a will on the 5th July, 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to Premsukh, "whom I have brought up and educated as my son from his infancy, and have made my heir and successor."

Premsukh survived the testator, and died in minority and unmarried in December, 1879. On the death of Baldeo Sahai the two widows assumed the possession and management of his whole estate, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of Premsukh. After the death of Premsukh,

(1) L.R 1 Q.B. 1. (2) 6 B. 215. (3) 8 B. 371.

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as found by the Subordinate Judge, "they obtained possession of the zemindari estates and other immoveable and moveable properties, and they described themselves sometimes as the widows of Baldeo Sahai and sometimes as mothers of Premsukh." It is obvious that, if the adoption of Premsukh was not valid according to the principles of Hindu Law, neither of the parties to this case would have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to Premsukh under his adoptive father's will, they could not on his decease pass to the present litigants as widows of Baldeo Sahai.

No question is raised in this case with respect to the zemindari estates, which are registered in the joint names of the widows, the respondent, as the senior, being lambardar. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th July, 1880, the arbitrators issued an award, being in substance a decree of partition, in virtue of which each of the widows has since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the appellant, in May, 1883, for partition and separate possession of house property, [55] which does not form part of the zemindari, and also of certain moveable effects which were not included in the arbitration.

Of the issues framed by the Subordinate Judge, the only one which it is now necessary to consider is the sixth, which is in these terms:—"Has the plaintiff a right to have the property in dispute divided in equal shares as she claims?" The learned Judge answered that question in the affirmative, and gave the appellant a decree of partition, but his decision was reversed on appeal by the High Court for the North-Western Provinces, consisting of Petheram, C. J., and Brodhurt, J., who gave judgment dismissing the suit. The carefully framed and articulate decree of the Subordinate Judge does not appear to be in any respect erroneous, if the appellant has a right to insist upon partition being made.

The Subordinate Judge purposely abstained from expressing any opinion either as to the validity of the adoption of his sister's son by Baldeo Sahai, or as to the efficacy of his will to carry the estates to Premsukh, if not duly adopted, who in that case would not be an heir of the testator. He considered it unnecessary to determine either point until the estates are claimed by a kinsman of Premsukh's paternal line, or by a reversioner or collateral heir of Baldeo Sahai. He held that, in all questions *inter se*, both widows were estopped by their own previous acts and admissions from alleging the invalidity of Premsukh's adoption; and, on that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition.

The Chief Justice, in whose judgment Brodhurst, J., substantially concurred, was of opinion that the adoption of his sister's son by Baldeo Sahai, who was admittedly a Brahman, was altogether invalid, the adoption of a child, whose mother he could not have lawfully married, being contrary to the text of the Mimansas, and also to a course of decisions in the Indian Courts. The Chief Justice then deals with the present appellant's alternative contention, (which was the same with that submitted here) to the effect that, inasmuch as the widows are in possession of the estate, they are [56] competent to maintain a suit for the partition of the estate between themselves." He refers to the well-known case of *Armory*

v. *Delamirie* (1) where it was ruled that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and therefore to maintain trover; and also to the case of *Asher* v. *Whitlock* (2) in which it was held that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator. The Chief Justice thus states the result of these authorities:— "Possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised." But he thus proceeds to distinguish these cases from the present. "In this case" he says "there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. To do so would be to recognise an illegal transaction, and we would be dividing an estate which has no legal existence."

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If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of Baldeo Sahai's will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Premsukh in 1879, appears to them to be sufficient for disposing of this suit in favour of the appellant. Their Lordships are at a loss to understand, at all events to appreciate the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in the sense, that it was not procured by force or fraud, but peaceably, [57] no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstances that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored. The respondent must pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

(1) 1 Smith's L. C. 6th ed., 313.

(2) L.R. 1 Q.B. 1.

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APPELLATE CIVIL.

12 A. 57 = 9 A.W.N. (1889) 197.

12 A. 57=9 A.W.N. (1889) 197.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MUNRO (*Plaintiff*) *v.* THE CAWNPORE MUNICIPAL BOARD (*Defendant*).*
[6th July, 1889.]

Review of judgment—Limitation—Act XV of 1877 (*Limitation Act.*) *s.* 5, *sch. ii, No.* 173—*Act VII of* 1870 (*Court Fees Act*), *ss.* 6, 28, *sch. i, Nos.* 4. 5—*Application insufficiently stamped—Sufficient cause for admitting application after period prescribed—Presentation of application to Munsarim instead of Judge.*

On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1889. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889. the deficiency pointed out by the Munsarim was made good. On the 26th May the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

[58] *Held* that s. 6 and the first paragraph of s. 28 of the Court-fees Act (VII of 1870) were applicable; that there was mistake or inadvertence within the meaning of the second paragraph of s 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of s. 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected.

Held also that the application should have been presented to the Judge, and not to the Munsarim.

[F. 28 A. 310=3 A.L.J. 338=A.W.N. (1906), 21.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *Strachey*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—The appellant here, Mr. Munro, had obtained a decree in appeal from the District Judge of Cawnpore against the Cawnpore Municipal Board on the 19th December, 1888. Now the Municipal Board, if they were in a position to show that s. 623 of the Code of Civil Procedure covered their case, could have applied within a period of ninety days from the date of that decree for a review of judgment. They could also have applied at a period beyond ninety days for a review of judgment, if they made out to the satisfaction of the Court, within the meaning of s. 5 of the Limitation Act, that they had sufficient cause for not making the application for review within ninety days from the date of the decree. The Court-fees Act provides that when an application for review of a decree in appeal is presented within ninety days, the court-fee which shall be paid shall be half the fee on the appeal, and that if presented on or after such ninety days, the legal fee shall be the court-fee payable on the memorandum of appeal. What took place here was that on the 26th

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* First Appeal, No. 62 of 1889, from an order of G.J. Nicholls, Esq., District Judge of Cawnpore, dated the 14th March, 1889.

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January, 1889, *i.e.*, within ninety days, the Cawnpore Municipal Board delivered to the Munsarim of the Judge's Court an application for a review of the decree of the 19th December, 1888. That application was insufficiently stamped. The Munsarim very properly endorsed on the application "stamp insuffi-[59] cient." On that a dispute arose between the Government Pleader at Cawnpore and the Munsarim as to whether or not the stamp was sufficient. We need only say that as a matter of fact the Munsarim was right and the Government Pleader wrong, and that is admitted here. Further, the application should have been presented to the Judge and not to the Munsarim. The next thing that happened was that on the 25th April, 1889, *i.e.*, after the expiration of more than ninety days from the date of the decree, the deficiency which the Munsarim had pointed out was made good, and on the 26th May the application came before the Judge. The Judge admitted the application, but only admitted it on the Cawnpore Municipal Board paying the court-fee payble on an application presented on or after ninety days from the date of the decree.

Mr. Munro has appealed against that order under s. 629 of the Code of Civil Procedure. His learned Counsel, Mr. *Strachey*, has taken three exceptions to the order, the first, and the only one which we need consider for the disposal of the case, being that the application was admitted after the period of limitation and without sufficient cause for the delay being shown. On behalf of the Board it has been contended that the Judge exercised his discretion as to sufficiency of the cause within the meaning of s. 5 of the Limitation Act, and that consequently we ought not to interfere. It was also contended that the application having been delivered to the Munsarim within the ninety days, the deficiency in stamp might be made good with the leave of the Court at any time. Now, as we have said, the stamp on the 26th January, 1889, was deficient. S. 6 and the first paragraph of s. 28 of the Court-fees Act, 1870, apply. It was impossible to say that there was here mistake or inadvertence within the meaning of the second paragraph of s. 28. There was in fact no presentation within ninety days of an application which could have been received. The Judge had no power, if he had been so disposed, to have treated the application of the 26th January as an application which he could entertain by reason of the court-fee being made good after ninety days. He had no power under the circumstances to admit the application as an application presented after [60] ninety days. As a matter of fact it was not an application made after ninety days, and the Municipal Board never intended to represent that they were making it as an application made after ninety days from the date of the decree. They or some one on their behalf filed at some time a *vakalatnama* which on the face of it and without scrutiny would appear to have been given on the 26th January, 1889, to the Government Pleader of Cawnpore to act in this matter. We shall, however, refer to that document again. Now, even if this was an application made after ninety days, it would be time-barred unless the applicants satisfied the Court that they had sufficient cause for not making the application within ninety days. What cause was there? None appeared except that the Government Pleader at Cawnpore chose to dispute with the Munsarim, who was right, as to the quantum of court-fee. That in our opinion is no cause at all. Consequently the Judge acted illegally in admitting this application. It was an application not fit to be received within ninety days by reason of the deficiency of stamp, and it was barred by limitation under the circumstances after ninety days. For these reasons we must allow this appeal with costs and set aside the order admitting the

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application for review, and restore the decree in appeal. We agree with the District Judge of Cawnpore that the *vakalatnama* to which we have referred has a most suspicious appearance, and we direct him to hold an inquiry and to ascertain when in fact that *vakalatnama* was given and when in fact it was filed in his Court. It appears to us that the date on the stamp has been altered, probably from 4-4-89 to 16-1-89. However, that is a matter which the Judge must consider. He will report to us and forward the evidence he takes on the point, and we will then consider what further steps are to be taken. *Appeal allowed.*

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12 A. 61 (F.B.) = 9 A.W.N. (1889) 198.

[61] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

KEDAR NATH (*Plaintiff*) *v.* LALJI SHAHNI AND ANOTHER (*Defendants*).* [15th July, 1889.]

Appeal—Order absolute for foreclosure—Act IV of 1882 *(Transfer of Property Act),* s. 87—*Execution of decree—" Decree "—Civil Procedure Code,* ss. 2, 244, *sch. vi, No.* 129—*Practice—Appeal wrongly presented as appeal from order—Such appeal not to be converted into appeal from decree.*

The order mentioned in s. 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable as a decree under s. 244 read with s. 2 of the Civil Procedure Code upon the stamp payable in respect of such orders.

So *held* by the Full Bench, EDGE, C.J., doubting.

Where an appeal has been erroneously presented to the High Court as a first appeal from order, the Court will not convert it into a first appeal from a decree under s. 244 read with s. 2 of the Civil Procedure Code.

So *held* by the Division Bench.

[Diss., 25 C. 133 ; F., 24 A. 179 = 22 A.W.N. 3 ; R, 13 A. 278 (280) = 11 A.W.N 83; 24 A. 542 (544) = 22 A.W.N. 160 ; 33 C. 867 (875) = 4 C.L.J. 141 ; 25 M. 244 (261) (F.B.) ; 12 A.W.N 5 ; 10 C.L.J. 91 ; 9 C.P.L.R 5 (7) ; 12 C.P.L.R. 82 (85) ; 13 C.P.L.R. 177 (178) ; 16 C.P.L.R. 111 ; 6 O.C. 114 (115) ; D., 14 A. 22 (222).]

THIS was a reference to the Full Bench by Brodhurst and Mahmood, JJ. The order of reference was as follows :—

" This is an appeal arising out of proceedings taken under the Transfer of Property Act, and the order appealed from is one passed under s. 87 of that enactment making the decree absolute within the meaning of that section. In that section the word used is 'order', and this appeal has been preferred as if it was a miscellaneous first appeal from order.

" Mr. *Jogindro Nath*, on behalf of the respondent, raises a preliminary objection to the effect that the appeal is really one from a decree, and that it should have been numbered and registered and dealt with as a first appeal from a decree in a regular suit, and that the court-fee payable therein should have been greater than that paid upon this memorandum of appeal, which is only Rs. 2. The learned Pandit for the appellant states, and, so far as we are concerned, rightly, that no similar appeal has, within our knowledge, been before this Court before, and that there is no established practice as to the manner in which such appeals should be dealt with. In consi- [62] deration of these circumstances and the desirability of uniform practice, we direct that this case be laid before the learned

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* First Appeal, from Order No. 106 of 1887.

Chief Justice with a recommendation that it may be heard by a Bench consisting of the whole of the Court, especially as the settlement of the case is not likely to take up much time. 1889 JULY 15.

"We may add that it is all the more necessary to have this question settled by the whole Court, because the learned Pandit argues that it is only a decree or order passed in the execution of decree within the meaning of clause (4) of s. 1 of the Rules of Court dated the 11th June, 1887, and if this contention is right, the case should have been placed before a Bench consisting of a single Judge." FULL BENCH. 12 A. 61 (F.B.) = 9 A.W.N. (1889) 198.

Mr. *Howell*, the Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT OF THE FULL BENCH.

STRAIGHT and MAHMOOD, JJ.—We are of opinion that the order mentioned in s. 87 of the Transfer of Property Act is an order in execution of the substantive foreclosure decree, and is appealable under s. 244 of the Civil Procedure Code.

The reference to Form 129 of schedule iv of the Civil Procedure Code in the last paragraph of s. 87 does not militate with this view, but is consistent with the definition of decree in s. 2 of the Code of Civil Procedure.

EDGE, C. J.—I entertain some doubts on the question, but my doubts are not sufficiently strong to make it necessary in my opinion that I should dissent from the judgment of my brothers Straight and Mahmood, JJ.

[The case went back to the Division Bench for disposal. The parties were represented as before.]

JUDGMENT OF THE DIVISION BENCH.

BRODHURST and MAHMOOD, JJ.—For the reasons stated by us in our order of the 19th December, 1887, this case was referred to a Full Bench for the determination of the point mentioned therein. The case was accordingly heard by a Bench consisting of the learned Chief Justice, our brother Straight and one of ourselves; and by the judgment of the 8th April, 1888, it was desided by the Full [63] Bench that the nature of the appeal was such as is contemplated by s 244 of the Civil Procedure Code, that is to say, that it was an appeal from a "decree" as defined in s. 2 of the Code.

The effect of this ruling is that this is not a first appeal from order of the miscellaneous kind contemplated by s. 588 of the Civil Procedure Code, and under this view, this appeal was wrongly presented to this Court as a first appeal from order; it should have been preferred as a first appeal from a decree within the meaning of s. 244 of the Civil Procedure Code, read with the definition of "decree" in s. 2.

Mr. *Ram Prasad* for the appellant has upon this state of things asks us to convert this appeal into a first appeal and to direct that it be so registered. But we are of opinion, with reference to the practice of this Court, that this procedure would be erroneous. There is no provision for it in the Code of Civil Procedure; and if we were to allow the request thus made, we should be holding that in some case where an application for revision has been made under s. 622 of the Civil Procedure Code, such application might be converted into a first appeal or into a second appeal or into a miscellaneous appeal, and this practice would no doubt introduce

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an element of confusion in the working of the Court, which we do not think is justified by any practice of the Court or by any authority of case-law.

Under these circumstances, we dismiss the appeal, but make no order as to costs. We may add that we leave it to the appellant to take such other measure as may be available to him for filing a duly framed appeal; and we cannot at this stage consider or decide how far under the circumstances of this particular case, the appellant, if he prefers a proper appeal, would be entitled to the benefit of the indulgence warranted by s. 5 of the Limitation Act (XV of 1877). *Appeal dismissed.*

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12 A. 64 = 9 A.W.N. (1889) 200.

APPELLATE CIVIL.

[64] *Before Mr. Justice Straight and Mr. Justice Tyrrell.*

CHATTAR AND ANOTHER (*Plaintiffs*) *v.* NEWAL SINGH (*Defendant*).*
[14th August, 1889.]

Execution of decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (4) —*Application "in accordance with law"—Civil Procedure Code*, ss. 325 (*j*). 341— *Act IV of* 1882 (*Transfer of Property Act*), s. 99.

The expression "applying in accordance with law" in Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4), means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

Held therefore that an application to have the judgment-debtor arrested in execution of decree, which was in contravention of the terms of s. 341 of the Civil Procedure Code, and an application to bring mortgaged property to sale, which was in contravention of s. 99 of the Transfer of Property Act (IV of 1882), were not application "in accordance with law" within the meaning of No. 179 (4) of sch. ii of the Limitation Act.

[F., 28 A. 387 = 3 A.L.J. 143 = A.W.N. (1906) 54; Appl., 27 A. 619 = A.W.N. (1905) 132 = 2 A.L.J. 376 R., 8 A.L.J. 1151 (1153) = 12 Ind. Cas. 734; 1 N.L.R. 61; 125 P.L.R. (1908) = 95 P.W.R. (1908); D., 13 C.W.N. 533 = 9 C.L.J. 443; 6 P.R. (1895).]

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *D. Banerji*, for the respondent.

JUDGMENT.

STRAIGHT and TYRRELL, JJ.—This is an appeal on the execution side from an order of the Judge of Aligarh, dated the 11th February, 1889. The decree-holder is appellant and the judgment-debtor is respondent. The decree to which the application for execution relates is dated the 21st March, 1884. It was a decree in favour of the decree-holder as usufructuary mortgagee for possession of the mortgaged property and for recovery of mesne profits of which he was deprived by the wrongful withholding of the mortgaged property by the mortgagee. The original decree-holder took certain steps in execution in the years 1884-85, and among others caused the judgment-debtor to be arrested. On the 23rd of August, 1885,

* First Appeal, No. 39 of 1889, from an oder of H. F. Evans, Esq., District Judge of Aligarh, dated the 11th February, 1889.

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he transferred his interest in the decree to the appellants. On the [65] 7th December, 1886, they sought to bring to sale certain property as the property of the judgment-debtor, but that application was rejected on the ground that the property was unsaleable under the provisions of s. 99 of the Transfer of Property Act. I ought to have remarked that prior to this application these persons again had applied for the arrest of the judgment-debtor; but it having been found that the grant of a second warrant of arrest was illegal, he was released on the 24th September, 1886. The learned Judge whose order is impeached held that neither of the applications of the 21st August, 1886, and the 7th December, 1886, were applications "according to law," and the question before us is whether he was right or wrong in this view. Mr. *Chaudhri* for the appellants contends that any application for execution so long as it, on the face of it, satisfies the requirements of s. 235 of the Code of Civil Procedure, is a sufficient compliance with the conditions to be found in the fourth paragraph of the third column relating to art. 179 of the Limitation Act. He says it is quite indifferent if the decree-holder under clause (*i*) of s. 235 asked for assistance from the Court in execution, which that Court, under the law, had no power to give. I cannot place that very narrow and to my mind technical construction on the words "applying in accordance with law" in the Limitation Act, to which I have referred. The necessary consequence of adopting that view would be to hold that any application, however, absurd, a decree-holder might make to a Court, would be sufficient to render his application one "in accordance with law." I think the term "applying in accordance with law" must mean applying to the Court to do something in execution which by law that Court is competent to do. I do not think that it means applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do.

In the present case it is not denied on behalf of the appellant that the judgment-debtor having been once arrested in execution of the decree, the provisions of s. 341 of the Code of Civil Procedure specifically prohibited his arrest a second time. This is a provision [66] which in our opinion the decree-holder must be presumed as part of the law of the land to have known. The same remark applies to the application of the 7th December, 1886. The decree-holders were mortgagees of the property, which had been attached under that application of the 7th December, 1886, and they must be presumed to have known the prohibition contained in s. 9 of the Transfer of Property Act. Under these circumstances we think the learned Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.

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CRIMINAL REVISIONAL.

12 A. 66 = 10 A.W.N. (1890) 7.

12 A. 66 = 10 A.W.N. (1890) 7.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* RADHE AND OTHERS. [12th September, 1889.]

Practice—Criminal trial—Transfer of case by Subordinate Magistrate to District Magistrate—District Magistrate, deciding on evidence taken by his subordinate—Criminal Procedure Code, ss. 192, 349, 320.

S. 350 of the Criminal Procedure Code was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to have jurisdiction in that post, and is succeeded by another officer.

A subordinate Magistrate, having taken all the evidence for the prosecution and for the defence, sent the case to the Magistrate of the District, not on the grounds mentioned in s. 349 of the Criminal Procedure Code, and the District Magistrate, observing that none of the accused asked to have the witnesses reheard, gave judgment upon the evidence taken by the subordinate Magistrate. The Sessions Judge refused to interfere in revision with the District Magistrate's proceedings, on the ground that they were covered by s. 350 of the Code.

Held that this view was erroneous, that neither under s. 192 nor under s. 349 was there any transfer to the District Magistrate by his subordinate, that s. 350 was inapplicable, and that the order passed by the District Magistrate must be quashed.

[F., 15 C.P.L.R. 66 (68); 17 C.P.L.R. 159 (160); 1 L.B.R. 301 (302); 1 N.L.R. 187 (190); R., 39 C. 781 (785) = 13 Cr.L.J. 218 = 14 Ind. Cas. 314; 12 C.W.N. 140 (144) = 6 Cr.L.J. 434; 14 P.R. 1903 (Cr.) = 175 P.L.R. 1903; 25 P.R. 1905 (Cr.).]

THE accused in this case were charged with offences under ss. 379 and 323 of the Penal Code. The case came, in the first instance, before a Magistrate of the third class, who took all the evidence for both prosecution and defence. The Magistrate then sent the case to the District Magistrate on the ground that, as one of the parties was a Mr. Ostosh, it was advisable that the matter should be dealt with by the District Magistrate. The case accordingly came before [67] the District Magistrate, who, in his judgment, said, "I take up this case under s. 349 of the Criminal Procedure Code. I have gone through the record. Neither party had asked to have witnesses reheard, and after the careful and full inquiry by the Tahsildar, there is no need of it." The Magistrate, after discussing the evidence, convicted and sentenced the accused under ss. 379 and 323 of the Penal Code.

The accused applied for revision to the Sessions Judge of Jaunpur, who gave judgment on the application as follows:—

"Before transferring this case, the third-class Magistrate did not record his opinion that the accused were guilty, or that they deserved a punishment different in kind from, or more severe than, he was competent to inflict; in other words, he did not submit his proceedings under s. 349 of the Criminal Procedure Code. He transferred the case to the file of the District Magistrate on the ground that 'as in this case one party is Mr. Ostosh, it is considered advisable that it should be decided by the District Magistrate.' Under s. 192 of the Criminal Procedure Code, he was not competent to make any such transfer; but on the other hand, there is no doubt that his proceeding, although erroneous, was in good faith, and therefore covered by s. 529 of the Criminal Procedure Code. The District Magistrate in his judgment says that he took up the case

under s. 349 of the Criminal Procedure Code. He should, I think, have referred to s. 350 of the Code, as is indeed indicated by his remark that the accused had not 'asked to have witnesses reheard:' see s. 350 (*a*). The conviction is therefore legal, and I see no cause for further interference The application for revision is therefore now dismissed."

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The accused applied to the High Court for revision of this order on the ground "that the District Magistrate was not competent to decide the case on the evidence recorded by the subordinate Magistrate by whom the case was transferred to him.

Mr. *A. H. S. Reid*, for the petitioner.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

[68] STRAIGHT, J.—This is an application for revision of an order of the Judge of Jaunpur, dated the 31st May last, refusing to report for the orders of this Court an order of the Officiating Magistrate of Jaunpur dated the 23rd of the same month. In my opinion this application must prevail. According to the Magistrate's own statement he took up the case under s. 349 of the Criminal Procedure Code; but as the learned Judge has pointed out, and as is patent upon the face of the record, the third-class Magistrate did not request the District Magistrate to take up the case because he could not pass a severe sentence enough, but for a totally different reason. Neither under s. 349, nor under s. 192 of the Criminal Procedure Code, could I for an instant hold that there was any transfer to the District Magistrate by his subordinate. The matter then stands thus, that by some means or another, a criminal trial, which was pending in the Court of the third-class Magistrate, and which had gone to the length of all the witnesses being examined for the prosecution and the defence, finds its way into the Court of the District Magistrate, and then and thereupon the record as it stands, he proceeds to deal with the case and give judgment and make an order of conviction. I do think that there is any provision in the Criminal Procedure Code which sanctions this course. The learned Judge relies upon s. 350 of the Criminal Procedure Code. That section is not applicable to the circumstances disclosed here, but is intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer cases to exercise jurisdiction in that post, and is succeeded by another officer. I allow this application and quash the convictions and the sentences of the three petitioners. I do not think it necessary either to order or sanction a new trial, because if a new trial were to be held, and they were again to be convicted, the ten days' rigorous imprisonment they have already undergone and which was considered an adequate punishment, would upon such conviction have to be taken into account, and no additional punishment would be necessary. Therefore further proceedings would only prove abortive in this respect, and the matter should be allowed to drop.

Application allowed.

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CRIMINAL REVISIONAL.

[69] *Before Mr. Justice Straight and Mr. Justice Tyrrell.*

IN THE MATTER OF THE PETITION OF BASANT BIBI.*
[27th September, 1889.]

Practice—Pardanashin lady—Personal appearance in Court,

Although there is no provision in the Criminal Procedure Code which protects pardanashin ladies from appearing in a Court of justice, nevertheless it is very undesirable to compel the attendance of such persons.

It cannot be admitted as a general principle that pardanashin ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them at some other place than the Court-house itself. *In the matter of the petition of Din Tarini Debi* (1), and *in re Farid-un-nissa* (2) referred to.

Where a Magistrate considered it necessary to take the evidence of a pardanashin lady, who objected to appear in Court, the High Court directed him to make arrangements so as to take her evidence either in an empty Court-room in the presence of himself, the accused, and the pleader for the prosecution, or if no empty Court room were available, in his own private room or some other room in the Court building.

[R., 24 C. 551 (555); 168 P.L.R. 1903=19 P.R. 1903 (Cr.).]

THIS was an application under s. 435 of the Criminal Procedure Code on behalf of Musammat Basant Bibi, a pardanashin lady, for revision of an order of the Joint Magistrate of Benares directing her to appear in his Court for the purpose of giving evidence. The case in which the question arose was a charge of theft of ornaments which belonged to the minor sons of the petitioner, who was a widow, and who was one of the guardians of the persons and property of the minors, appointed under Act XL of 1858. The case was initiated on a report by the police.

In the course of the trial, the Joint Magistrate required the personal attendance in Court of the petitioner to give evidence. It was objected on her behalf that she was a pardanashin lady. The Magistrate was of opinion that this fact did not sufficiently excuse her from attendance in Court, as she could come in a palki and give evidence from inside, and issued a summons for her attendance, and as she still refused to appear issued a warrant. An application was made under s. 435 of the Criminal Procedure Code to the Sessions Judge for revision of this order; and the Judge sent for the record, and requested the Magistrate to submit his reasons for considering the issue of a warrant necessary, the execution of the warrant being [70] meanwhile stayed. In reply to this order, the Magistrate stated that the petitioner's evidence was required for the purpose of identifying the stolen property, and expressed his opinion that "it would be every unsatisfactory not to have her evidence." When the case again came before the Sessions Judge, he observed that pardanashin ladies were not exempted by the Criminal Procedure Code from attendance in Court; that the argument that such attendance was a "degradation" to the petitioner could not be entertained, and that if it were necessary that she should give her evidence, there was no reason why she should not be required to do so. He further said:—

"As it does not appear at present that the evidence of Basant Bibi is indispensable, I would suggest to the Joint Magistrate that he should

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* Criminal Revision, No. 519.

(1) 15 C, 775,

(2) 5 A, 92,

first take the evidence of the other persons whom her pleaders say they can produce on the question of identification. If their evidence is sufficient, he may come to the conclusion that the evidence of the applicant and her daughter is not necessary. If he decides that their attendance should be required, then the only order that I am prepared to pass is the following:— 1889 SEP. 27. — CRIMILAL REVISIONAL. — 12 A. 69 = 9 A.W.N (1889) 202.

"After hearing the evidence produced as to the identification of the ornaments, the Joint Magistrate will decide whether the attendance of the applicant and her daughter should be required or not. If he decides that it should be, he will notify the fact to applicant's pleader, and postpone proceedings for compelling attendance for ten days, in order that the applicant may apply to the High Court, if her pleaders say they intend to take that course. The matter will not be referred by this Court."

The Joint Magistrate, after proceeding with the case, was of opinion that the evidence as to identification of the stolen property was incomplete and unsatisfactory, and that it was necessary to take the deposition of Basant Bibi on the point. He passed the following order:—

"I therefore reject the application, but allow the applicant six days to bring the matter before the Hon'ble High Court if she likes, and if within that time no order is received from the High [71] Court to the contrary, she and her daughter must attend to give evidence. Summonses will issue for their appearance on the 24th September."

The petition thereupon made the present application to the High Court. The petition contained the following statements:—

"That the petitioner is a Hindu pardanashin lady of rank and position, of independent means, living on an income derived from landed property and business; that the petitioner is connected with the wealthiest and most respectable families of Benares, and according to the customs and manners of the country never appears before the public.

"That the enforced attendance of the petitioner in the Court of the Joint Magistrate, if allowed, will lower her in the estimation of the members of her own caste and the whole society with which she is concerned, and thus cause irreparable injury to her.

"That the wealthy families (among whom is that of the petitioner) of the caste to which the petitioner belongs, occupy a much higher social status, and are regarded with more respect, than any other Brahman family in that locality.

That the petitioner, though not entitled to claim exemption from personal attendance, bases her request on a practice whereby sentiments like the one now in question have always been respected by the Courts in this country.

"The petitioner therefore prays that if the attendance of herself and her daughter in the Joint Magistrate's Court be deemed to be indispensable, and their examination by commission be held to be inexpedient, this Hon'ble Court will be pleased to direct the Joint Magistrate to examine the petitioner and her daughter in the house mentioned above and secured for that purpose, after necessary identification and in the presence of the proper parties and pleaders."

The house here referred to was one close to the Magistrate's Court and had been engaged by the petitioner in order that, if her examination should be considered indispensable, it might be taken there instead of in the Court.

[72] Munshi *Juala Prasad* and Munshi *Madho Prasad*, for the petitioner.

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JUDGMENT.

STRAIGHT, J. (TYRRELL, J., concurring).—From what appears in the several orders of the learned Sessions Judge and the Joint Magistrate it would seem to be highly improbable that the evidence of this lady Musammat Basant Bibi will be ever required in the case, and unless it is absolutely necessary for the purposes of justice either as regards the prosecution or the defence that her attendance should be required, the Joint Magistrate should not require her attendance. Although no doubt there is no provision in the Criminal Procedure Code which protects pardanashin ladies from appearing in a Court of justice and very rightly so, all necessary safeguards to protect their privacy that are reasonable being adopted, nevertheless it is very undesirable to compel the attendance of such persons. In the event of the Magistrate in the present case finding it absolutely necessary that Musammat Basant Bibi should give evidence in the case, he would do well to consider very seriously whether he should issue coercive process for the purpose of compelling that attendance. Mr. *Juala Prasad* who appears in support of this petition for revision of the Magistrate's order has stated very frankly that what his client does object to is being compelled to appear in a public Court and to give evidence therein, but that she is quite ready under such arrangement as may reasonably secure her privacy to give her evidence in the case in the presence of the Magistrate and of the accused and his legal adviser. My attention has been called to a Calcutta ruling in the matter of the petition of *Din Tarini Debi* (1) about which I have only this to say. I am scarcely prepared to go the length of the learned Judge who decided that case, and I see no reason to depart from the view that I expressed in *re Farid-un-uissa* (2). I took a similar view in an unreported case—*in re Mubarak-un-nissa*—and while I am always most anxious to recognise and give effect to the feelings of the people of this country in such matters, I think it would be weakness to surrender as a general principle to be adopted in all cases of this description that *parda*-[73] *nashin* ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them at some other place than the Court-house itself. In the present case I think the Magistrate was right in refusing to go with his officials to a private house for the purpose of examining Musammat Basant Bibi, and I agree with the remarks made by the learned Judge in the course of his order in the matter. No doubt what I understand lies at the bottom of the objection of this lady is that she objects to mixing in a promiscuous crowd of persons or to being brought in contact with persons who frequent criminal Courts. In many respects I sympathize with her, because as a general rule the company that is to be found there is not of the most agreeable character. What I think the best order to be passed is that, if it becomes imperatively necessary for the Magistrate to take the evidence of this lady, he shall make arrangements so as to take her evidence either in an empty Court-room in the presence of himself, the accused and his pleader and the pleader for the prosecution, if there by any, or if no empty Court-room be available, in his own private room or some other room in the Court building. Mr. *Juala Prasad* intimates that this will meet the objetions of his client. I do not think that this is an unreasonable concession to make, and to this extent I accede to the request of the petitioner. The Magistrate must see that the orders thus conveyed to him are strictly carried out.

(1) 15 C. 775.

(2) 5 A. 92.

12 A. 73=10 A W.N. (1890) 13.

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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAGHUBAR DIAL (*Plaintiff*) *v.* HAMED JAN AND ANOTHER (*Defendants*).* [15th July, 1889.]

Execution of decree—Civil Procedure Code, s. 244 (*c*)—*Question for Court executing decree—Parties to the suit—Representative.*

After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect [74] of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold, and was purchased by the decree-holder: one of the judgment-debtors had died during the execution-proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property; and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor, and had thence passed to the plaintiff.

Held that the plaintiff's vendor was a party to the suit within the meaning of s. 244 (*c*) of the Civil Procedure Code, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution-proceedings: and that the suit was barred by s. 244. *Ram Ghulam* v. *Hazaru Kuar* (1) followed. *Bahori Lal* v. *Gouel Sahai* (2) distinguished *Mulmanrri* v. *Ashfak Ahmed* (3), *Roop Lall Dass* v. *Bekani Meah* (4), and *Ramunni Menon* v. *Kunju Nayar* (5), referred to.

[R., 16 A. 449 (450); 1 O. C. 60 (65).]

THE following genealogical table indicates the relative position of some of the persons to whom reference is necessary for the purposes of this report:—

Khaman Singh.

Sheo Singh (died childless). | Moti Singh. | Chatai Singh. | Nanid Singh.

Moti Singh. — Sohan Kuar, widow

Chatai Singh. — Hamir Singh.

Nanid Singh. — Gopal Singh.

Harpal Singh (died childless), Rewa Kuar (widow). | Dan Kuar (widow). | Majnun Singh (died childless).

The property in suit originally formed part of the estate of Moti Singh, upon whose death disputes arose between his widow Sohan Kuar and his brother Nanid Singh as to the estate. The dispute was amicably settled by a compromise, whereby half of the estate was assigned to Nanid Singh and the other half remaind in possession of Sohan Kuar including the property now in dispute.

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* Second Appeal, No. 300 of 1887, from a decree of H.P. Mulock, Esq., District Judge of Shahjahanpur, dated 25th November, 1886, confirming a decree of Maulvi Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated 15th April, 1886.

(1) 7 A. 547. (2) 8 A. 626. (3) 9 A. 605. (4) 15 C. 437. (5) 10 M. 117.

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[75] By a deed executed on the 23rd October, 1867, Sohan Kuar leased certain properties including the property now in suit to the defendant-respondent Hamid Jan.

On the 28th November, 1872, Sohan Kuar executed a sale-deed purporing to convey the property now in suit to Dan Kuar (widow of Hamir Singh) and one Raghu Nath Singh, who was stated to be a brother-in-law of Gopal Singh.

The rights and interests of Hamir Singh and Gopal Singh had been purchased in an auction-sale by Jugal Kishore, father of the plaintiff-appellant Raghubar Dial; but those rights were not in question in this litigation.

The subject-matter of the present litigation was the rights and interests of Harpal Singh, who executed a sale-deed in respect of them in favour of the plaintiff-appellant Raghubar Dial on the 28th August, 1885,

In the meantime Sohan Kuar died on the 27th September, 1873, and the defendant-respondent Hamid Jan thereupon brought a suit against Raghu Nath Singh and Dan Kuar (who were considered as being in possession under their purchase of the 28th November, 1872) for damages, upon the allegation that he had been kept wrongfully out of possession of the property which had been leased to him by Sohan Kuar. The litigation ended in a decree in his favour passed by the original Court, and upheld by the appellate Court on the 5th May, 1876.

The effect of the decree was to decree the claim against the estate of Sohan Kuar, but the decree expressly exempted Raghu Nath Singh and Dan Kuar personally and the property which they had purchased under the sale-deed of 28th November, 1872, from liability under the decree; and it was not alleged that the decree was subsequently altered.

Meanwhile a separate litigation had been going on between Dan Kuar and Raghu Nath Singh on the one hand as plaintiffs, and Jugal Kishore (father of the present plaintiff) on the other, as defendant. In that litigation Dan Kuar and Raghu Nath Singh [76] relying upon their purchase of the 28th November, 1872, sought to set aside the auction-sale at which Jugal Kishore had purchased the rights and interests of Hamir Singh and Gopal Singh in the estate of their deceased uncle Moti Singh. But the suit was defeated on the 11th January, 1876, upon the ground that the sale-deed was null and void for fraud and collusion.

Subsequently Hamid Jan, defendant-appellant, in execution of his decree of the 14th December, 1875, brought the property now in suit to auction-sale, and purchased the same himself on the 20th of June, 1882.

In the meantime Dan Kuar had died, and it appeared that in the execution proceedings which resulted in the sale of the 20th June, 1882, Harpal Singh was impleaded as representative of his mother Dan Kuar; but he did not appear in those proceedings to have raised any objections to the attachment or sale of the property now in suit.

The present suit was instituted by the plaintiff-appellant on the 19th September, 1885, having for its object recovery of possession of Harpal Singh's share which the plaintiff had purchased from him as already stated. The main contention upon which the suit proceeded was that the defendant-respondent Hamid Jan's decree in execution whereof the sale of the 20th June, 1882, took place, being limited to the estate of Sohan Kuar, the defendant as purchaser could not acquire by such sale higher rights than those which Sohan Kuar herself possessed, that her rights were only those constituting the life-estate of a childless Hindu widow, which expired

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upon her death, and left nothing to be sold on the 20th June, 1882, at which the defendant purchased; and that upon her death the property devolved to the extent of the share claimed upon Harpal Singh whose rights were purchased by the plaintiff.

The suit was resisted, *inter alia*, upon the ground that Harpal Singh having been impleaded in the execution-proceedings which resulted in the sale of the 20th June, 1882, must be taken to have become a party to the decree, and as such he might have raised [77] objections to the sale of the property under clause (*c*) of s. 244 of the Civil Procedure Code; that his omission to raise any such objection in the execution-proceedings precluded him under that section from maintaining a separate suit such as this, and that the plaintiff who claimed under a subsequent purchase from Harpal Singh was equally barred from maintaining this suit.

Both the Courts below concurred in accepting this contention, and dismissed the suit as barred by s. 244 of the Civil Procedure Code. The plaintiff appealed to the High Court.

Mr. *Dwarka Nath Banerjee* and Shah *Asad Ali*, for the appellant.

Mr. *G. T. Spankie*, *Mir Zahar Husain* and Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

MAHMOOD, J. (after stating the facts as above, continued):—In second appeal it has been argued upon the authority of a ruling of the Court in *Behori Lal* v. *Gauri Sahai* (1), and especially upon the judgment of my brother Straight in that case, that Harpal Singh, who was impleaded in the execution-proceedings as legal representative of his mother Dan Kuar, could not be treated as a party to the defendant's decree in execution whereof, that sale took place; that inasmuch as the title now claimed by the plaintiff was not derived from Dan Kuar, but was a separate title, therefore the suit is not barred by s. 244 of the Civil Procedure Code.

I confess that some of the observations made by my brother Straight in the last paragraph of his judgment in that case lend support to the contention presented on behalf of the appellant, but in delivering my judgment in that case I expressed considerable doubts and summarized the case-law upon the subject as it then stood.

I need not, however, re-enter into the same question in this case, because I agree with the learned Judge of the lower appellate Court in thinking that the ruling is essentially distinguishable from the present case, there being no question here as to objections having [78] been taken under s. 278 of the Civil Procedure Code by a third party, nor any question relating to the death of such third party leaving the judgment-debtor or his legal representative as his heir.

This case is really governed by the principle which I laid down in *Ram Ghulam* v. *Hazaru Kuar* (2), namely, that the legal representative of a judgment-debtor is a party to the suit for purposes of execution, and that the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections to execution of decree against any property pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title

(1) 8 A. 626. (2) 7 A. 547.

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totally separate from that which he personally holds in such property. The rule thus expressed is supported by the various cases to which I referred in delivering my judgment in *Bahori Lal* v. *Gauri Sahai* (1), and to the cases which I then cited I may add a more recent ruling of this Court in *Mulmantri* v. *Ashfak Ahmad* (2) and *Roop Lall Dass* v. *Bekani Meah* (3), as also *Ravunni Menon* v. *Kunju Nayar* (4).

Applying the principles of these rulings to the present case, I am of opinion that Harbal Singh who was duly impleaded in the execution proceedings of the defendant's decree must be dealt with as a party to the suit within the meaning of clause (*c*) of s. 244 of the Civil Procedure Code, and that he not having raised any objections to the sale of the property in execution of that decree, and the sale of the 20th June, 1882, at which the defendant-respondent purchased having taken place, neither he nor his vendee the present plaintiff could go behind that sale or claim the property upon any title which Harpal Singh might have asserted in the execution-proceedings above mentioned.

The suit was therefore barred by s. 244 of the Code of Civil Procedure, and the learned Judge of the lower appellate Court was [79] therefore right in refraining from entering into consideration of the other questions raised by the pleadings of the parties.

I would dismiss this appeal with costs.

BRODHURST, J.—I concur. *Appeal dismissed.*

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12 A. 79=10 A.W.N, (1890) 25.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

PARBATI (*Plaintiff*) *v.* BHOLA (*Defendant.*)* [18th July, 1889.]

Civil Procedure Code, ss. 569, 592—Application for leave to appeal as a pauper—Act XV of 1877—(Limitation Act) ss 5, 12, sch. ii, No. 170—Time requisite for obtaining copy of decree—Exclusion of time between delivery of judgment and signing of decree.

Judgment was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with s. 579 of the Civil Procedure Code, it bore date the day on which the judgment was pronounced. On the 15th April the plaintiff applied for a copy of the decree; on the 16th she received notice that the estimate of the costs of preparing the copy was prepared: on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May she presented in the High Court, to the proper officer, an application, under s. 532 of the Code, for leave to appeal as a pauper.

Held that the application was barred by limitation under art. 170, sch. ii, of the Limitation Act (XV of 1877), and that s. 5 of the Act did not apply.

Per Edge, C.J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should, under s. 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or

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* Second Appeal, No. 835 of 1887, from a decree of Babu Pramoda Charan Banerji Subordinate Judge of Allahabad, dated the 29th March 1887, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 24th June, 1886.

(1) 8 A. 626. (2) 9 A. 605. (3) 15 C. 437. (4) 10 M. 117.

applicant in obtaining a copy of the decree, and not otherwise. *Beni Madhub Mitter* v. *Matungini Dassi* (1) referred to. 1889 JULY 18. — APPELLATE CIVIL. — 12 A. 79 = 10 A. W.N. (1890) 25.

A delay caused by the carelessness or negligence of a party applying for copy of decree, such as negligence in coming forward to pay the money required, cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of s. 12 of the Limitation Act, [80] does not mean requisite by reason of the carelessness or negligence of the applicant it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to s. 12 and art. 170, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date.

[Appl., 12 A. 461; R., 19 B. 48 (50); 30 C. 790 (793) = 8 C.W.N. 906; 15 C.W.N. 205 (211) = 7 Ind. Cas. 118 = 12 C.L.J. 173; 10 Ind. Cas. 210 = 5 S.L.R. 47; U.B.R. (1905), Crim. Pro. Code, 24.]

THE facts of this case are sufficiently stated in the judgments of the Court.

Babu *Jogindro Nath Chaudri*, for the appellant.

Mr. *Dwarka Nath Banerji*, for the respondent.

JUDGMENTS.

EDGE, C.J.—This was a suit for maintenance and for arrears of maintenance alleged to be due. The plaintiff's suit was dismissed in the first Court; it was dismissed on appeal in the lower appellate Court on the 29th March, 1887. On the 21st May, 1887, she presented an application to Mr. Justice Mahmood for leave to appeal as a pauper. Through some inadvertance it was overlooked apparently at the time that her application was an application for leave to appeal as a pauper, and was not a mere presentation of a momorandum of appeal.

At a late stage in the case I was called in to hear the appeal by Mr. Justice Brodhurst and Mr. Justice Mahmood. We have heard a long argument on the merits of the case, and have called upon Mr. *Jogindro Nath* to satisfy us that the application for leave to appeal was not barred by limitation. The dates are shortly as follows:—On the 29th March, 1887, the lower appellate Court delivered judgment dismissing the plaintiff's appeal. The decree of the lower appellate Court bears date the 29th March, 1887; but as a matter of fact it was not signed by the Judge until the 1st April, 1887. On the 15th April, 1887, the plaintiff applied for copies of the judgment and decree, on the 16th April she had notice that the estimate of the costs of preparing the copies was prepared; on the 19th April she paid into Court the amount required by the estimate; she had notice to attend on the 23rd April, for the delivery to her of the copies; on the 25th April she did actually attend and, received the copies of the judgment and decree; on the [81] 12th May, 1877, her application was presented to the officer in this Court whose duty it is to see that the proper fees are paid on documents and to report whether the applications are made within time, and he on the same 12th May made report that the application was four days beyond time. On the 21st May the applicant presented her application for leave to appeal as a pauper to Mr. Justice Mahmood, and, as I have said, he, overlooking the fact that it was an application for leave to appeal as a pauper, not a memorandum of appeal, admitted the case as if it was a memorandum of appeal, but reserved the question of limitation for consideration at the hearing of the appeal.

(1) 13 C. 104.

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Mr. *Chaudhri* has contended that the period of limitation should be computed from the 1st April, and not from the 29th March, 1887. His contention is that, inasmuch as the decree was not signed by the Judge until the 1st April, the period between the 29th March and the 1st April should be allowed to the applicant. But referring to the Limitation Act of 1877, we find that by art. 170 of sch. ii the time for presenting an application for leave to appeal as a pauper is fixed at thirty days from the date of the decree appealed against. By s. 579 of the Code of Civil Procedure it is enacted that the decree of the appellate Court shall bear date the day on which the judgment is pronounced. The section also provides that the decree shall be signed and dated by the Judge who passed it. Reading that section as it must be read, the date which the decree should bear is the date when the judgment was delivered, that is, the date must be looked to when applying art. 170.

Mr. *Chaudhri* has cited the case of *Bani Madhub Mitter* v *Matungini Dassi* (1) as an authority for showing that where the decree is not signed until a date subsequent to the date of delivery of judgment, the intermediate time should be allowed. In my opinion, applying s. 12 of the Limitation Act to such a case, allowance should be made for the time between the date when a judgment was pronounced and the date when the decree was signed, if the delay in signing the decree delayed the applicant in [82] obtaining a copy of the decree, and not otherwise. In such a case as that it would clearly be, within the meaning of s. 12, time which was requisite for obtaining a copy of the decree, because a copy of the decree could not be obtained until the decree was signed by the Judge. But that is not the case here. Here no application was made until the 15th April; so that in no sense was the applicant delayed in obtaining a copy of the decree by the fact that the decree was not signed by the Judge on the date the judgment was pronounced, but was signed on the 1st April. Consequently the period between the 29th March and the 1st April cannot in my opinion be allowed.

There is another question about the computation of time, and that is whether this lady having had notice on the 16th April of the amount of the estimate, and delayed until the 19th April to pay into Court the money required for making the copies, such delay should be allowed? In my humble judgment delay caused by the carelessness or negligence of a party applying for a copy cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite there does not mean requisite by reason of the carelessness or negligence of the applicant: it means the time which is occupied by the officer who has got to provide that copy, in making the copy.

Mr. *Chaudhri* pressed upon us a circular order issued in 1882, which had reference not to this Court but to the Courts below, and is in favour of his contention.

What we have to consider in this case is not whether a circular order of this Court issued for the guidance of subordinate Courts was justified in law, but the true construction of art. 170 of the second schedule and s. 12 of the Indian Limitation Act, 1877. It appears to me that one limit of the period is not the date when the copy was delivered, but the date when the copy was ready for delivery to the applicant, if the applicant had chosen to apply, where the applicant had notice that the copy would be ready on that date. Otherwise we should be extending the period of limitation

(1) 13 C. 104.

beyond the period contemplated by the Limitation Act, and would be [83] excluding from the period of limitation the time, it might be one month, two months or two years, during which an applicant with notice of the date when a copy would be ready, neglected to take delivery of it.

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Again, the clause in the circular order as to making allowance for other days is, it appears to me, a clause which we must not consider when we have to deal with the Limitation Act. Delays caused by the negligence of an applicant in coming forward to pay the money for a copy cannot be considered as time requisite for obtaining the copy of a decree.

In any view of this case the application for leave to appeal as a pauper was out of time when it came before this Court. S. 5 of the Indian Limitation Act, 1877, does not apply to an application of this kind. The result in my opinion is that we must treat this as a case in which the application for leave to appeal as a pauper should have been refused, having regard to its being four days beyond time.

Under these circumstances I am of opinion that this application for leave to appeal as a pauper is barred, and it must be dismissed with costs.

BRODHURST, J.—The plaintiff Mussammat Parbati sued her husband Bhola, who is of the Teli or oil-seller caste, for a maintenance allowance of Rs. 4 per mensem, and with reference to an order of the Criminal Court passed in her favour on the 16th January, 1883, she also sued for recovery of Rs. 64 as maintenance at the same rate, for sixteen months, from May, 1884 to August, 1885.

She alleged that she was married to the defendant eleven years ago; that she went to live with him three years afterwards; that she lived with him for about five years, and that about three years prior to the date of suit he turned her out of his house without any reason whatever.

The defendant in reply stated that the plaintiff was not entitled to a maintenance allowance, because he never expelled her from [84] his house, but she refused to live with him; that she was out of caste on account of her misconduct; that she is a Sudra; that women of her class maintain themselves by labour, and that one rupee per mensem was a sufficient maintenance for her; that she was not entitled to the Rs. 64 she claims, because she, in the Magistrate's Court, refused to live with him the defendant, and she therefore did not receive the maintenance; and that defendant's income never exceeds Rs. 48 per annum.

The case was tried by the Munsif, a Hindu. He held that under the Hindu law a woman who deserted her husband of her own accord and without serious violence or ill-treatment on his part was not entitled to maintenance, but that if the husband turned his wife out of his house and refused to permit her to return to it he would be liable to pay her maintenance; that the parties had not produced any direct evidence on these points; that the plaintiff's witnesses stated that the defendant kept another woman of his caste as a mistress, whilst the defendant's witnesses deposed that the defendant was married to that woman; that the plaintiff's misconduct was not proved by any legal and reliable evidence; but on the other hand that ill-treatment by the defendant was not proved, and that the plaintiff had not proved her claim; and the Munsiff dismissed her suit.

An appeal was preferred from the Munsif's decree. It was decided by the Subordinate Judge, who also is a Hindu. He found that "the plaintiff has utterly failed to prove cruelty or any other justifiable reason for her refusal to live with her husband. There is in fact a total absence of evidence on the point; all that her witnesses prove is that she goes to her

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husband and lives with him, then the two fall out and quarrel, and the wife comes away on the allegation that she is beaten by her husband. There is no evidence whatever as the chastisement or as to ill-treatment of any sort. The plaintiff herself has not volunteered her own evidence on the point. She has thus failed to show any justification for not residing with her husband, and cannot therefore claim maintenance. The appeal is accordingly dismissed, with costs."

[85] The plaintiff was permitted to bring her suit, and also her appeal *in forma pauperis*. I now find what I was previously unaware of, that she applied to this Court for leave to file a second appeal as a pauper. Her application was four days beyond time. She alleged that "as she fell sick she could not present this appeal within time." It is now obvious that this petition should have been rejected, because it was positively barred by limitation, and was not admissible under the provisions of s. 5 of the Limitation Act.

The appeal, however, was admitted by my brother Mahmood, "subject to such objection as may be raised by the respondent as to the appeal being beyond limitation, &c."

The learned counsel who now represents the respondent was unaware of this order, and consequently did not take any objection on this point.

The case came before my brother Mahmood and myself in second appeal. The pleas taken by the plaintiff-appellant are as follows :—

"1. The findings of the lower Court are contrary to law. The plaintiff is entitled to maintenance.

"2. When the Criminal Court fixed maintenance, the plaintiff should get it so long as the said order is not set aside.

"3. The finding of the lower appellate Court is bad, inasmuch as it is not exhaustive."

As to the second plea, the Criminal Court's order referred to apparently ceased to be in force about May, 1884, and the plea is obviously unsustainable.

The other two pleas are extremely vague and weak.

In the plaint there is no allegation of cruelty, and there is not even an allusion to Musammat Ghasiti.

I am now clearly of opinion that the plaintiff-appellant has met with unusual and uncalled-for indulgence, and that her second appeal, which was beyond time and ought not I consider to have been admitted, should after admission have been dismissed at the first hearing. I think that my brother Mahmood and myself must [86] have had some misapprehension as to the circumstances of the case, and that, regarding the plaintiff-appellant as a poor and perhaps injured woman without any legal adviser, we remanded the case under s. 566 of the Civil Procedure Code for findings on five issues that we framed.

Those issues have now been very carefully tried by the learned Subordinate Judge. His findings generally are adverse to the plaintiff-appellant, and objections to them have been filed under s. 567 of the Code of Civil Procedure.

The lower appellate Court on the first issue found that the plaintiff was married to the defendant about the year 1875; that they began to co-habit as man and wife about 1876; that the plaintiff lived with her husband till about June, 1882, that is, for over five years; that they lived apart for about fifteen months after she had obtained a Magistrate's order of the 15th January, 1883, awarding her maintenance; that after the

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expiration of the fifteen months the plaintiff and defendant came to a compromise; that the plaintiff returned to her husband and lived with him until the early part of September, 1884, when she again left him and applied to the Magistrate form an order of maintenance, but that her application was refused; that the total period of cohabitation was thus from 1876 to the middle of 1882 and again for a period of about six months prior to September, 1884.

On the second issue the Subordinate Judge found:—" There is no evidence whatever to prove that the plaintiff was ill-treated, and the evidence of her own witnesses noticed above shows that she came away from her husband because he would not allow her to go to her mother's house. I am of opinion that that was the first reason for which differences arose between the parties, and as the plaintiff's mother did not send her to the defendant's, the latter got up the story alleged by him as to her misconduct and brought another woman who is now living with him. The name of that woman is Musammat Ghasiti as she herself states it to be. It is admitted by both parties that shortly after she had come to cohabit with the defendant, the plainiiff made her application to the Crimi-[87]nal Court for maintenance, so that Musammat Ghasiti began to live with the defendant from the end of 1882. The exact date is unknown and cannot be ascertained."

On the third issue the Subordinate Judge held that " Musammat Ghasiti is according to the rules of the caste to which the parties belong, the lawfully married wife of the defendant, and that she is not in the position of a mistress."

The finding on the fourth issue is:—

"The defendant is certainly unwilling to provide a separate house for the plaintiff. It appears from the plaintiff's own statement that she lived in the same house with Musammat Ghasiti, and she as stated in her deposition in this case that if her husband does not ill-treat her she has no objection to live with him and his other wife, so that the presence of Musammat Ghasiti in the house of the plaintiff's husband is no ground for her objecting to live with him, and she has admitted that she never had any difference with Ghasiti during the six months that she had lived in the same house with her in 1884."

On the fifth issue the Subordinate Judge found that "Rs. 4 a month is a reasonable amount for the plaintiff's maintenance, having regard to the rank in life of the parties and the pecuniary means of the defendant."

I see every reason to believe that these findings are perfectly correct, and they are findings of fact with which, I consider, we are not empowered to interfere in second appeal. I would therefore have dismissed the appeal with costs, but my brother Mahmood was of a different opinion. He requested Mr. *Jogendro Nath Chaudhri* to appear for the appellant, and that learned pleader having acceded to the request, informed us that he was prepared to argue:—

1. Refusal of a wife to live with her husband may be a plea in answer to a suit for maintenance, but that such refusal should have been preceded by an offer on the part of the husband to maintain her.

[88] 2. Upon defendant's own admission he has contracted a second marriage because plaintiff left his house without his consent. The plaintiff must be treated as a forsaken wife under the Hindu law, and thus entitled to maintenance.

3. That a charge of infidelity in open Court and on oath brought against the wife amounts to cruelty in law—

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(*a*) Because it may lead to the wife being put out of caste.

(*b*) Because it is an implied repudiation of the wife.

4. (*Per* MAHMOOD, J). Where in British India polygamous marriages are allowed, the husband, according to the rule of justice, equity and good conscience, is bound to provide separate abodes for each wife, and his failure to do so and his insisting upon his two or more wives cohabiting with him in the same abode amounts to legal cruelty entitling any one of such wives to separate maintenance.

Questions are here raised that have not been taken by the parties themselves in any one of the three Courts in which the case has been heard and argued.

These questions have been raised by my brother Mahmood directly or indirectly through the learned pleader, who has at his request, at this late stage in the proceedings, appeared on behalf of the appellant.

I thought that we should not now re-open the case to consider these questions, and owing to this difference of opinion between my brother Mahmood and myself, the learned Chief Justice has consented to give his assistance in disposing of the case.

We have now heard Mr. *Chaudhri* for the appellant and Mr *Banerji* for the respondent on such points as the majority of us held they were entitled to argue.

Mr *Chaudhri* in support of his arguments referred us to a law which we unanimously held had no bearing on the question before us, and he referred us also to a text of Hindu law which in the opinion of the Chief Justice and myself did not in any way support [89] his case. He has not stated anything to induce me to believe that the case has not been properly disposed of by the lower Courts.

Mr. *Benerji* on the other hand has referred us to texts of the Hindu law and to rulings of the High Courts of Calcutta, Bombay and Madras that support his arguments and the judgments of the lower Courts.

Having regard to all the circumstances of the case, there is not, I think, any necessity to quote the authorities above alluded to.

I concur in dismissing the appeal with costs.

MAHMOOD, J.—This appeal has arisen out of a suit instituted by the plaintiff-appellant, Musammat Barbati, against her husband, Bhola, defendant-respondent, on the 7th October, 1885, for fixation of the amount of maintenance and recovery of arrears thereof due to her.

Both the Courts below have concurred in dismissing the suit upon grounds which represent to my mind extremely doubtful proposition of the Hindu law of maintenance relating to superseded wives such as the plaintiff in the present case.

I am, however, relieved from entering into the somewhat difficult question of the Hindu law raised by the facts of this case and by the learned arguments which have been addressed to us on behalf of the parties. The solitary reason why I am so relieved is that, upon consideration, I have arrived at the opinion that this appeal is barred by limitation and should be dismissed as such without entering into the merits of the points of law raised in the case.

The facts relating to the question of limitation are that the plaintiff-appellant, who has all along been suing *forma pauperis*, had her appeal to the lower appellate Court, which dismissed it by its judgment of the 29th March, 1887, and it is from that decision that the plaintiff applied to this Court under s. 592 of the Civil Procedure Code for leave to be allowed to appeal as a pauper. This application was presented to the office of this

Court on the 12th May, 1887, and the office report of that date shows that the application was on that date four days beyond the period of limitation. 1889 JULY 18.

[90] The application came on for hearing before me sitting as a single Judge on the 21st May, 1887, and upon that date I made the following order:— APPELLATE CIVIL.

" Subject to such objection as may be raised by the respondent as to the appeal being beyond limitation, I admit the appeal." 12 A. 79= 10 A.W.N. (1890) 25.

The appeal was accordingly registered as second appeal No. 835 of 1887, and in due course it came on for hearing before my brother Brodhurst and myself, and we, by our order of the 3rd January, 1887, remanded the case under s. 566 for findings upon certain points which we therein mentioned.

In pursuance of that order the lower appellate Court recorded its findings on the 21st March, 1889, and those findings having been submitted to my brother Brodhurst and myself as Judges of the Division Bench, we, by our order of the 11th July, 1889, held that the case was a fit one for decision by a Bench consisting of three Judges, and we directed that with this recommendation the case be laid before the learned Chief Justice for orders.

By the learned Chief Justice's order of the 11th instant this Bench consists of the Judges named in that order, and we have heard the appeal upon the merits.

In the course of the argument either before the Division Bench consisting of my brother Brodhurst and myself or before this Bench, no objection was pressed on behalf of the respondent as to the appeal being barred by limitation.

I am of opinion, however, that the imperative requirements of s. 4 of the Limitation Act (XV of 1877) render it necessary for us, as Judge who have to dispose of this appeal, to take the objection ourselves.

In the case of *Mangu Lal* v. *Kandhai Lal* (1) I took occasion at some length to explain the views which I have long entertained that the Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England that statutes of this description must be construed strictly, [91] against their operation. On the contrary I held that such Acts, where their language is ambiguous or indistinct should receive a liberal interpretation and be treated as "*statutes of repose*, and not as of a penal character or as imposing burdens. It was in view of the opinion which I thus expressed and to which I still adhere, that in delivering my judgment in *Husaini Begam* v. *The Collector of Muzaffarnagar* (2), I was constrained to dissent from my brother Tyrrell, and dismissed the appeal as barred by limitation. My judgment in that case was upheld by a Bench of three Judges of this Court who heard an appeal from my judgment under s. 10 of our Letters Patent in the same case—*Husaini Begam* v. *The Collector of Muzaffarnagar* (3).

With reference to the views which I have thus on more than one occasion expressed from the Bench as to the applicability of the law of limitation I entertain no doubt that this appeal is barred by limitation and should be dismissed as such without any trial of the merits of the questions raised in the appeal.

(1) 8 A. 475. (2) 9 A. 11. (3) 9 A. 655.

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I have already stated that proceedings in this case, so far as this Court is concerned, began with an application under s. 592 of the Civil Procedure Code, namely, with an application for leave to be allowed to appeal as a pauper, which application was made on the 12th May, 1887, and was admitted by me by my order of the 21st May, 1887, subject to such objections as might be raised by the respondent.

I am of opinion that my order of the 21st May, 1887, admitting the appeal, was erroneously passed, as it seems to me that in passing that order I must have dealt with pauper appeals upon the same footing as ordinary appeals, and overlooked the stringent provisions of the Limitation Act, which draw a marked and almost an invidious distinction between an appeal by an appellant who can pay the Court-fees, and an appeal by a person, such as the plaintiff-appellant in this case, who admittedly cannot afford to pay the Court-fees.

[92] That order can be considered by us upon the principle of a Full Bench ruling of this Court in *Dubey Sahai* v. *Ganeshi Lal* (1); indeed it can be set aside, as this Bench is now seized of the whole case for disposal.

Mr. *Dwarka Nath Banerji* who appears for the respondent stated that he did not insist upon the appeal being barred by limitation, because such a plea was not taken when the case was heard by my brother Brodhurst and myself on the 3rd January, 1889, when we remanded the case under s. 566 of the Civil Procedure Code, and the learned Counsel desisted from pressing the plea because he considered it to be too late at this stage of the case.

I am of opinion, however, that the order of my brother Brodhurst and myself dated the 3rd January, 1889, though made without any argument being addressed to us as to the appeal being barred by limitation, does not debar this bench from holding that the application for leave to appeal preferred to this Court on the 12th May, 1887, was barred by limitation, that therefore my order of the 21st May, 1887, whereby the application was admitted subject to such objections as the respondent might raise upon the question of limitation, was *ultra vires*, and should be set aside as such, resulting in the dismissal of the appeal as barred by limitation.

It is to this question that I wish to address myself.

I have already indicated that the plaintiff, a superseded wife of the defendant, who has taken another wife, has possibly, if not probably, a very good case under the Hindu law itself, to require her husband to provide her with separate maintenance according to his rank in life. Her appeal seeks decision of this question. She is admittedly a pauper and cannot afford to satisfy the requirements of what certainly cannot be called the requirements of justice, but the requirements of the revenues of the State.

It is in this light that I as one of Her Majesty's Judges of this Court regard the questions, and I deal with the law as it now stands irrespective of any considerations of good policy, which fall within **[93]** the province of the Legislature much more than within the province of the Judge.

Viewing the case in this light, I hold that both the Code of Civil Procedure (Act XIV of 1882), and the Indian Limitation Act, XV of 1877, draw such a marked distinction between the rich and the poor when they

(1) 1 A. 34.

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are litigating with each other, that to say the least, much plausibility is given to what has sometimes been said, that the remedies of law even as administered in British India are available more to the rich than to the poor.

For instance, what would be an ordinary first appeal under s. 540 of the Civil Procedure Code to a person who can afford the court-fees, is no longer such an appeal in the case of a person who is a pauper and cannot afford to pay the court-fees. For his case then, though absolutely similar, falls not under s. 540 of the Code, but under s. 592, which disables the pauper appellant from questioning the lower Court's decree upon grounds absolutely similar to those which enable the rich appellant, so long as he can afford to pay the court-fees, to insist upon his case being heard and determined upon grounds such as s. 540 of the Civil Procedure Code permits.

The same marked distinction between the poor appellant and the rich appellant is maintained in another statute also relating to the administration of civil justice. I refer to the Indian Limitation Act, XV of 1877.

That the statute in art. 156 of sch. ii provides ninety days for the person who can afford to pay the court-fees to appeal under the Code of Civil Procedure, but only thirty days for an appeal by the pauper who cannot afford to pay the court-fees.

This is the effect of s. 592 of the Civil Procedure Code read with art. 170 of sch. ii of the Limitation Act, XV of 1877, with the result that whilst a rich man is entitled to ninety days for appealing, the pauper appellant is given only thirty days, that is to say, exactly one-third of the time which the person who can satisfy the demands of the State revenues possesses.

[94] Nor does the distinction end here. S. 4 of the Limitation Act imperatively requires the Courts to dismiss suits, appeals and applications after the prescribed period when sufficient cause is not shown within the meaning of the second paragraph of s. 5 of that enactment.

The indulgence is shown not to the pauper appellant, but to the appellant who can afford to pay the court-fees, as I shall presently show.

I have already said enough to show that this, which to me sitting here as a Judge, seems almost an unreasonable distinction between rich litigants and the poor litigants, is by reason of the imperative mandates of the Legislature itself, a provision which seems to me to be beyond any such consideration as I can entertain as a Judge of this Court. But because it is sometimes possible for the Legislature to consider the views which are expressed from the Bench in connection with such cases, I may say that I have failed, even after much anxious consideration, to understand the policy upon which these statutory provisions have been made, and which statutory provisions I am bound to obey ; nor do I understand why such provisions were ever made part of the statute law of the land.

As the statute law stands, and it is because it is for a Judge to explain the law and not to make it, I am driven to rule exactly according to the requirements of the statute law.

The application which was admitted by my order, for leave to appeal as a pauper, was an application governed by the provisions of art. 170 of sch. ii of the Limitation Act (XV of 1877). I have already said that I mistook it to be entitled to the same privilege as it might have been entitled to, if it was made by a person who could satisfy the State demand of Government revenue. That order passed by me was an illegal order, and the petitioner is not entitled to the benefits of s. 5 of the Limitation Act, which benefits are limited to the rich who can pay the court-fees stamp.

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I am all the more convinced that this interpretation of the law is right, because in the first place. in not only art, 170, but also in [95] the penultimate paragraph of s. 12 of that enactment, a marked distinction is to be observed in the wording of the statute between appeals by the rich man and the appeals or rather applications for leave to appeal when made by paupers. S. 12, in keeping with the other provisions to which I have referred, allows indulgence not to the poor but to the rich, because there it draws a clear distinction between an appeal by one who can pay the court-fees and application by a pauper to be allowed to appeal *in forma pauperis*. So also s. 5 of the same enactment gives every indulgence to the person who can pay court-fees, and none to him who cannot pay.

The result of this view is that I, with very much regret, feel that the statute law as contained in s. 5 of the Limitation Act (XV of 1877), which I am bound to follow and enforce, disables me from considering whether or not, under the circumstances of this case, the delay of four days as reported by the office was or was not excusable. The appellant's misfortune might have been similar to the misfortune of one who could pay the court-fees, and even if the misfortune consisted in the breaking of a leg, such misfortune might probably be intensified by the circumstances that she, the appellant, is admittedly a pauper. But so long as the law does not take this circumstance into account, it is not for me, sitting here as one of Her Majesty's Judges, to advise what the law should be, nor to do other than enforce that law.

The matter therefore stands thus. Because the plaintiff-appellant was a pauper and could not pay court-fees, therefore her appeal, instead of being governed by ninety days' limitation, was to be governed by thirty days' limitation, and because she was a pauper she was not to be allowed any such deduction in computation or indulgence as s. 5 provides ; and that because she is a pauper it does not lie within the power of Her Majesty's Judges, sitting in appeal, to allow her indulgence, or to say whether the delay of four days was or was not justifiable or excusable.

I have said enough to indicate how far, if I was one of the members of the Legislature, I should dissent from such provisions of the law, but being here as a Judge I am bound to follow them [96] in order to indicate, as I have often done, to the population within the jurisdiction of this Court, how far laws of limitation are laws which must be strictly enforced, and that they are essentially laws of repose.

Because the plaintiff-appellant did not within the period of limitation provided by art. 170 of Act XV of 1877 apply for leave to appeal to this Court, and because such application for leave to appeal *in forma pauperis* was delayed by four days, and also because such delay cannot be excused by this Court within the meaning of s. 5, I hold that the appeal is barred by limitation, and that it should be dismissed as such without entering into the question as to the rights of the parties. I would dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SANT LAL AND ANOTHER (*Plaintiffs*) v. UMRAO-UN-NISSA (*Defendant*).* [14th August, 1889.]

Execution of decree—Postponement of sale in execution—Sale held through order for postponement not reaching the conducting officer—Material irregularity in conducting sale—Illegal sale—Civil Procedure Code, s. 311.

The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void.

Held that the effect of the Court's order for postponement of the sale was to deprive the officer of all egal authority to hold it on the date previously fixed; that his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311 of the Civil Procedure Code; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai* v. *Sheo Ghulam* (1), *Ram Dial* v. *Mahtab Singh* (2), and *Ganga Prasad* v. *Jag Lal Rai* (3), referred to.

[F., 9 O.C. 289; R., 5 M.L.J. 70 (74); D., 21 A. 140 (142).]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

[97] Munshi *Juala Prasad*, for the appellants.

Mr. *Hamid-ullah*, for the respondent.

JUDGMENT.

STRAIGHT, J.—The facts of the case to which this appeal relates are as follow:—A decree was obtained against the judgment-debtor respondent, and an application was made for sale of certain property of hers, and the sale took place on the 29th November, 1888. The respondent applied for the postponement of the sale on the 22nd November, 1888, and an order was made to the effect that if security was given within one week the sale would be postponed. On the 29th November, 1888, the judgment-debtor filed a security-bond, and on that date the Court executing the decree passed an order postponing the sale. Owing to some circumstances for which the judgment-debtor cannot be held responsible, that order of the Court failed to reach the officer conducting the sale. Consequently the sale was held and the decree-holder appellant before us became the purchaser of the property. The judgment-debtor then asked to have the sale set aside on the ground that at the time it took place the conducting officer was incompetent to hold the sale by reason of the order of the 29th November, 1888. To this objection the learned Subordinate Judge has given effect, and holding that there was material irregularity set the sale aside. It is this order that is the subject of the appeal by the decree-holder, the auction-purchaser. It is contended by Mr. *Juala Prasad*, the learned pleader for the appellant, that the Subordinate Judge was bound to find something more than mere irregularity, and that it lay on him on

* First Appeal, No. 69 of 1889, from an order of Munshi Peare Lal, Subordinate Judge of Meerut, dated the 14th August 1889.

(1) 4 A. 382. (2) 3 A. 701. (3) 11 A. 333.

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the evidence produced by the judgment-debtor to come to the conclusion either one way or the other that there had been some substantial loss to the judgment-debtor by reason of the irregularity complained of. I think that the use of the word "irregularity" by the learned Subordinate Judge is misleading, if he intended to say that the case was one which fell within s. 311 of the Code of Civil Procedure. I think it was something more than an irregularity. I think that the sale was an illegal sale just as much as if a Court tried a cause in respect of a subject-matter, which before the date of trial had been removed from its jurisdiction by an authority having power to deprive it of such juris-[98]diction. Under the Code of Civil Procedure the officer conducting the execution-sale derives his authority and competence entirely from the Court executing the decree, and it is clear from the powers given by the statute to such Court that if it does postpone a sale its order must have the immediate effect of postponing the sale: indeed, if it be not so, most serious complications might arise, and the result would ensue that although a Court having full power to do so had postponed a sale, the officer appointed to conduct it might nevertheless hold such sale. I do not think that the question whether the order of the postponement did or did not reach the officer conducting the sale is of any serious importance. When once the sale was postponed, all power to hold it went out of the officer appointed, and he, though no doubt in this particular case without being aware of it was *functus officio*. Then the question arises what power have we under the Code to deal with the state of things? I cannot suppose that it was intended that a Court executing a decree was to confirm a sale which had never taken place in the sense that it had taken place without authority, or that it was to refuse to set aside such a sale when brought to its notice. In the case of *Sukhdeo Rai* v. *Sheoghulam* (1) I stated, in terms which I believe have been more than once approved of by Judges of this Court, the grounds on which it seemed to me cases of this kind might be dealt with, and in the case of *Ram Dial* v. *Mahtab Singh* (2) which was subsequently confirmed in appeal by their Lordships of the Privy Council, I and my late colleague Mr. Justice Oldfield dealt with a case in a similar manner. There is also a ruling of the learned Chief Justice in the case of *Ganga Prasad* v. *Jag Lal Rai* (3) which adopted a similar view, and there it was held by him, in reference to s. 290, that the terms of that section were not merely directory but mandatory, and under certain circumstances the sale being contrary to law was void, and that this Court, or indeed any Court dealing with such a sale, could not recognize or sustain it. I therefore come to the conclusion that the order of the Subordinate Judge in this case should not be disturbed, its practical [99] effect being to declare the sale of the 29th November, 1888, to be a void sale. The appeal is dismissed with costs.

TYRRELL, J.—I agree.

Appeal dismissed.

(1) 4 A. 382. (2) 3 A. 701. (3) 11 A. 333.

12 A. 99=10 A.W.N. (1890) 17.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BENI MADHO (*Defendant*) v. BASDEO PATAK AND OTHERS (*Plaintiff*).* [14th January, 1890.]

Hindu law—Joint Hindu family—Mortgage and decree thereon affecting joint family property—Mortgage effected by and decree passed against father only—Father's debt—Effect of mortgage and decree on son's rights and interests.

Where a Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage-security or in respect of a simple money-debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree, or affected by the sale certificate.

[F.—12 A. 209 (212), F. Appr.—14 A., 179 (182); R.—13 A. 216 (219); 14 A. 190 (192); 22 A. 408 (490, 410); 27 A. 16 (F.B.)=1 A.L.J. 310=A.W.N. (1904), 151; 28 A. 508 (538)=3 A.L.J. 274=A.W.N. (1906), 117; 31 A. 176 (215)=6 A.L.J. 263; =16 C.P.L.R. 19 (23); 1 O.C. 53.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Jokhu Lal*, for the appellant.

Munshi *Juala Prasad*, for the respondents

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit, of a by no means uncommon description, brought by the minor sons of a Hindu to avoid a mortgage transaction of the 12th April, 1884, and a decree obtained against their father by the mortgagee for sale of the mortgaged property, by obtaining a declaration that their interests in the property charged were not affected thereby. The mortgage transaction, as I have stated, took place upon the 12th April, 1884, and it was between the appellant Beni Madho, for a consideration of Rs. 8,600 as mortgagee and Kandhya Ram the father of the minor plaintiffs and his brother Bhagantia as mortgagors. The mortgage money was sought to be raised and in fact was raised to satisfy and [100] pay off a debt due from Bhagantia, the uncle of the plaintiffs, a member of the joint family along with them and their father. The mortgagee having failed to get payment of the mortgage-debt, on the 30th March 1886, obtained a decree against both his mortagors, for sale of the mortgaged property, and in execution it was attached. Thereupon objections were preferred to such attachment on behalf of the minors, which were disallowed, and in consequence the present suit was instituted upon the 21st July, 1887. The object of this suit is to have it declared that the decree of the 30th March, 1886, obtained by the appellant against the father of the plaintiffs and their uncle, is not binding upon the plaintiffs, nor can their interests in the property attached and threatened with sale be brought to sale. This form of suit, as I have already said, is a well-known

* First Appeal, No. 11 of 1888, from a decree of W.T. Martin, Esq., District Judge of Mirzapur, dated the 28th October, 1887.

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one; and their Lordships of the Privy Council have over a long series of years had to give many important rulings upon the subject. No doubt the principle enunciated by them in earlier cases led the Courts in India to take a somewhat narrower view of the rules that should govern in such matters than that which appears to have been since adopted. I think I am correct in saying that down to the point at which the judgment of the late Chief Justice Sir Comer Petheram and myself was delivered, in the case of *Basa Mal* v. *Maharaj Singh* (1), all the decisions of their Lordships of the Privy Council, which had been delivered were collected; and we therein stated what appeared to us to be the result of those rulings as formulated in the proposition with which our judgment concluded. Since then there have been several more rulings by their Lordships of the Privy Council; namely: *Simbhunath Panday* v. *Golab Singh* (2), *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (3), *Doulat Ram* v. *Mehr Chand* (4), *Bhagbut Pershad* v. *Musammat Grija Koer* (5), *Meenakshi Naidu* v. *Inmudi Kanaka Ramaya Koonden* (6), and an unreported case of *Rai Babu Mahabir Pershad* v. *Rai Meheswar Nath Sahai*, dated the 20th November, 1889.

[101] In the first of these cases in L. R., 14 I. A., p. 77, it was held that, where an execution-sale relating to joint family property has taken place under a decree obtained in a suit against the father alone in respect of a mortgage executed by him alone, in which his interest in the property specifically was alone charged and the decree and sale-certificate are limited to such interest, no matter what the nature of the debt was, only his interest passed. In the judgment it is remarked:—"Each case must depend upon its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money-decree." This case was followed by my brother Mahmood and myself in *Ram Sahai* v. *Kewal Singh* (7) and in *Raghubar Singh* v. *Lachmi Narain* (8). In the second of their Lordships' decisions in L. R., 14 I. A., p. 84, it was held upon the facts that only the right, title and interest of the father was intended to be sold at the execution-sale and only that interest was actually purchased. It was there said:—"If the whole estate could have been put up for sale, it was not put up. It is not a question of what the Courts could have done or what they ought to have done, but what they did, what was put up for sale and what was purchased. If what was put up for sale, was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest." In the third case at p. 187 of L. R. 14 I. A., Daulat Ram, the plaintiff, being the holder of a decree on a mortgage by the managing members of a joint Hindu family, in execution purchased the mortgaged property. Being resisted on obtaining possession under his purchase by the defendants, other members of the same family, he brought this suit to have it declared that such purchase covered or included the interests of the defendants. The latter simply defended the suit on the ground that as they were no parties to the mortgage or the suit thereon, the decree and execution-sale did not touch their interests. It was held that this contention was of no avail and they were bound. In [102] the

(1) 8 A. 205. (2) 14 I. A. 77. (3) 14 I.A. 84. (4) 14 I.A. 187. (5) 15 I.A. 99. (6) I.A. 1. (7) 9 A. 672. (8) 7 A.W.N. (1887) 291.

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course of judgment it is said:—"It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff on the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interests of all parties or only the right, title and interest of the two parties, who were made defendants. In the case reported from Volume 5 of the Indian Law Reports, Mr. Justice Pontifex in giving his decision says at page 852: "It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then in a suit by the mortgagee, the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant. and the reason for such decision probably is that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right validly acquired to have the whole 16 annas sold." Elsewhere their Lordships remark as to the facts before them, "When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He therefore brought this suit and the defendants had the opportunity of trying whether the mortgage was a valid mortgage, which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding on them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit and that the two mortgagors alone had been sued. But that ground falls from under them." In a somewhat similar condition of facts my brother Tyrrell and I took the same view, in the case reported in I. L, R., 10 All., 123. In the fourth decision of their Lordships to be found in L. R. 15 I. A., p. 99, it was held that where joint ancestral property has been sold in execution of a decree on a mortgage [103] executed by a Hindu father, if his sons come into Court to set aside such sale, they must establish that the debt to which the mortgage related was contracted for an immoral purpose, and that it did not rest on the creditors to show that they had made proper inquiry or that the money had been borrowed in a case of necessity. Their Lordships say, "It must be borne in mind that this was not a case of a joint family consisting of brothers, but it was one consisting of fathers and children, and it has been held that sons are liable to pay the debt of their fathers unless incurred for immoral or illegal purposes." The case *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) was referred to and the propositions established by it stated, and then their Lordships continue: "Now although at the time of the sale, notice was given on behalf of the childern that the property was joint ancestral property and that the father had no right to mortgage it, still the question arises whether under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to show that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the childern to show that the debt was contracted for an immoral or illegal purpose. If it was

(1) 6 I. A. 104.

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necessary to show that the debt was so contracted, the plaintiff failed to prove that fact. It appears to their Lordships that according to the dicision in the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose.........It appears therefore from the decisions that in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity." In the fifth case, in L.R., 16 I.A., p. 1, the father had executed a single bond for Rs. 2,000 upon which the creditor obtained a simple money-decree and attached the whole joint zemindari interest. The son objected and asked to have his share excluded but failed, and the [104] sale went on and the whole estate was sold and purchased by the decree-holder. Then the son brought his suit, not denying that the whole had been sold but impeaching the debt which led to the sale, and asserting that the decree founded on it could not bind his interest. It was held that, failing to make out the grounds on which he brought his suit, it had been rightly dismissed by the Court of first instance. In the unreported case, the question was whether the purchaser at a sale in execution of a decree against the father had purchased the entirety of the zemindari interest, and it was remarked, "The question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit.................It is hardly possible to make it clear that all parties, judgment-creditors, judgment-debtor, the plaintiff and his advisers and the Court itself considered that the thing put up to sale was the entirety of the estate."

These rulings seem to me to have gone somewhat further than the former ones, and the outcome of the whole of this body of decisions appears to be this, that where a Hindu son is coming into Court to assail either a mortgage made by his father or a decree passed against his father or a sale held or threatened in execution of such decree—whether it be upon a mortgage-security or in respect of a simple money-debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security, or dealt with by a decree, it rests upon him, if he seeks to escape from having his interests affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he as the son of a Hindu would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale-certificate. Now in this case upon the showing of the learned Judge, there is no proof whatever that the mortgage-[105] debt of the 12th April 1884, was an immoral debt, that is to say, a debt which according to the Hindu Law the sons of a Hindu would not be under a pious obligation to discharge, or that anything less than the whole zamindari interest was mortgaged, or that the decree for sale related only to the father and uncle's share. It was alleged in the plaint that the debt was incurred for "bad and immoral purposes," but there is not a particle of proof of that, and the only suggestion appears to be that it was bad and immoral for one brother to pay another's debt. Adopting the

principles which their Lordships of the Privy Council have laid down, I think that this suit instead of having been decreed should have been dismissed, and I therefore decree the appeal with costs, and the suit of the plaintiffs will stand dismissed with costs.

MAHMOOD, J.—I am entirely of the same opinion.

Appeal dismissed.

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12 A. 105=10 A.W.N. 1890) 10.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

SHEO GOBIND AND ANOTHER (*Plaintiffs*) v. ABLAKHI AND OTHERS (*Defendant*).* [7th August, 1889.]

Limitation—Appeal—Act XV of 1877, (*Limitation Act*), ss. 5, 12—" *Time requisite for obtaining a copy of the decree appealed against*"—*Neglect of Court officials in issuing copies.*

A decree of a lower appellate Court was passed on the 26th March 1888, and an appeal therefrom was presented to the High Court on the 6th July, or twelve days beyond the time allowed by art. 156, sch. ii of the Limitation Act (XV of 1877). An application for a copy of the judgment under appeal was made by the appellants on the 28th March, and the 29th March was fixed by the office as the date when the estimate of the costs of such copy was to be delivered, and it was delivered on that day. The estimate was not complied with until the 5th April, when the appellants put in the necessary stamp paper according to the estimate. Upon the entry of the stamp paper no intimation was made by the office to the appellants as to when the copy would be ready for delivery. The copy was delivered on the 10th April.

Held that under s. 12 of the Limitation Act the appellants were entitled to a deduction of the whole period between the 28th March and the 10th April, and that, if this were not so, the appeal should be admitted under s. 5 of the Act.

[106] The words in s. 12, "the time requisite for obtaining a copy of the decree appealed against" imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies or who are required to give notice when such copies are ready.

[R., 12 A. 461 ; 3 C.W.N. 55 ; 5 L B.R. 15, (17).]

THE fact of this case are stated in the judgment of Mahmood, J.

Mr. *Niblett*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

MAHMOOD, J.—Before I can dispose of this case finally, I consider it necessary to remand the case, under s. 566 of the Civil Procedure Code, for clear findings upon certain points but in order to explain them it is necessary to state certain facts, upon which the following genealogical table throws light.

Parmeshar Dat.

Musammat Bachi (concubine, defendant No. 3), Mata Prasad (son, defendant No. 4).	Narain (son. defendant No. 2).	Musammat Ablakhi (widow, defendant No. 1).

*Second Appeal No. 996 of 1888, from the decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 26th March 1888, modifying the decree of Munshi Madho Lal, Subordinate Judge of Mirzapur, dated the 9th November, 1887.

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On the 21st May, 1883, Musammat Ablakhi, defendant No. 1, for herself and as guardian of her minor son Narain, defendant No. 2, executed a hypothecation bound in favour of Sheo Gobind and Parsotam, plaintiffs-respondents, in respect of a grove and a house situate therein. The money due upon the bond was not paid, and the present suit was instituted by the plaintiffs on the 19th May, 1887, for recovery of money due upon the bond of the 21st May 1883, by enforcement of lien.

In the suit Musmmat Bachi, who has been found to be the concubine of the deceased Parmeshar Dat, was impleaded as defendant No. 3, and her son by Parmeshar Dat, namely, Mata Prasad, was impleaded as defendant No. 4.

Both Musammat Bachi, and her son Mata Prasad resisted the suit upon the ground that thay had been in proprietary possession adverse to the mortgagors Musammat Ablakhi and Narain, defendants [107] Nos. 1, and 2, and that their rights were therefore not affected by the hypothecation of the 21st May, 1883.

The Court of first instance decreed the claim as against Musammat Ablakhi, defendant No. 1, and Narain, defendant No. 2, but exempted the property and person of Musammat Bachi, defendant No. 3, and Mata Prasad, defendant No. 4.

The plaintiffs appealed to the lower appellate Court which has recorded a judgment which does not fully satisfy the specific requirements of s. 574 of the Civil Procedure Code. The effect, however, of the decree passed by that Court was to modify the first Court's decree by exempting the house, but allowing the decree to be enforced against the grove.

From the decree of the lower appellate Court Musammat Bachi, defendant No. 3, and Mata Prasad, defendant No. 4, have preferred this second appeal, and an inordinately large amount of time of this Court has been taken up in hearing the argument addressed to me by Mr. *Sundar Lal* in support of the preliminary objection to the effect that the appeal was barred by limitation and could not therefore be heard.

Before I proceed any further I wish to state exactly the line of thought which induced the learned Pandit to devote so much time to the point which does not appear to me too difficult to decide. The argument of the learned Pandit proceeds upon the following facts :—

The case was decided by the learned Judge of the lower appellate Court on the 26th March 1888, and the appeal was not preferred till the 6th July 1888, thus giving an interval of 102 days, that is to say, twelve days beyond the limitation allowed by art. 156 of sch. ii of the Limitation Act (XV of 1877), which provides only 90 days.

The learned Pandit in placing his case before me admits that s. 12 of the Limitation Act is applicable, and that thereunder the appellants are entitled to the exclusion of "the time requisite for obtaining a copy of the decree appealed against." This the learned Pandit [108] argues the defendants were fully entitled to; but his argument rests upon these facts :—

The application to obtain a copy of the judgment appealed from was made on the 28th March 1888, and the next day, namely, the 29th March 1888, was fixed by the office as the date when the estimate as to the costs of such copy were to be delivered. The estimate was so delivered on that day.

It is admitted that the estimate so delivered was not complied with immediately; but what did actually happen was that on the 5th April,

1888, the defendants-appellants put in the stamp paper requisite according to the estimate for copies which they had applied for so long before as the 28th March, 1888. Upon the entry of the stamp papers no kind of intimation was given to the defendants-appellants as to the period when the copy would be ready for delivery to the appellants who had applied for it so long before as the 28th March, 1888, but as a matter of fact, the copy was delivered on the 10th April 1888.

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Mr. *Sundar Lal* in the long and elaborate argument which he has addressed to me has argued that although if the period between the 28th March and the 10th April 1888 is to be excluded, the appeal is within limitation, yet out of this period I must deduct the period between the 29th March 1888 and the 5th April 1888, that is to say, the period when the estimate was given and the period when the stamp paper was filed, and the learned pleader contends that even under the circumstances of this case this period was not necessary, and that even the provisions of s. 5 of the Limitation Act which enable the appellate Court to entertain an appeal are inapplicable to the present case.

I have listened to the argument in support of the preliminary objection with much interest, and I may say with sufficient patience, but I have no doubt that the argument has no force.

The whole of the argument addressed to me relates to the interpretation of some English words, namely, the words "*the time requisite for obtaining a copy of the decree appealed against*" [109] as they occur in the second paragraph of s. 12. I have no doubt that the word "*requisite*" makes it possible for the appellant to require its meaning to be such that he should not lose the right of appeal either by reason of the neglect of the officials who issue copies or those who are required to give notice when such copies are ready. The word "*requisite*" as it occurs in the section, in my opinion, includes under the circumstances of the case the whole period intervening between the 28th March 1888, when the application for copy was made, and the 10th April 1888, when it was actually delivered. I say so, because in this case no date was fixed by the officers of the Court below either as to the date when the copy would be ready or as to the date when it would be delivered; and the copy itself was not delivered until the 10th April 1888.

But there is quite another aspect of the matter, and it relates to the interpretation of s. 5 of the Limitation Act, XV of 1877.

It is not for me to lay down any rule which will be binding upon the other Judges of this Court, but it is within my powers to say that in this case ample reasons exist, even if my views as to the interpretation of s. 12 do not meet with their approval, to require the exercise of the discretionary powers conferred by s. 5 of the enactment.

The preliminary objection as to the appeal being barred by limitation being thus disallowed, I have to hear the case upon the merits and explain the order which I should make.

In dealing with the case in this manner I do not think any satisfactory judgment can be delivered by me without clear findings upon the following points :—

(1) When did Parmeshar Dat die?

(2) For what length of time have the defendants been in possession of the house and grove in suit?

(3) What has been the nature of such possession as to its being adverse or otherwise to Musammat Ablakhi and Narain who are mortgagors to the plaintiffs-respondents?

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[110] I wish to add that it was at the express request of Mr. Niblett for the appellants that the case has been heard without any one being impleaded as party-respondent representing the deceased Parsotam, as stated in my order of to-day. The proceedings therefore will not affect the heirs, if any, of the deceased respondent Parsotam.

I remand the case under s. 566 of the Civil Procedure Code to the lower appellate Court for clear findings upon the above points, and upon receipt of the findings ten days will be allowed to the parties for objections under s. 567 of the Code.

Issues remitted.

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12 A. 110 = 10 A.W.N. (1890) 31.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

IBN HUSAIN AND ANOTHER (*Plaintiffs*) *v.* RAMDAI AND OTHERS *Defendants.** [8th November, 1889.]

Contribution, suit for—Joinder of parties—Joinder of causes of action—Limitation—Charge—Act XV of 1877 (*Limitation Act*) *sch. ii No.* 99, 120, 132.

Where the owner of two villages sold under a decree obtained upon a mortgage claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners. *Hira Chand* v. *Abdal* (1), distinguished. *Rujaput Rai* v. *Mahomed Ali Khan* (2), *Tevasi Telvar v. Palani Andi Telvar* (3) *Khema Debia* v. *Komola Kant Bukhshee* (4) and *Eglinton* v. *Koylashnath Mozoomdar* (5), referred to.

He may also bring a single suit in respect of the two sales, and is not bound to bring a separate suit in respect of each sale.

The owners of the other villages included in the mortgage are liable to contribution; and the owner of the property sold is entitled to a charge on those other villages in respect of the several amounts to be contributed, and the suit for contribution is governed by limitation provided by art. 132 and not by that provided by art. 99 or art. 120 of sch. ii of the limitation Act (XV of 1877) and must be instituted within twelve years from the date of confirmation of the sale. *Ram Dutt Singh* v. *Horakh Narain Singh* (6), and *Pancham Singh* v. *Ali Ahmad* (7) referred to.

[R., 26 A. 407 (444) = A.W.N. (1904) 74; 31 A. 65 (67) = A.W.N. (1908) 289 = 6 A.L.J. 2 = 5 M.L.T. 46; 26 B. 379 (385); 26 M. 686 = 13 M.L.J. 83 (F.B); 1 A.L.J. 276; 9 O.C. 259 (B); D., 24 M. 96 (108); 16 C.L.J. 148 (151).]

[111] THE facts of this case were as follows:—

The plaintiff No. 1, Saiyid Ibn Hasan, was the purchaser of two villages, mauza Basanta and mauza Tanda Mahideswala, at sales in execution of decrees against one Kadir Ali Khan. The sales were confirmed in May 1874. The plaintiff No. 2, Saiyid Wilayat Ali Khan, claimed by purchase from Saiyid Ibn Hasan.

At the time when the sales were held, the two villages had been hypothecated, with twenty-nine others, under deeds of simple mortgage dated respectively the 12th December, 1867, and the 28th April, 1873, and executed by Kadir Ali Khan and his wife Umrao Begam in favour of the defendant No. 1, Raja Sheoraj Singh. The mortgagee sued upon these

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* First Appeal No. 207 of 1887 from a decree of Munshi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 15th August 1887.

(1) 1 A. 455. (2) 5 N.W.P. 215. (3) 3 M.H.C.R. 187. (4) 10 B.D.L. 259, Note. (5) W.R. 1864 P. 303. (6) 6 C. 549. (7) 4 A. 58.

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deeds, and on the 13th November 1873 he obtained two decrees, in which the sale of thirty-one villages, including Basanta and Tanda Mahideswala, was directed. The amount due under these decrees was, in all, Rs. 67,064-6-9.

On the 20th June, 1874, the decree-holder brought to sale the villages Basanta and Tanda Mahideswala in execution of one of his decrees, and the sales were confirmed on the 5th August, 1874. The former village was sold for Rs. 9,500 and the latter for Rs. 16,000, the total amount realized by the sale being thus Rs. 25,500.

The present suit was instituted by the plaintiffs on the 21st June 1886 in the Court of the Subordinate Judge of Moradabad. In it they claimed contribution from the owners (twelve in number) of the other twenty-nine villages included in the mortgage, and which the decree had directed to be sold. The claim was not for one lump sum claimed generally as contribution from all the defendants collectively, but a document annexed to the plaint specified, in regard to each of the twenty-nine villages owned by the defendants, the proportion of contribution claimed by the plaintiffs in respect thereof.

The defendants pleaded, *inter alia*, that the suit was barred by limitation, and was bad for misjoinder. On the first point, the Subordinate Judge decided in favour of the plaintiffs, holding that the suit [112] was governed by art. 132 and not by art. 99 of sch. ii, of the Limitation Act (XV of 1877), and, having been brought within twelve years from the 5th August 1874, the date of the confirmation of the sales of Basanta and Tanda Mahideswala in execution, was within time. In regard to the second point, the Subordinate Judge held that the suit was bad for misjoinder. After referring to the case of *Hira Chand* v. *Abdal* (1), as authority for the proposition that a separate suit should have been brought against each of the owners of the twenty-nine villages, the Subordinate Judge continued :—

"Now the present suit has been brought seeking collectively for contribution in respect of several villages from a number of defendants, though the cause of action against each of the defendants was altogether separate, and the defences made by most of the defendants are such that they have no connection with those made by some of the others. Such a procedure cannot in anyway be held to be proper. It is to be observed that the villages Basanta and Tanda Mahideswala were sold in separate lots that is, each village was sold separately, and the sale certificate was also obtained separately....................In short, the cause of action as against all the defendants was not at all one, and yet the plaintiffs seek adjudication of their case against all of them. In my opinion by reason of the causes of action being different, the claim of the plaintiffs, as brought against all the defendants cannot be heard and tried, and as my finding on the second issue is that the plaintiffs' claim as brought should be dismissed for misjoinder and multifariousness, it is not necessary, I think to express any opinion regarding the other issues."

From this decree the plaintiffs appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Babu *Ratan Chand* and Mir. *Zahur Husain*, for the respondents.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.—This was a suit for contribution, in which the plaintiffs claimed contribution proportionately from the

(1) 1 A. 455.

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defendants, and not one lump sum as against all. It arose out of a sale of two villages. The two villages were sold on the [113] same day, but the sales were confirmed on different dates. The sales were confirmed within twelve years before this suit. Those villages and others were sold under a decree obtained on a mortgage. Those two villages and the villages which are alleged to be the property of the defendants were hypothecated by that mortgage. The Subordinate Judge dismissed the suit on the ground of misjoinder, but found in favour of the plaintiffs on the question of limitation. In dealing with the question of misjoinder, anything that we may say must not prejudice the hearing of the suit. For present purposes we only assume that the facts are correctly stated in the plaint. It is said that there was misjoinder in two respects, namely, that the sales of the two villages being distinct sales gave rise to two separate and distinct causes of action, and that even in respect of either of the sales the plaintiffs were bound to sue in a separate action the separate owners of the other villages.

To deal with the last objection first, we have seen no authority for the proposition that the owner of the village sold under a decree obtained under a mortgage must bring separate suits for contribution against separate owners of the other properties included in the mortgage. The Subordinate Judge relied on a judgment of this Court in the case of *Hira Chand* v. *Abdal* (1). That case has been misunderstood by the Subordinate Judge. What was decided there was that the purchaser of a share in a mortgaged estate who had paid off the whole of the mortgaged debt in order to save the estate from foreclosure, could not claim from the other mortgagors collectively one lump sum as contribution. The other mortgagors would not be liable for the lump sum. They would respectively be only liable proportionately. We have been referred to three cases in support of this view, that all the contributors may be joined in one suit. In the case of *Rujaput Rai* v. *Mahomed Ali Khan* (2) this Court held that on the ground of convenience all contributors might be made parties to the suit. The case of *Tavasi Telavar* v. *Palani Andi Telavar* (3), the case of *Khema Debai* v. *Kumola Kant Bukhshee* (4) and the case of *Eglinton* v. *Koylashnath* [114] *Mozoomdar* (5) are authorities to show that persons liable to contribute may all be joined in one suit. A similar view was taken by this Court in the case of *Musammat Bachcha Kuari* v. *Bhory Ishur Singh*, F. A. No. 22 of 1888.

As to the second point, it appears to us that under the circumstances of this case, common sense points to the course adopted by the plaintiffs being the right one, and that they were not liable to have the suit dismissed for misjoinder on either of the grounds contended for before us. If two separate suits had been brought, the defendants in one suit would also have been defendants in the other, and the same questions in the settlement of accounts would have to be considered in each suit. So far we are of opinion that the appeal should succeed.

Mr. *Jogindro Nath*, who appears for some of the respondents, has, under s. 561 of the Code of Civil Procedure, attempted to support the decree on a ground decided against his client in the Court below; that is to say, he has contended that art. 99 or art. 120 and not art. 132 of the second schedule of the Limitation Act applies to this case.

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(1) 1 A. 455. (2) N.W.P.H.C.R. 1873, p. 215. (3) 3 M.H.C.R. 187.
(4) 10 B.L.R. 259, Note. (5) W.R. 1864, p. 303.

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It is quite clear that art. 99 does not apply; this is not a case where a person has paid money due under a joint decree, nor is it a suit by a sharer in a joint estate suing for contribution for revenue paid by him. If art. 132 applies, art. 120 cannot. In our opinion the other villages were liable for contribution in this case, and liable so as to bring this case within art. 132. The case of *Ram Dutt Singh* v. *Horakh Narain Singh* (1) is an authority to show that in such a case as this, art. 132 would apply. The case of *Pancham Singh* v. *Ali Ahmad* (2) goes to show that the owners of these two villages would be entitled to a charge on the other villages in respect of the several amounts to be contributed. This case is one which we think is provided for by art. 132. We disallow the objections without costs, and allow the appeal. Costs of this appeal [115] to abide the result. We remand the case under s. 562 of the Code of Civil Procedure.

Cause remanded.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

TEYEN (*Defendants*) v. (*Plaintiff*).* [31st January, 1890].

Judicial officers, liability of—Act XVIII of 1850—Judicial act within the limits of the officer's jurisdiction—Such act protected though done erroneously, illegally or not in good faith—Jurisdiction."

Under Act XVIII of 1850, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

The word "jurisdiction" is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder* v. *Halket* (3). It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.

Where a Magistrate of the first class having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under ss. 379 and 411 of the Penal Code, and having issued a warrant purporting to act under s. 386 of the Criminal Procedure Code, for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, schedule V and s. 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court,—*held* that he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that, under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

[Diss.—10 M.L.J. 232 (234); R.—59 P.W.R. (1908).]

[116] THE facts of this case were as follow:—

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* Second Appeal No. 305 of 1888, from a decree of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 2nd February 1888, reversing a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 2nd March, 1887.

(1) 6 C. 549. (2) 4 A. 58. (3) 2 M.I.A. 293.

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The defendant, Mr. L.W. Teyen, was a Deputy Magistrate at Fatehpur, and on the 14th May, 1885, he convicted the plaintiff Ram Lal, a zemindar of the same district, of offences punishable under ss. 379 and 411 of the Penal Code and sentenced him to three years' rigorous imprisonment and Rs. 500 fine. On appeal, the conviction and sentence were set aside by the Sessions Judge of Cawnpore on the 3rd July 1885.

On the 16th May, 1885, the defendant caused a notification to be issued for the sale of certain moveable property belonging to the plaintiff, in realization of the fine. This notification was not in the form prescribed by schedule V, No. XXXVII of the Criminal Procedure Code, with reference to s. 386 of the same Code. It was in the following terms :—

" As the following moveable property belonging to Ram Lal Thakur has been attached in default of payment of Rs. 500 fine, through the police of Fatehpur and brought to this tahsil for sale, this notification, giving ten days, is issued ; and it is notified that if the fine is not paid within the period fixed herein, the attached property shall be sold at this tahsil, on Tuesday, the 26th May 1885. Any person who has any objection, to the sale of the attached property must file it in Court within the period specified in this notification."

Appended to this notification was a list of the property to be sold. It consisted principally of two mares, two buffaloes, five bullocks and a cow with calf.

On the 19th and 20th May 1885 and at his Court at Fatehpur (*i.e.*, at a time and place other than those specified in the notification)' the defendant had the property put up for sale by auction and the sale realized Rs. 360-0-3.

On the 9th April, 1886, the plaintiff instituted the present suit in the Court of the Subordinate Judge of Cawnpore. The plaint alleged that the defendant in selling property before the date fixed in the notification had acted maliciously and in bad faith, illegally, [117] and without jurisdiction, and that in consequence of such action intending purchasers were unable to be present at the sale, and the loss thereby occasioned to the plaintiff was Rs. 1,500. The claim was for damages of this amount.

The defendant pleaded, *inter alia*, " that whatever action he took in the case of Queen-Empress v. Ram Lal, charged under ss. 379 and 411 of the Indian Penal Code, was taken by him in good faith; and according to the best of his judgment and ability," and " that the sale of the defendant's moveable property was conducted under s. 386 of the Criminal Procedure Code, and as the property consisted of live-stock, it became necessary to sell it sooner, so as to avoid the cost of their maintenance."

The Court of first instance dismissed the claim on the ground that the suit was barred by Act XVIII of 1850, the acts complained of having been done by the defendant in the discharge of his judicial duty, and, though irregular and improper, not beyond his jurisdiction. The Court, however, did not allow costs to the defendant.

From the decree of the Subordinate Judge, the plaintiff appealed to the District Judge of Cawnpore. The material portion of the Judge's judgment was as follows :—

" The property was sold in disregard of s. 554 of the Crminal Procedure Code and of Form 37, Schedule V of the Code ; also in disregard of Form D, Chapter V, Criminal Circulars of the High Court, having the force of law under s. 553 of the Criminal Procedure Code.

"No time was allowed for the plaintiff to pay in the fine inflicted on him, nor were the time and place of sale notified to purchasers. It is contended for the defendant that s. 386 of the Criminal Procedure Code invests the defendant with jurisdiction to sell, and that the other provisions of the Code are mere subsidiary matters, and the neglect of them merely an irregularity not affecting jurisdiction. I cannot adopt this view. The conditions materially affect the position of the convicted person and the price of the goods sold. The defendant, in selling the plaintiff's property, was bound to [118] fulfil all material conditions of the law which gave him the power to sell.

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I find that the defendant had no jurisdiction to sell the plaintiff's property in the manner he did. It remains to enquire whether the defendant in good faith believed himself to have power to sell the property as he did. He does not plead ignorance of the law, but he urges that the animals had to be sold as soon as possible in order to avoid the costs of their maintenance. No authority is quoted justifying such a procedure. It is not shown that this is the usual procedure. On the contrary, there is evidence that proclamations for sale issue as a matter of course in the Fatehpur district. It is in evidence that the Tahsildar obtained sanction from Mr. Teyen for the issue of a proclamation, and actually issued one, naming the tahsil as the place of sale of this property, and that subsequently Mr. Teyen sent for the property, and sold it at once at his own kachahri. The plaintiffs pleader has deposed that he gave a petition asking for time to pay the fine up to the date fixed for sale, that the defendant was unwilling to receive it, that he, the pleader, placed it on the table and left. That petition is not now forthcoming. I see no reason to doubt this evidence and it should have drawn the defendant's attention to the law and facts regarding the sale. There is evidence produced to show that one Thakur Prasadan, an Honorary Magistrate and the police, are hostile to the plaintiff, that the defendant had probably been biassed against the plaintiff, by private information from these persons, that the defendant showed animus against the plaintiff in conversation with his friends, that he disclosed an opinion unfavourable to the plaintiff's case before any evidence had been taken, that he expressed displeasure at one of the witnesses supporting the plaintiff and assisting him.

"It may be that the defendant believed the plaintiff to be a person of bad character, but if he did so, it was still his duty to take care that the plaintiff was in no way prejudiced by this opinion in any case coming before him, and in such a case the defendant should have been more than usually careful to comply with the conditions of the law. The defendant has not used due care and attention in [119] this matter, and I find that he did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner he did. On the question of damages, the average price of the grey mare is stated to be Rs. 500, of the bay mare Rs. 450, of the bullocks Rs. 170 or Rs. 200 per pair, of the bullock Rs. 70, of the buffaloes Rs. 53 and Rs. 45, and of the cow Rs. 45. The entire property sold for Rs. 360-0-3. I assess damages at Rs. 1,200.

"The decree of the lower Court is reversed, and Rs. 1,200 is decreed in the appellant's favour, with costs of both Courts."

The defendant appealed to the High Court.

Mr. *J. E. Howard* and Mr. *Dwarka Nath Banerji*, for the appellant.

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Mr. *W. M. Colvin*, Mr. *A.H.S. Reid*, and Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—The suit out of which this second appeal arose was brought by Thakur Ram Lal against L. W. Teyen, a Magistrate of the first class, to recover damages for the sale by the defendant of two mares, five bullocks, one cow with calf, and two buffaloes, the property of the plaintiff, on the allegation that the defendant had, in bad faith and maliciously and without any sufficient cause, illegally and without authority sold the property in question before the date fixed for the sale, by reason whereof the plaintiff had suffered the damages claimed.

The defendant pleaded that he, when acting as a Deputy Magistrate in the Fatehpur district, had sentenced the plaintiff to three years' rigorous imprisonment and a fine of Rs. 500, under ss. 379 and 411 of the Indian Penal Code, which conviction and sentence he admitted had been set aside by the Sessions Judge of Cawnpore. The defendant also, amongst other things, alleged that such action as he had taken in the matter was taken in good faith by him and according to the best of his judgment and ability; that the sale was conducted under s. 386 of the Code of Criminal Procedure; and that it became necessary to sell the animals earlier than the date fixed [120] for the sale so as to avoid the costs of their maintenance; and relied upon Act XVIII of 1850.

The then Subordinate Judge of Cawnpore, being of opinion that Act XVIII of 1850 was a bar to the suit, by his decree dismissed the suit, but without costs.

From that decree the plaintiff appealed. On appeal the then Judge of Cawnpore found that the defendant had no jurisdiction to sell the plaintiff's property in the manner in which he had sold it; that the defendant had not used due care and attention in the matter, and did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner in which he had sold it.

The Judge of Cawnpore allowed the appeal, and assessing the damages at Rs. 1,200, gave the plaintiff a decree for Rs. 1,200 with costs of both Courts

From that decree this second appeal has been brought.

The Judge of Cawnpore and the Subordinate Judge differed as to the construction of Act XVIII of 1850.

Act XVIII of 1850 is as follows:—

"An Act for the protection of Judicial Officers.

"For the greater protection of Magistrates and others acting judicially.

"It is enacted as follows:—

"I. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant [121] or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

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The Judge of Cawnpore considered that inasmuch as the sale was not in conformity with Form 37, schedule V, and s. 554 of the Code of Criminal Procedure, and Form D in Chapter V of the Circular Orders of this Court, the acts complained of were not done or ordered to be done within the limits of the defendant's jurisdiction as a Magistrate of the first class. In other words, the Judge of Cawnpore considered that an act done or ordered to be done by a Magistrate in the discharge of his judicial duty could not be treated as done or ordered to be done by him within the limits of his jurisdiction if in doing such act or ordering it to be done he did not comply with the provisions of the law, which required that the act should be done in a particular manner.

If that construction of the Act is correct, this appeal must, on the finding of fact of the Judge of Cawnpore, that the defendant did not in good faith believe that he had jurisdiction to sell the plaintiff's property in the manner in which he sold it, be dismissed. If, on the other hand, that construction of the Act be not correct, that finding of fact is immaterial, as there can be no doubt that in sentencing the plaintiff to imprisonment and fine of Rs. 500, and in issuing his warrant for the levy of the amount by distress or sale of the moveable property belonging to the plaintiff, the defendant was acting in the discharge of his judicial duties as a Magistrate of the first class, whether or not he discharged those duties irregularly or even illegally.

Mr. *Banerji* for the appellant referred us to s. 386 of the Code of Criminal Procedure and the cases of *Meghraj* v. *Zakir Husain* (1), *Calder* v. *Halket* (2), *The Collector of Hooghly* v. *Tarak Nath Mukhopadhya* (3), *Fray* v. *Blackburn* (4), *Dhan Singh* v. *Basant Singh* (5) and Maxwell, pp. 67 and 385.

Mr. *Reid* and Pandit *Bishambhar Nath* for the respondent referred us to the cases of *Queen* v. *Shahon* (6), *Ammiappa Mudali* [122] v. *Mahomed Mustafa Sahib* (7), *Ashburner* v. *Keshav Valad Tuku Patil* (8), and *Collector of Sea Customs, Madras* v. *Punniar Chithambaram* (9).

It was at first contended that the Judge of Cawnpore having found that the defendant did not in good faith believe himself to have jurisdiction, it was immaterial whether the act done or ordered to be done was "within the limits of his jurisdiction." That contention was properly abandoned on its being pointed out to Counsel that such a reading of the Act would lead to the inference that a Judge or Magistrate would be liable to be sued for an act done by him in the discharge of his judicial duties, although the law imposed upon him the duty of doing such act, and such act was done in strict conformity with the law if at the time of doing the act he did not *bona fide* believe that he had jurisdiction to do or order the act complained of, and would make the protection which the Act was intended to afford to Judges, Magistrates and others acting in the discharge of judicial duties depend in all cases on the ignorance of the Judge or Magistrate or other person of the law, and not upon his having acted in conformity with the law.

In construing the Act, the first principle of construction must, if the Act is susceptible of it, be observed, and the same meaning be applied to the term "jurisdiction" wherever it occurs.

What is the meaning of that term where it first occurs? The Act was passed "for the greater protection of Magistrates and others acting

(1) 1 A. 280. (2) 2 M.I.A., 293. (3) 7 B.L.R. 449.
(4) 3 B. & S. 576. (5) 8 A. 519. (6) 11 W.R. Cr. 19.
(7) 2 M. H. C. R. 443. (8) 4 B.H.C. R.A.C. 150. (9) 1 M. 89.

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judicially," and is etitled "An Act for the protection of Judicial Officers." There could have been no necessity to pass an Act to protect a Judge, Magistrate or other person who in the discharge of his judicial duties acted as the law required him to act and in conformity with the law. The law could not make a judicial officer liable to suit for acting in conformity with the law. Prior to Act XVIII of 1850, the Acts which afforded protection to judicial officers in India were, so far as we are aware, the 13 Geo. [123] III. c. 63, and the 21 Geo. III, c. 70. S. 24 of the 21 Geo. III, c. 70. is as follows :—

"And whereas it is reasonable to render the Provincial Magistrates, as well Natives as British subjects, more safe in the execution of their office, be it enacted: That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the Country Courts for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

In 1839 the Judicial Committee of the Privy Council in the case of *Calder* v. *Halket* (1) judicially interpreted that section. The Judicial Committee considered that the object of that section was to protect Judges of the Native Courts from actions for things done within their jurisdiction, though erroneously or irregularly done, leaving them liable for things done wholly without jurisdiction. It is obvious that in using the term "jurisdiction" in that case the Judicial Committee did not use it in the sense of authority or power to do an act in a particular manner, but in the sense of authority or power to act in the matter. Act XVIII, of 1850 not only protected judicial officers from suits for acts done or ordered to be done by them in the discharge of judicial duties within the limits of their jurisdiction, but extended the protection which had to that extent according to the Judicial Committee of the Privy Council in *Calder* v. *Halket* (1), been afforded to them by s. 24 of the 21 Geo. III, c. 70, by further protecting them from suits for acts done or ordered to be done by them in the discharge of judicial duties, without the limits of their jurisdiction, provided that in such last case the officer at the time of doing the act or ordering it to be done in good faith believed himself to have jurisdiction to do or order the act complained of.

We presume that the Legislature in passing Act XVIII of 1850 had in mind the decision of the Privy Council in *Calder* v. *Halket* (1) and intentionally used the term "jurisdiction" in the sense in which it had been used by their Lordships of the Privy Council in that case.

[124] The concluding portion of Act XVIII of 1850 leads us also to that conclusion. If the term "jurisdiction" in that concluding paragraph were to be construed as meaning authority or power to issue the warrant in the particular matter and in the particular manner or form in which it was issued, the officer or person executing the warrant would under the section obtain no greater protection then the law, without the aid of Act XVIII of 1850, already afforded him, the protection being extended only to an "officer of any Court or other person bound to execute the lawful warrant," &c. The protection to such officer or person afforded by the section was not against suits for executing lawful warrants or orders, but against suits for executing warrants or orders, which were not lawful, provided that such warrant or order was issued by a judicial officer in a

(1) 2 M.I.A. 293.

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matter within his jurisdiction, and not merely in a matter in which such judicial officer had authority or power to issue the particular warrant.

This Court, in the case of *Meghraj* v. *Zakir Husain* (1) in considering Act XVIII of 1850, decided that no person acting judicially was liable to be sued for an act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction, and that in such a case the question of good faith did not arise. That, so far as we are aware, was the only case prior to that now under consideration in which this Court has had to construe Act XVIII of 1850.

In the case of *Collector of Sea Customs, Madras* v. *Punniar Chithambaram* (2) the defendant-appellant, who was Collector of Sea Customs at Madras, professing to Act under s. 24 of Act VI of 1863, imposed a fine upon the plaintiff, over whom he had no jurisdiction, and seized the property of the plaintiff with a view to realizing the fine. The Collector was held not to have been protected by Act XVIII of 1850, because he had no *bona fide* belief that he had jurisdiction. The judgment of Sir Walter Morgan, C.J., in that case is instructive on the point under consideration here. We extract two passages from that judgment as showing, as [125] we understand that judgment, that Sir Walter Morgan construed Act XVIII of 1850 as we construe it. Those passages are as follow:—

" The illegal imposition and levy of the fine is the alleged cause of action. There is no allegation in the plaint, except incidentally in the prayer for relief, that the Collector acted maliciously and without reasonable or probable cause. With reference to this, the first and fourth issues were apparently framed to raise the question whether the Collector, unless shown to be actuated by corrupt and malicious motives, was liable to suit. These issues were, on the assumption that the Collector acted judicially, properly regarded by the Court below as immaterial. His act being in its nature judicial, if we assume in his favour that he acted within his jurisdiction, this would not, in my judgment, render him liable to suit even though the act was done maliciously. If, on the other hand, he acted without jurisdiction his liability would depend, not on whether the act was malicious and without reasonable and probable cause, but on whether it was within the protection of Act XVIII of 1850.

"The *bona fide* belief which this Act of 1850 requires in those whom it protects from liability to suit in respect of acts done without jurisdiction, is of a different kind. A belief based on no probable or plausible grounds and arrived at inconsiderately and without due inquiry cannot be considered a belief in good faith within the meaning of the Act, which has been construed in several cases to require reasonable care and attention in the performance of his official duty on the part of him who does or orders the act complained of. It is difficult to suppose that the appellant in his proceedings could have given due consideration to the extent of his powers or endeavoured to inform himself on the subject. Certainly we cannot infer that he did so merely from the fact that his acts were fully known to the Government Solicitor, and at a later period to his official superiors

"Each case of this sort must no doubt be treated on its own circumstances. But we are bound, I think, to hold according to [126] the received construction of the Act that the error, whether it be one of law or of fact, must, to be protected or excused, be shown to rest on some foundation of reason."

(1) 1 A. 280.

(2) 1 M. 89.

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In the case of *The Collector of Hooghly* v. *Tarak Nath Mukhoopadhya* (1) the plaintiff sued a Magistrate for damages occasioned to him by the cutting of his *band* at the Magistrate's order. The High Court at Calcutta held that the Magistrate was acting judicially and with jurisdiction (though under the circumstance carelessly and irregularly), and was therefore protected by Act XVIII of 1850 from the action for damages. The judgment in that case is a long one, and we need refer only to the following passages in the judgment which are to be found at pp. 484-5 of the report:—

"Although we consider it clear that the procedure prescribed by Chapter XX was observed as little as it could well be by anybody acting under that chapter at all, still, as the Deputy Magistrate did, as the lower appellate Court finds he did, in fact act under Chapter XX and did call upon the plaintiff to show cause, and did hold a sort of inquiry (however irregular), through the police, we do not think we can say that the Deputy Magistrate was not proceeding judicially. We think he was proceeding judicially, though carelessly and irregularly.

"Then was the cutting of *band* an act within his jurisdiction? We take it for granted that it was, if he had proceeded regularly under Chapter XX. But does the irregularity or incompleteness of this procedure so affect the matter that the jurisdiction did not attach? For the same reasons which induce us to hold that the proceeding was a judicial proceeding though irregular, we hold that the Deputy Magistrate was acting with jurisdiction. As the Deputy Magistrate, acting on the report of the overseer, considered it necessary that the *band* should be removed, and as he under s. 308 passed an order calling upon the plaintiff to remove it, or show cause to the contrary within seven days, and as there was in fact a species of inquiry through the police, we think that the jurisdiction attached, [127] and that the Deputy Magistrate cannot be held to have acted without jurisdiction. On the whole, as we must accept it as a fact that the Deputy Magistrate in cutting the *band* was acting under Chapter XX of the Criminal Procedure Code, we are of opinion that he did act judicially and with jurisdiction, and therefore that he ought not in this suit to have been held liable in damages to the plaintiff."

The observations of Norman, J., in the case of the *Queen* v. *Shahon* (2), were, so far as Act XVIII of 1850 was concerned, clearly *obiter*.

It does not appear from the report of the case of *Ammiappa* v. *Mahomed Mustafa Saib* (3), whether or not the learned Judges in that case were considering the provisions of Act XVIII of 1850.

In the case of *Vinayak Divakar* v. *Bai Itcha* (4), the Court held that for the order of the Magistrate, in respect of the carrying out of which the suit against the Magistate was brought, there was not a shadow of legal foundation; and, further, that the order was made by the Magistrate for the purpose of placing undue pressure upon the plaintiff's husband.

The case of *Venkat Shrinivas* v. *Armstrong* (5), related to a question of pleading, and throws no light on the present case.

We cannot see what bearing the case of *Ashburner* v. *Keshav Valad Tuku Patil* (6) has upon the case before us.

In the result we are of opinion that the defendant-appellant here was in doing or ordering the act complained of to be done, acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the

(1) 7 B.L.R. 449. (2) 11 W.R. Cr. 19. (3) 2 M.H.C.R. 443.
(4) 3 B.H.C.R. 36. (5) 3 B.H.C.R. 47. (6) 4 B.H.C.R. 150.

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first class; that under such circumstances the finding of fact that "he did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner he did," is immaterial; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

[128] However hard it may be upon the plaintiff to have no redress by suit for the grossly irregular and oppressive act of the defendant, it is of the utmost importance to the public and to the State that the protection afforded by Act XVIII of 1850 should not be cut down to meet hard cases, and that Judges, Magistrates and others who have to exercise judicial duties for the benefit of the community should be able to act without the constant fear before them that if they happen to act irregularly or without full legal justification for the act done or ordered to be done by them, they will have to answer in damages to the person injured.

In the case of *Fray* v. *Sir Colin Blackburn* (1) Crompton, J., explained the principle upon which the law protected Judges of the Superior Courts in England from actions for a judicial act thus:—

"It is a principle of our law that no action will lie against a Judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed exists for their benefit and was established in order to secure the independence of the Judges and prevent their being harassed by vexatious actions. In the present case there can be no doubt that the action is most improper and vexatious."

That, it appears to us, is the principle which underlies Act XVIII of 1850.

The Executive Government may in gross cases be depended upon by their action to prevent the particular person having an opportunity of again misconducting himself in the discharge of judicial duties.

We allow the appeal, but without costs here or below, and we restore the decree of the Subordinate Judge.

We direct that a copy of this judgment and the record be sent to the Local Government for its consideration. *Appeal allowed.*

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12 A. 129 F.B.) = 10 A.W.N. (1890) 39.

[129] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

BALKARAN RAI AND OTHERS (*Defendants*) v.. GOBIND NATH TIWARI AND ANOTHER (*Plaintiffs*). [14TH FEBRUARY, 1890.]

Court-fee—Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Act VII of 1870 (*Court-fees Act*), *ss.* 4, 5, 6, 9, 10, 11, 12, 28, 30—"*Finality*" *of taxing officer's decision as to Court-fee—Civil Procedure Code, ss.* 54,541, 582, 638—*Act XV of* 1877, *Limitation Act, s* 4—*Memorandum of appeal from decree granting two distinct declarations—Construction of statute—Practice of Court.*

An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Limitation Act (XV of 1877) unless it is accompanied by the copies required by the Code.

A memorandum of appeal is a document included in the first and second schedules to the Court-fees Act (VII of 1870), and is a document within the

(1) 3 B. & S. 576.

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meaning of ss. 4, 25, 28 and 30 of the Act, and therefore cannot be filed or recorded in or received by the High Court unless and until the proper court-fee in respect of it is paid, and is of no validity unless and until it is properly stamped. Consequently, if it is not, when tendered, praperly stamped, it is not at that time a memorandum of appeal within the meaning of s. 541 of the Code and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of the Limitation Act, or as valid for any other purpose, except in the events specified in s. 28 of the Court-fees Act.

Where a memorandum of appeal which, when tendered, was insufficiently stamped has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of the Court-fees Act. In the case of a High Court, such an order can be made only by a Judge, and by him only in cases of "mistake or inadvertence." These words mean mistake or inadvertence on the part of the Court or its officers, and not on the part of the appellant or his advisers. The expression "head of the office" in s. 28 does not refer to the head of the office of the Courts, or at all events to the head of the office of a High Court, acting not as such but as a taxing officer; but it refers to the head of a public office such as the Board of Revenue.

Ss. 9, 10 and 11 of the Court-fees Act are not in conflict with s. 28; nor are ss. 9 10, 11 and 28, read together, in conflict with s. 54 of the Civil Procedure Code. Cases within s. 10 or s. 11 of the Act would arise only where, through mistake or inadvertence of the Court, a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed, or used in the Court; and clauses (*a*) and (*b*) of [130] s. 54 of the Code are similarly related to s. 28 of the Act, and were not intended to cut down or limit its provisions. The "dismissal" of a suit under s. 10 or s. 11 of the Act has the same effect as that provided by s. 56 of the Code in the case of "rejection" of a plaint under s. 54.

Clauses (*a*) and (*b*) of s. 54, which are declared by s. 638 to be inapplicable to the original and civil jurisdiction of the High Court, are also inapplicable to its appellate jurisdiction, notwithstanding the provisions of s. 582.

The word "final" in s. 5 of the Court-fees Act has the same meaning as in s. 12, though it is applied to a different subject. The cases in which it has been held that, notwithstanding the use of this word in s. 12, an appeal lies from a decision as to the category in which the relief sought by a plaintiff or appellant falls, do not mean that decisions which the section declares to be "final" are nevertheless appealable, but that the question of category is not a "question relating to valuation," and therefore is not declared by the section to be final. In both s. 5 and s. 12 "final" is used in its ordinary legal sense of unappealable. A decision under s. 5 of the Act is not open to appeal, revision, or review and is final for all purposes, and no means have been provided or suggested by the Legislature for questioning it.

The officer mentioned in s. 5 of the Court-fees Act is not bound to advise parties as to the stamp required under the Act, or to give them notice that they have not sufficiently stamped documents which the Act requires to be stamped before presentation.

A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act, be influenced by extraneous considerations, such as questions of hardship.

A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff, and (ii) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree, and stamped their memorandum of appeal with a stamp of Rs. 10 only. On the 9th November, 1887, it was tendered to a Judge for admission, and it bore a report dated the 7th November by the officer appointed under s. 5 of the Court-fees Act, "report will be made on receipt of record." The Judge made an order, "admit, subject to stamp report;" and the memorandum was then received by the office, and the appeal was entered on the

register. On the 27th September 1888 the office reported that there was a deficiency in the stamp of Rs. 615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888 it was made good. At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard.

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[131] *Held* that there was before the Court no vaild appeal as to the merits of which the Court could give a decision.

Held also that the stamp of Rs. 10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection.

[**Diss.**, 29 A. 749 (766) = A.W.N. (1907), 253 = 4 A.L.J. 636 = 2 M.L.T. 375; 15 M. 29 (34); **Not F.**, 27 B. 330 (332) = 5 Bom. L.R. 198; 19 C, 789 (780); 6 M.L.T. 129 (130) (F.B); 4 O.C. 108 (112, 114); 123 P.R. 1907 = 82 P.W.R. 1907 = 3 M.L.T. 63. **Doubted and D.**, 20 C. 41 (44); **F.** 28 A. 310 = 3 A.L.J. 838 = A.W.N. (1906). 21; 16 C.P.L.R. 89; **Disappr**, 29 A. 749 (766) = A.W.N. (1907). 253 = 4 A.L.J, 636 = 2 M.L.T. 375; **R.**. 13 A. 320 (322); 15 A. 65 (70, 72); 15 A. 123 (125); 16 A. 308 (311) (F.B.); 18 A. 206 (210); 23 B. 486 (490); 19 C. 747 (749); 28 C. 427 (433); 20 M. 319 (321); 24 M. 331 (333); 21 A.W.N. 21; 13 C.W N. 815 (821); 4 N.L.R. 166 (168); P.L.R. 1900 at p. 189; **D.**, 27 A. 197 (199); 36 C. 925 (931); 10 A.W.N. 122.]

THIS was a reference to the Full Bench by Straight and Mahmood, JJ. The order of reference was as follows:—

STRAIGHT, J.—Upon this appeal being called on, a preliminary objection was taken by Mr. *Hill*, on behalf of the plaintiffs-respondents, to the hearing of the appeal upon the ground that it was barred by limitation. The following dates are material. The suit in the Court below was decided on the 14th September 1887; the appeal was presented for admission on the 9th November 1887, to my brother Brodhurst, bearing upon it an office report, dated 7th November 1887, to the following effect: "Report will be made on receipt of record." On the 9th November 1887 my brother Brodhurst made the following order: "Admit, subject to stamp report." On the 27th September 1888 the stamp report was made, and it was to the effect that Rs.625 was the proper amount of court-fee payable upon the memorandum of appeal; and that, as only Rs. 10 had been paid upon it, there was a deficiency of Rs. 615. This report of the office was approved by the taxing officer on the 9th November 1888, and on the 19th of the same month the learned pleader for the appellant acknowledged having seen the report, and on the 8th December 1888 the deficiency was made good. Upon these facts the contention of the learned Counsel for the respondent, is that the presentation for admission on the 9th November 1887 was no presentation in law for the purpose of saving limitation, and that consequently, the deficiency not having been made good until the 8th December 1888, there was no presentation of a memorandum of appeal bearing the required court-fee within the period of limitation allowed for the presentation of appeals from decrees to this Court. It is also contended by Mr. *Hill* that the failure of an appellant to pay the necessary court-fee through ignorance of what that court-[132] fee is, would not constitute good ground for extending the indulgence provided by s. 5 of the Limitation Law. It is also contended by Mr. *Hill* that, as a matter of fact, the present appeal never was admitted, because the order of my brother Brodhurst of the 9th November was a mere conditional order, and that until he or some other Judge of the Court had made an order absolute, admitting the appeal, it never was admitted.

Pandit *Ajudhia Nath*, for the appellant, contends that, though for

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the mere purposes of court-fee the Registrar's order as taxing officer may be final, yet in considering the question of limitation he is entitled to urge that the court-fee paid upon the memorandum of appeal was the proper court-fee; and that therefore at the time it was presented for admission the memorandum of appeal was a memorandum of appeal properly stamped.

These contentions raise questions of much importance, and it is essential, in the interest not only of litigants and those who have to advise them, but of the Judges who have to deal with these matters, that there should be a clear and distinct expression of the opinion of the Court as to what should be the guiding rule. The first of these points was touched upon in a recent Full Bench ruling, but upon the facts therein disclosed it became unnecessary to decide it. I have consulted the learned Chief justice and he agrees with my brother Mahmood and myself that these questions should be laid for determination before the Full Bench. We, therefore, refer the above points for determination to the Full Bench.

MAHMOOD, J.—I agree, as I think the points raised require determination by the whole Court, especially with reference to the terms of Rule 19 of the present Rules of Court (1).

[133] The Hon. *T. Conlan*, the Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Mr. *C. H. Hill*, Mr. *G. T. Spankie*, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J.—Before considering the questions referred to this Full Bench for an expression of our opinion, I shall state as briefly as I can what I now understand to be some of the material facts and dates in this case. It is contended on behalf of some of the persons who were defendants in a suit which was decided by the Subordinate Judge of Gorakhpur adversely to the defendants, that this is a legally admitted appeal from the original decree in that suit, presented according to law and within time by them. On the other hand, it is contended by the plaintiffs in the suit, in whose favour the decree was, that no appeal from the original decree in the suit was legally presented within time or at all, and that what the defendants in the suit say is an appeal, is not in law an appeal which can be heard. For the sake of brevity only I shall call the document which was tendered to this Court as the memorandum of appeal a memorandum of appeal, and I shall refer to the defendants as the appellants and to the plaintiffs as the respondents.

The decree below was made on the 14th September 1887. The document which it is contended on behalf of the appellants is in law a memorandum of appeal from that decree, was tendered to my brother Brodhurst for admission on the 9th November 1887. It then bore a stamp of the

(1) "Every memorandum of appeal on the civil side, every memorandum of objection under s. 561 or under s. 567 of the Code of Civil Procedure, and every other application on the civil side, which when presented bears upon it an office note that a report as to the sufficiency of the stamp will be made on receipt of the record, shall, as soon as is possible after the receipt of such record, be examined in the office with respect to the sufficiency of the stamp, and the proper officer shall thereupon report as to the sufficiency of the stamp, and cause such memorandum or application, with such report thereon, to be laid before a Judge for orders on the next day upon which a Judge sits for the hearing of applications. No such memorandum or application shall be filed or registered, except in compliance with an order made by a Judge, after he has considered the office report as to the sufficiency of the stamp."

value of Rs. 10 only. When it was tendered to my brother Brodhurst it bore upon it a report by Dip Chand, who was then the officer whose duty it was, within the meaning of s.5 of the Court-fees Act, 1870, to see that a fee was paid under chapter II of that Act. That report had been made on the 7th November 1887, and was, so far as is material, as follows :— "Report will be made on the receipt of record."

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On the 9th November 1887, my brother Brodhurst endorsed on the document an order in the following words :—"Admit, subject to stamp report."

[134] That is a form of order which in such cases I have been in the habit of making, and which I have always understood to be a conditional order of admission, conditional in the sense that if the stamp report when made showed that the stamp on the memorandum of appeal was sufficient, the appeal was thereupon admitted ; but that if it showed that the stamp was insufficent, my order did not operate as an order of admission.

After my brother Brodhurst had made his order and on the same day, that is, on the 9th November 1887, the memorandum of appeal was received by the office and the appeal was entered in the Register of First Appeals. On the 27th September 1888 Dip Chand made his stamp report. That report was to the effect that Rs. 625 was the proper amount of court-fee payable upon the memorandum of appeal ; and that, as only Rs. 10 had been paid upon it, there was a deficiency of Rs. 615.

As Dip Chand is absent on sick leave, and as the then taxing officer is no longer an officer of the Court, having been promoted, it is impossible to ascertain when first that report of Dip Chand of the 27th September 1888 came to the notice of the appellants or of their vakil.

On or prior to the 2nd November 1888, the question of the correctness of the report of Dip Chand came before the then taxing officer, as I find that on the 9th November 1888 he made in the matter an order in writing in the following terms :—" See order in connected case. Deficiency must be made good."

The order in the connected case was as follows :—" The decree gives consequential relief, and deficiency must be made good."

Immediately below that order of the then taxing officer, Munshi *Kashi Prasad*, the vakil who was acting for the appellants, wrote on the 19th November 1888, " Seen," showing that on that day he had seen the decision of the then taxing officer. That decision of the taxing officer of the 9th November 1888 was accepted on behalf of the appellants as final and conclusive, for on the 8th December 1888 the appellants delivered to the officer of this Court stamps equivalent to the amount of the deficiency which [135] Dip Chand had reported to exist. With the exception of the order of my brother Brodhurst of the 9th November 1887, no order relating to the admission of the appeal was ever made by any Judge of the Court or indeed by any one, nor was the memorandum of appeal ever tendered to any Judge or indeed to any one for admission, except on the occasion when it was tendered to my brother Brodhurst on the 9th November 1887. Memoranda of appeal are not, nor were they, admissible in the Court, except under an order of a Judge.

It has been the practice of this Court to allow time, irrespective of any question of limitation and of the circumstances under which a memorandum of appeal is tendered when insufficiently stamped, to an appellant to make good any deficiency which may be reported to exist in the stamp of a memorandum of appeal, in cases in which the stamp report is accepted as correct by the appellant, and also in cases in which the

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taxing officer or the Judge appointed for that purpose under s. 5 of the Court-fees Act has decided that the stamp is insufficient. One of the questions involved in this case is whether that practice is in compliance with or in contravention of the law. If it is in contravention of law, the practice was unlawful.

A practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful; nor can a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act. If it were otherwise, cases might occur in which an absolutely different construction, based upon practice only, might be placed by this Court, the High Court at Calcutta, the High Court at Madras, the High Court at Bombay and the Chief Court of the Punjab upon a general Act, applicable to the whole of British India, which was susceptible of one construction only. Such a principle of construction in such a case would lead, not to making the law certain, but to confusion and uncertainty.

In order to clear the ground and to keep my mind in the consideration of the important legal questions which arise in this [136] case free from extraneous influences, I shall first refer to the *argumentum ad misericordiam*, the plea of hardship, which Mr. *Kashi Prasad* pressed upon us, and which at one time very nearly induced me to overlook what I conceive to be the true principles of law which can alone guide us to a safe and legal conclusion. I shall then consider how an appeal can be presented to this Court; what the law requires for the valid presentation of an appeal; whether these requirements have been complied with in this case; and various other points which arose during the arguments, although many of the latter appear to my mind to be irrelevant.

In the course of the argument, Mr. *Kashi Prasad* pressed upon us the hardship which would result to his clients, the defendants in the suit, if we were to hold that this appeal had not been presented within time. He also contended that in that event that hardship would be the direct result of the omission of the officer of this Court, Dip Chand, whose duty it was to see that fees are paid under chapter II of the Court-fees Act, to inform him, Mr. *Kashi Prasad*, or his clients, before the ninety days allowed by article 156 of the second schedule of the Indian Limitation Act, 1877, had expired that the stamp upon the memorandum of appeal was insufficient.

In my opinion, it was no part of the duty of Dip Chand to advise parties as to the stamp required under the Court-fees Act or to give them notice that they had not sufficiently stamped documents which that Act requires to be sufficiently stamped before they are presented to the Court.

If it were the duty of the officer who has to see that the proper fees are paid, to inform parties or their vakils that the stamps upon which their memoranda of appeal or other papers were tendered to the Court were insufficient, he would require a staff of assistants, which he has not got, and questions of limitation would depend, not upon the law as applied to the acts of the parties or their vakils, but upon our officer doing such duty and his being able to prove that his notice of a deficiency in the stamp had reached either the parties themselves or, if they had vakils, their vakils, within time to allow of the deficiency in the stamp being made good within the period [137] of limitation allowed by law. This in many cases it would be practically impossible for our officer to do, on account of the number of parties, the distance of their homes, in most cases from Allahabad or, where a vakil was engaged in the case, his absence from Allahabad,

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and the practical impossibility of getting from native litigants acknowledgments that they had received such notices.

Further, a very large percentage of memoranda of appeal is tendered so late that even if our officer was able to ascertain on the day or the day following that, on which a memorandum of appeal was tendered, that the stamp was insufficient, notice could not reach the parties, or their vakil if they had one, in time to allow of the deficiency in the stamp being made good if such deficiency had to be made good within the period of limitation. It is, in my opinion, the duty of those who tender documents to this Court to see that such documents bear at the time when they are tendered the proper stamps required by the Court-fees Act, and if they neglect that duty either intentionally, as I fear too frequently happens, or through carelessness or ignorance, they or their advisers, and not the officers of this Court, are the parties upon whom the blame for the results of such neglect must fall.

We cannot allow any question of hardship to influence us in applying the principles of construction to Acts of the Legislature where the wording of those Acts is plain and unambiguous. We are not responsible for those Acts and to put upon those Acts a construction different from that which according to the principles of construction, upon which a Court of Justice must act, they bear, would be to depart from our duty as Judges and to arrogate to ourselves the powers and functions of the Legislature. We have to construe the Acts of the Legislature as we find them, whether we approve of them or not,—not to alter or amend them. We have no power to read into the second schedule of the Indian Limitation Act an article which is not there, any more than we have power to read into the Indian Limitation Act or the Court-fees Act or any other Act or Code, a section or words which it does not contain. So far as I am aware, even their Lordships of the Privy Council [138] have no such powers. We have to justify our decisions when they are based on or governed by the Indian Codes, not by extraneous considerations, such as that of hardship, but by distinct reference to the section or article of the Code upon the proper construction of which our decision depends. This is a duty which it is most necessary for us carefully to attend to if we are to avoid causing doubt, perplexity and uncertainty, as to the law in the Courts which are bound to accept our decisions as their guide.

The question as to whether this appeal was presented within time depends, in my opinion, upon the construction of s. 541 of the Code of Civil Procedure, of ss. 4, 5, 25, 28 and 30 of the Court-fees Act (VII of 1870), of s. 4 of the Indian Limitation Act, 1877, and of art. 156 of the second schedule of the last mentioned Act. It will be necessary to refer to some other sections in order to see how far, if at all, many arguments which were addressed to us by way of analogy were well founded.

Under s. 541 of the Code of Civil Procedure, an appeal from an original decree must be made in the form of a memorandum in writing presented by the appellant, and must be accompanied by a copy of the decree appealed against, and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. Such memorandum must set forth concisely and under distinct heads the grounds of objection to the decree appealed against.

S. 548 of the Code of Civil Procedure enacts that "when a memorandum of appeal is admitted, the appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the

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appeal in a book to be kept for that purpose. Such book shall be called the Register of Appeals," and shows that the memorandum of appeal must be in fact first admitted as a condition precedent to its being endorsed with the date of presentation and to the appeal being entered in the register.

It has been held by the Chief Court of the Punjab, and I think rightly, that an appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Indian Limitation Act, [139] 1877, unless it be accompanied by the copies prescribed by the Code of Civil Procedure: *Bhag Singh* v. *Chandu Singh* (1) and *Nihal Singh Johar Singh* (2).

The Court-fees Act, 1870, was, as even its name imports, an Act primarily passed for the purpose of prescribing the fees which are to be paid in respect of documents to be used in Courts. It also provides in the schedules for the stamps to be used in certain offices other than offices of Courts of justice.

That Act not only prescribes the fees, but provides how those fees are to be ascertained, how questions as to the sufficiency of fees on documents, so far as Courts are concerned, are to be determined, and the conditions under which only the documents included in the first and second schedules to the Act may be received, filed, registered or used, as the case may be, in Courts in India. The Court-fees Act also specifies the documents which need not be stamped under that Act for the purpose of being used in Courts. A memorandum of appeal is a document specified in the first and also in the second schedule to the Court-fees Act, 1870, within the meaning of s. 4 of that Act, and is a document which, under s. 25 of that Act, must be stamped with a stamp at least equivalent to the fee chargeable in respect of it under the Act. A memorandum of appeal is consequently a document which ought to bear a stamp under the Court-fees Act, 1870, within the meaning of s. 28 of that Act. It is also a document requiring a stamp within the meaning of s. 30 of the Court-fees Act, 1870.

It follows that in construing ss. 4, 28 and 30 of the Court-fees Act, when the question arises as to a memorandum of appeal, we must read into those sections the words " Memorandum of appeal."

Thus read for the purposes of construction, s. 4 so far as memoranda of appeals are concerned reads as follows :—" No memorandum of appeal of the kind specified in the first or second schedule to this Act annexed as chargeable with a fee shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise [140] of its jurisdiction as regards appeals from the Courts subject to its superintendence unless in respect of such memorandum of appeal there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such memorandum of appeal."

Similarly, s. 28 reads thus :—" No memorandum of appeal which ought to bear a stamp under the Act shall be of any validity unless and until it is properly stamped. But if any such memorandum of appeal is through mistake or inadvertence received, filed or used in Court or office without being property stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such memorandum of appeal

(1) 7 P. R. 1879. (2) 147 P. R. 1879.

being stamped accordingly, the same or any proceeding relative thereto, shall be as valid as if it had been properly stamped in the first instance." 1890 FEB. 14.

Similarly, the first paragraph of s. 30 reads thus:—" No memorandum of appeal requiring a stamp under the Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled. The stamp referred to in s. 30 must mean a sufficient stamp according to the Act." FULL BENCH. 12 A. 129 (F.B.) = 10 A.W.N. (1890) 39.

We have then s. 4 enacting that no memorandum of appeal, such as that in the present case, shall be filed or recorded in, or received by, any High Court, such as this High Court, unless at least the proper fee in respect of it be paid. We have also s. 28 enacting that no such memorandum of appeal as this shallbe of any validity unless and until it is properly stamped.

The second paragraph of s. 28 is of importance in more ways than one, as it emphasizes the provision contained in the first paragraph of that section by providing that in the events therein specified a memorandum of appeal and all the proceedings relative thereto "shall be as valid as if it had been properly stamped in the first instance," and making it obvious that the intention of Legisature was that an improperly stamped memorandum of appeal chargeable with a fee under the Act should be treated as an absolutely invalid memorandum of appeal which could not until it was [141] properly stamped in the events specified in the second paragraph of that section be the foundation of any valid legal proceeding in any Court. The second paragraph of s. 28 prevents us applying the principle of *nunc pro tunc* except when an order under that paragraph has been made and complied with.

It has been contended that, although this Court could not legally file, record, receive or act upon the document in question, assuming that it was not properly stamped when tendered, and is bound to treat it as of no validity, yet that this Court must treat it as a document which was on the day on which it was tendered to this Court a memorandum of appeal within the meaning of s. 541 of the Code of Civil Procedure, and regard the appeal as having been presented within the meaning of s. 4 of the Indian Limitation Act to this Court on that day. To do so would, it appears to me, be to treat the document in question as a valid memorandum of appeal for the most important purpose for which a valid memorandum of appeal is required, namely, as the inception or foundation of a valid appeal.

When the Legislature has enacted, that a memorandum of appeal which is not properly stamped shall not be treated as of any validity and shall not be filed or recorded in or received by this Court and shall not be acted upon in any proceeding in this Court, I as a Judge of this Court, who have to obey the mandates of the Legislature and have not power to legislate, can only regard and deal with an improperly stamped memorandum of appeal as the Legislature has said that it must be regarded and dealt with.

Further, as a Judge who is bound by the statute law as I find it, I cannot hold that any practice of this Court which not only is not known to, but has not been sanctioned by, the Legislature, entitles me to treat for any purpose as valid a document which the Legislature, has enacted shall not be "of any validity." To do so in this case would be to treat a memorandum of appeal as a document which was not specified in either of the schedules to the Court-fees Act.

I fail to understand how an invalid memorandum of appeal, which

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in law must be regarded as no memorandum of appeal at all, [142] can, except in the events specified in the second paragraph of s. 28 of the Court-fees Act, be treated as a valid memorandum of appeal, or how the tendering to this Court of a memorandum of appeal which was of no validity, can be regarded as the presentation of an appeal for the purposes of the Indian Limitation Act, 1877, or for any other purpose.

In my opinion an appeal cannot be said to be presented within the meaning of s. 4 of the Indian Limitation Act, 1877, when the only presentation of the appeal is the tendering to the Court of a document which the Legislature has specifically enacted shall not be regarded by a Court as of any validity, and that the tendering to my brother Brodhurst on the 9th November, 1887 of a document which the law says shall be regarded as of no validity was no more a presentation of an appeal than would the tendering to him of a blank piece of paper have been a presentation of an appeal. In one case he could see nothing on the paper; in the other case the law had forbidden him to see anything on it.

It has been contended that, inasmuch as this document is now sufficiently stamped, we may apply the principle of *nunc pro tunc* and treat it as if it had been properly stamped in the first instance, that is, at the time when it was tendered to this Court, and my brother Brodhurst made his order of the 9th November 1887, and give effect to it as if it was when tendered on the 9th November 1887, a valid memorandum of appeal. That I cannot do without doing violence to the plain wording of s. 28 of the Court-fees Act. Although the proper stamps have since been put upon the memorandum of appeal, that was not done under any order of any Judge of this Court. Indeed, no application was ever made to any Judge of this Court or to anyone else to make any such order. So far as this Court is concerned, no one but a Judge of this Court could make such an order under s. 28 of the Court-fees Act nor could any Judge of this Court make any such order unles the memorandum of appeal had through mistake or inadvertence been received, filed or used in this Court or its office without being properly stamped. The words "mistake or inadvertence" limit the cases in wuich a [143] Judge of this Court can make an order under s. 28 of the Court-fees Act, 1870.

The "mistake or inadvertence" in s. 28 must mean mistake or inadvertence on the part of the Court or its officers, and not mistake or inadvertence on the part of an appellant or his advisers, who do not act for the Court in the receiving or filing or using of a memorandum of appeal in the Court. If the "mistake or inadvertence" is to be read as the mistake or inadvertence of the party, it would in the great majority of cases be impossible for a Judge to ascertain whether the receiving, filing or using of an improperly stamped document was owing to the mistake or inadvertence of the party or to his intentional act in an attempt to escape having to pay the proper fee at the proper time or at all.

For the contention that as sufficient stamps in value have since the document was tendered been affixed to it, although not under an order under s. 28 of the Court-fees Act, it is to be treated as if it was when tendered on the 9th November 1887 a valid memorandum of appeal for the purpose of limitation, and that we are to hold that the appeal was on that day presented within the meaning of s. 4 of the Indian Limitation Act, 1877, Mr. *Kashi Prasad*, for the appellants, relied upon the following cases:—*Ram Lal* v. *Harrison* (1); *Sheo Partab Narain Singh* v. *Sheo*

(1) 2 A. 832.

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Gholum Singh (1); *Syed Ambur Ali* v. *Kali Chund Dass* (2); *Musammat Begee Begum* v. *Syed Yusuf Ali* (3) and *Musammat Chouwara* v. *Wasil Khan* (4), but mainly upon *Skinner* v. *Orde* (5) in the Privy Council. As the case of *Skinner* v. *Orde* (5) was a case decided by their Lordships of the Privy Council and as we were mainly pressed with it by Mr. *Kashi Prasad*, I shall consider it first to see how far, if at all, it bears upon the present contention. It is to be observed that the petition to sue as a pauper in that case was when presented properly stamped, in accordance with law, with an eight-anna stamp, and was consequently a document which the Court was not prohibited for receiving by the Court-fees Act, 1870. In *Skinner* v. [144] *Orde* (5) their Lordships of the Privy Council held that on the full stamp for a plaint having been paid, that document, which had been properly received as a petition to sue as a pauper, might be treated as the plaint in a suit by a person no longer a pauper. In that case their Lordships said:—"To be logical, the Court should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

"The case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act (the then Code of Civil Procedure) requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed."

I infer from the passage which I have just quoted that if there had been any negative words in the Act requiring the rejection of the plaint or anything in its enactments requiring their Lordships to say that the petition should not, when the money had been paid for the fees, be considered as a plaint from the date when it was filed, their Lordships would have given effect to them, and not, as it is contended here that we should treat such words or provisions as a nullity. In this case we have not only the specifically negative words of s. 4 of the Court-fees Act and the specifically negative words of s. 28 of that Act, but the specific enactment in [145] the second paragraph of s. 28 under which alone a memorandum of appeal which was not properly stamped in the first instance can retrospectively be given effect to as valid as if it had been properly stamped in the first instance.

When in the passage which I have quoted their Lordships alluded to the practice in the Indian Courts, I must assume that their Lordships were alluding to a lawful practice of the Indian Courts, such as was authorized, for example, by the second paragraph of s. 28 of the Court-fees Act or by s. 6 of the repealed Act, XV of 1868, and not to a practice if such existed, which was contrary to the express enactment of the

(1) 2 A. 875. (2) 24 W. R. 258. (3) N. W. P. H.C. R. 1874, p. 139.
(4) S. D. A. N. W. P. 1864, p. 18. (5) 6. I. A. 126 = 2 A. 241.

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Legislature, a practice which unquestionably their Lordships, if their attention had been drawn to it, would not have endorsed, as appears from what their Lordships said in the subsequent portion of the passage which I have quoted. So far as the case of *Skinner* v. *Orde* (1) is applicable, it is, in my opinion, an authority against Mr. *Kashi Prasad's* contention, as it indicates that effect must be given to negative words and words of prohibition when they occur in Acts of the Legislature.

As to the case of *Ram Lal* v. *Harrison* (2), I should have considered that the amendment there was such as not to affect the date of the original institution of the suit. That case throws no light upon this case.

In the case of *Sheo Partab Narain Singh* v. *Sheo Gholam Singh* (3) it does not appear whether or not the attention of the learned Judges was called to s. 28 of the Court-fees Act, nor does it appear under what circumstances the insufficiently stamped memorandum of appeal had been filed. It appears, however, that the Judge who returned the memorandum of appeal, it is said under s. 54 (*b*) of Act X of 1877, omitted to comply with that section and to fix a time. Possibly the Judge may not have considered that he was returning the memorandum of appeal under s. 54 (*b*) of that Code.

In the case of *Syed Ambur Ali* v. *Kali Chand Dass* (4) the learned Judges do not refer to s. 4, or to s. 28 of the Court-fees Act, [146] 1870, nor does it appear whether or not their attention had been called to those sections. They based their judgment mainly on s. 31 of Act VIII of 1859.

In the case of *Musammat Begee Begam* v. *Syed Yusuf Ali* (5) the learned Judges did not consider what effect, if any, the Court-fees Act, 1870, had upon their construction of the Limitation Act, IX of 1871. In that case no time had been fixed by the Court within which the plaintiff should make good the deficiency.

The case of *Musammat Chowara* v. *Wasil Khan* (6) was decided long before the Court-fees Act, 1870, was passed.

I cannot treat cases in which the Court-fees Act of 1870 was not relevant, or where relevant, it was not even referred to, as authorities which it is safe to follow in this case, on the question which I am now considering.

Notwithstanding the cases to which I have just referred, I am, as I have already said, of opinion that the law prohibited the Court from receiving, filing or using the memorandum of appeal in this case, in the condition in which it was when it was tendered on the 9th November, 1887, and that as no order has been made by a Judge under s. 28 of the Court-fees Act, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation. If we are to regard the time when the document was fully stamped as the time when it was presented, the presentation was beyond the limit of ninety days allowed by article 156 of the second schedule of the Indian Limitation Act.

It has also been contended that ss. 9, 10 and 11 of the Court-fees Act are in conflict with s. 28 of that Act, and that ss. 9, 10, 11 and 28 of the Court-fees Act are in conflict with s. 54 of the Code of Civil Procedure, and, further, that so far as the High Court is concerned, s. 28 of that Act is in conflict with s. 54 of the Code of Civil Procedure, and on

(1) 6 I.A. 126 = 2 A. 241. (2) 2 A. 832. (3) 2 A. 875. (4) 24 W.R. 258.
(5) N. W. P. H. C. R. 1874, p. 139. (6) S. D. A. N. W. P. 1864, p. 18.

that assumption it has been argued that we should not in this case construe s. 28 of the Court-fees Act according to its plain wording.

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[147] First, as to the contention that ss. 9, 10 and 11 of the Court-fees Act are in conflict with s. 28 of that Act. On a careful consideration of those sections I fail to see any conflict between them.

Chapter III of the Court-fees Act, in which are ss. 9, 10 and 11, relates to public offices and to Courts other than High Courts or Courts of Small Causes in the Presidency Towns. In the Courts to which Chapter III relates it is the Court, that is, the Judge of the Court, whose duty it is under s. 12 to decide questions as to valuation for the purposes of determining the amount of court-fees chargeable. In such Courts the question as to the sufficiency of the stamp on a plaint, when raised, is, as a rule, dealt with as one of the issues in the suit. I assume that the reason for such questions not being sooner disposed of in such Courts is that in those Courts a plaint is presented in nearly all cases to the officer appointed in that behalf by the Court, under s. 48 of the Code of Civil Procedure, and not to the Judge or Munsif. Ss. 9, 10 and 11 of the Court-fees Act relate to suits, and do not relate to appeals. That appears on an examination of those sections, and also from the fact that s. 12 enacts that every question relating to valuation for the purposes of determining the amount of any fee chargeable under Chapter III on a plaint shall be decided by the Court in which such plaint is filed, and further enacts that every question relating to valuation for the purposes of determining the amount of any fee chargeable under Chapter III on a memorandum of appeal, shall be decided by the Court in which the memorandum of appeal is filed, and in each case such decision shall be final as between the parties to the suit. When such a decision with regard to the memorandum of appeal shows that an additional fee is required, s. 28 of the Court-fees Act would at once apply.

The application of s. 28 would not be inconsistent with the provisions of s. 10 or 11. Cases coming within s. 10 or s. 11 of the Court-fees Act would arise only where through mistake or inadvertence of the Court a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed or used in the Court. No such Court would knowingly receive, file or use [148] a plaint which was insufficiently stamped, in contravention of the express prohibition of s. 6 of the Court-fees Act.

S. 9 merely empowers the Court to issue a commission for the purposes therein mentioned.

There is consequently, in my opinion, no conflict between ss. 9, 10 or 11 and s. 28 of the Court-fees Act. Now, as to the contention that there is a conflict between ss. 9, 10, 11 and 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure. The latter portion only of clause I and clause II of s. 10 and possibly s. 11 of the Court-fees Act deal with the same subject as s. 54 of the Code of Civil Procedure, and then only with the subject dealt with in clause (a) of s. 54.

The only apparent conflict—the conflict is apparent and not real—between ss. 10 and 11 of the Court-fees Act and s. 54 of the Code of Civil Procedure consists in this, that whereas ss. 10 and 11 of the Court-fees Act enact that in the event of the additional fee not being paid within such time as the Court shall fix, the suit shall be "dismissed," s. 54 of the Code of Civil Procedure enacts [clause (a)] that if the relief sought is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so, the plaint

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shall be rejected. The dismissal of a suit under s. 10 or s. 11 of the Court-fees Act would not be a dismissal on the merits, and consequently would not preclude a plaintiff from presenting a fresh plaint in respect of the same cause of action, and such fresh plaint could be presented accordingly, assuming that it could be presented within the time within which under the Indian Limitation Act it could be presented, and that is all that is provided by s. 56 of the Code of Civil Procedure in the case of the rejection of the plaint. There is consequently, in my opinion, no conflict between ss. 9, 10 and 11 of the Court-fees Act, taken by themselves, and s. 54 of the Code of Civil Procedure.

If ss. 9, 10 and 11 of the Court-fees Act are read, as I think they must be, in conjunction with s. 28 of that Act, is there a con-[149] flict between them, so read, and s. 54 of the Code of Civil Procedure; or between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure? I have already pointed out how far, in my opinion, s. 54 of the Code of Civil Procedure applies to the matters which are dealt with by ss. 9, 10 and 11 of the Court-fees Act. However, s. 28 of the Court-fees Act is one of wider application than are ss. 10 and 11 of that Act, and would in Courts other than the High Court apply to cases coming within clauses (*a*) and (*b*) of s. 54 of the Code of Civil Procedure. Later on I propose to show that, at least in my opinion, clauses (*a*) and (*b*) of s. 54 do not apply to the High Courts in the exercise of their ordinary original civil, extraordinary original civil, or appellate jurisdiction; and if I am right in that view, the question now under consideration is only interesting from the point of view of analogy.

In enacting in ss. 10 and 11 of the Court-fees Act that "if the additional fee is not paid *within such time as the Court shall fix*, the suit shall be dismissed," the Legislature could not have intended to cut down or limit the specific provisions of s. 28 of the same Act.

The wording of s. 54, clauses (*a*) and (*b*) of the Code of Civil Procedure, is in this respect almost precisely similar to that in the sentence which I have above quoted from ss. 10 and 11 of the Court-fees Act. It is "the plaint shall be rejected in the following cases:—

"(*a*) If the relief sought is undervalued, *and the plaintiffs on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so*:

"(*b*) If the relief sought is properly valued, but the plaint is written on paper insufficiently stamped, *and the plaintiffs on being required by the Court to supply the requisite stamp within a time to be fixed by the Court fails to do so*:—"

If the Legislature did not intend by the use of the words which I have quoted from ss. 10 and 11 of the Court-fees Act to cut down or limit the specific provisions of s 28 of that Act, I see no reason why we should infer from the use by the Legislature of [150] almost precisely similar words in s. 54 of the Code of Civil Procedure that the Legislature intended by s. 54 to cut down or limit the specific provisions of s. 28 of the Court-fees Act or its application. If there was any such intention I should expect to find it clearly expressed.

Further, I fail to see any case in which there could be a conflict between the provisions of s. 28 of the Court-fees Act and s, 54 of the Code of Civil Procedure; unless a Court wilfully acted in contravention of s. 4 or s. 6 of the Court-fees Act, and this it is not to be presumed that a Court would do.

As I have already indicated, the effect of ss. 4, 6 and 28 of the Court-fees Act is, in my opinion, to prohibit a Court from knowingly filing, recording or receiving an improperly stamped document of the classes specified in the first or second schedule to the Court-fees Act and the object of the second paragraph of s. 28 is to enable the Court or the Judge when such an improperly stamped document has through mistake or inadvertence been received, filed or used in the Court, to make an order under which such document may be properly stamped, and on being so stamped to give effect to it as a document as vaild as if it had been properly stamped in the first instance.

For the reasons which I have above stated I see no conflict between ss. 9, 10, 11 and 28 of the Court-fees Act or any of them and s. 54 of the Code of Civil Procedure, and for these reasons and a further reason, to which I shall presently refer, I am satisfied that no conflict exists or can arise, so far as the High Court is concerned, between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure. Even if there was a conflict between ss. 9, 10 and 11 of the Court-fees Act and s. 54 of the Code of Civil Procedure it would, it appears to me, be immaterial so far as the question before us in the case is concerned. Ss. 9, 10 and 11 of the Court-fees Act do not relate to appeals, and s. 638 of the Code of Civil Procedure enacts that clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. Most probably the reason why s. 638 enacts that [151] clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction is, that in a High Court questions in difference as to whether a fee, is payable under Chapter II of the Court-fees Act and the amount of the fee, if any, in cases within its extraordinary original civil jurisdiction and in such cases within its ordinary original civil jurisdiction as s. 3 of that Act provides for, are by s. 5 for the taxing officer, the Chief Justice, or the Judge appointed for that purpose by the Chief Justice, and not for the Court. As to other cases within the ordinary original civil jurisdiction of a High Court, the procedure is, so far as I can see, left to be settled by rules to be made by the High Court.

The further reason for my opinion that no conflict between s. 28 of the Court-fees Act and s. 54 of the Code of Civil Procedure, so far as the High Court is concerned, exists or can arise, is this. Such a conflict could not in any case arise, so far as the High Court is concerned, unless clauses (*a*) and (*b*), or one of them, of s. 54 of the Code of Civil Procedure apply to the High Court in the exercise of its ordinary original civil, extraordinary original civil or appellate jurisdiction.

As I have pointed out, it is, by s. 638 of the Code of Civil Procedure, enacted that clauses (*a*) and (*b*) of s. 54 shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. It has, however, been contended that s. 582 of the Code of Civil Procedure makes clauses (*a*) and (*b*) of s. 54 applicable to the High Court in the exercise of its appellate jurisdiction.

I cannot so read the first part of s. 582 and apply to the High Court in its appellate jurisdiction claus s (*a*) and (*b*) of s. 54, which s. 638 enacts shall not apply to it in the exercise of its ordinary or extraordinary original civil jurisdiction. If I am correct in my surmise as to the reason why by s. 638 it was enacted that clauses (*a*) and (*b*) of s. 54 should not apply to the High Court in the exercise of its extraordinary original civil jurisdiction, the same reason would apply to the exclusion of the application of those

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clauses to the High [152] Court in the exercise of its appellate jurisdiction, as questions in difference as to whether a fee is payable under Chapter II of the Court-fees Act, and the amount of the fee, if any, in cases within its appellate jurisdiction, are, under s. 5 of that Act, for the taxing officer, the Chief Justice or the Judge appointed for that purpose and not for the Court. The latter portion of s. 582 of the Code of Civil Procedure strengthens this view. If the earlier portion of s. 582 was intended to have the wide application which it is contended that it has, I do not understand why it was considered necessary in the latter portion of that section to enact that "and in Chapter XVI, so far as may be, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal in proceedings arising out of the death, marriage or insolvency of parties to an appeal." In my opinion clauses (*a*) and (*b*) of s. 54 of the Code of Civil Procedure do not apply to the High Court in the exercise of its appellate jurisdiction.

Another contention was that the term "final" in s. 5 of the Court-fees Act does not mean final as that term is understood in law, and that the decision of the taxing officer, the Chief Justice or the Judge appointed under s. 5 is open to appeal or revision. The arguments were that "final" in s. 5 has the same meaning as "final" in s. 12, and that decisions of the Court under s. 12 had been held to be appealable, and therefore not final as that term is generally understood. Further, that a decision under s. 12 of the Court-fees Act was in the same position as an order under s. 54 of the Code of Civil Procedure, that an order under s. 54 was appealable, and that consequently decisions under s. 5 or s. 12 of the Court-fees Act are appealable.

I have no doubt that the term "final" in s. 5 of the Court fees Act has precisely the same meaning as the term "final" in s. 12 of that Act. But the subject to which that term is applied in s. 5 is different from that to which it is applied in s. 12. In s. 5 it is applied to a decision as "to the necessity of paying a fee or the amount thereof," whereas in s. 12 it is applied to a decision as "to [153] every question relating to valuation for the purpose of determining the amount of any fee chargeable under the chapter (chapter iii) on a plaint or memorandum of appeal." When we come to look into the authorities it will be necessary to keep this distinction in mind.

For the proposition that a decision under s. 12 of the Court-fees Act is appealable, the following authorities were relied upon, that is to say, *Chunia* v. *Ram Dial* (1), *Gulzari Mal* v. *Jadaun Rai* (2), *Chedi Lal* v. *Kirath Chand* (3), and *Muhammad Sadik* v. *Muhammad Jan* (4).

The contention that these authorities, with the exception of that in the I.L.R., 11 All., 91 show that decisions within the meaning of s. 12 of the Court-fees Act, 1870, are appealable, arose from confusing the decisions in which the term "final" in that section applies with decisions as to subject-matter to which, according to those authorities, the term "final" does not in s. 12 apply.

What those authorities, rightly or wrongly, it is immaterial to consider which, decided was that a question as to the category of the relief sought in a plaint or by a memorandum of appeal is not "a question relating to a valuation for the purpose of determining the amount of any fee chargeable" under Chapter iii of the Court-fees Act on a plaint

(1) 1 A. 360. (2) 2 A. 63. (3) 2 A. 682. (4) 11 A. 91.

or memorandum of appeal, and consequently that an appeal lay from a decision as to the fuudamental question of category.

It could not, in my opinion, be contended that category is not under s. 5 of the Court-fees Act for the taxing officer; otherwise he could not decide whether any fee was payable or the amount thereof.

To explain what I mean by the term "category" I give an example. If a Court under s. 12 applied to a case in which the only relief asked was a declaration that the plaintiff was the adopted son of A.B, the scale of fees applicable to a case in which the relief asked was a decree for possession of immoveable property, that would be an error as to the category of the relief asked for, and [154] that question might, according to those authorities, be the subject of an appeal. No Court, so far as I am aware, except this Court in the case reported at I.L.R., 11 All., 91, has held that the term "final" in s. 12 of the Court-fees Act is not to have applied to it the ordinary legal meaning of "final." What they have held is that the question of category is not a question relating to valuation for the purpose of determining the amount of a fee under s. 12, and consequently that s. 12 does not enact that a decision as to category shall be final.

I confess that when I joined in the judgment in *Muhammad Sadik* v. *Muhammad Jan* (1) I did not quite understand, as I do now, the distinction which the Courts had drawn between a question of category and a question relating to valuation for the purpose of determining the amount of a fee chargeable within the meaning of s. 12 of the Court-fees Act. That decision went beyond what had been decided by all the previous authorities, and so far as it decided that an appeal lay from a decision which was a decision within the meaning of s. 12 of the Court-fees Act, it was not only not supported by authority, but was against the authorities and I am now satisfied that to that extent it was an erroneous decision in law.

Whether the distinction which has been drawn is a sound one or not, it is obvious that the Courts in their efforts to differentiate the two questions, considered that unless they could be differentiated, a decision of a Court under s. 12 on a question of category would be final and could not be questioned as between the parties.

Another argument in support of the contention that "final" does not mean final was that, inasmuch as an order of rejection under s. 54 of the Code of Civil Procedure rejecting an appal is a "decree," every such order in virtue of s. 540 or s. 584, as the case may be, appealable is a decree, and that similarly a decision under s. 12 or s. 5 of the Court-fees Act is appealable. It appears to me that that argument is based upon a confusion of reasoning. I would not have thought it necessary to observe, if it had not been contended to the contrary, that s. 2 of the Code of Civil Procedure, [155] which merely defines what is a decree, does not confer any right of appeal.

S. 540 relates to appeals from original decrees and s. 584 to appeals from appellate decrees, but so far as this question is concerned, the wording of the two sections is the same. I shall take s. 540 to test the accuracy of the contention. That section is as follows:—

"Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising orginal

(1) 11 A. 91.

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jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. An appeal may lie under this section from an original decree passed *ex parte*.

That sectoin does not confer a right of appeal from all adjudications or orders which are decrees as defined in s. 2 of the Code of Civil Procedure. It only confers the right of appeal in cases in which the right of appeal is not expressly taken away by the Code of Civil Procedure " or by any other law for the time being in force."

It cannot be doubted that ss. 5 and 12 of the Court-fees Act are in force, nor can it be doubted that by those sections it is respectively expressly enacted that the decisions in those sections respectively referred to shall be and are "final." A decision, decree or order could not be described as "final" if it was appealable or so long as it was appealable, and I must assume that the Legislature in using the terms "final" in ss. 5 and 12 used it in the legal sense in which that term is always used in Acts and Codes.

So far therefore, if at all, as s. 54 of the Code of Civil Procedure applies to decisions under s. 5 or s. 12 of the Court-fees Act, the orders under it come within the exceptions contained in ss. 540 and 584 of the Code of Civil Procedure.

To take an example of what the Legislature means when it uses the term "final" I refer to s. 588 of the Code of Civil Procedure, which enacts that the "orders passed in appeal under this [156] section shall be final." It has never been contended that "final" did not mean in that section what is understood by the term final, and that such orders were appealable.

Where the Legislature has used the term "final" for other purposes and without intending that the decision, decree or order to which it is applied shall not be appealable, it has been careful to express its intention, of which explanation IV in s. 13 of the Code of Civil Procedure is an example.

Further, it is clear to my mind that a decision under s. 5 of the Court-fees Act " as to the necessity of paying a fee or the amount thereof" is not a decree as "decree" is defined in s. 2 of the Code of Civil Procedure. It is not a " formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication so far as regards the Court expressing it, decides the suit or appeal." The " right claimed or defence set up" referred to in the definition of " decree " must be a right claimed or a defence set up in the suit or appeal, and not a right to have the suit or appeal heard on a particular stamp or the plaint or the memorandum of appeal rejected on account of the stamp. An adjudication under s. 5 of the Court-fees Act as to the stamp by the taxing officer, the Chief Justice or the Judge appointed for that purpose, is not an adjudication, which, to use the words of s. 2 of the Code of Civil Procedure " so far as regards the Court expressing it, decides the suit or appeal."

In my opinion ss. 540 and 584 do not apply to decisions under s. 5 of the Court-fees Act and an order under clause (*a*) or (*b*) of s. 54 of the Code of Civil Procedure, so as far as it is a decision on a " question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal " within the meaning of s. 12 of the Court-fees Act, is final and within the exception contained in ss. 540 and 584 of the Code of Civil Procedure.

As to s. 5 of the Court-fees Act, there is no provision so far as I can ascertain under which the Court or any Bench of the Court has power to

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consider the propriety of a decision under that section [157] by appeal, in an appeal, or in revision. S. 622 of the Code of Civil Procedure would not apply, the reason being that the decision under s. 5 of the Court-fees Act is not the decision of a Court within the meaning of s. 622, nor is it a decision in a case within the meaning of that section, nor could it be said that the taxing officer, even if he took an incorrect view of the case as to the necessity for a fee or as to the amount of a fee, exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction vested in him by law, or acted in the exercise of his jurisdiction illegally, or with material irregularity.

S. 15 of the 24 and 25 Vic., c. 104, is not applicable to decisions by our taxing officer under s. 5 of the Court-fees Act.

A decision under s. 5 of the Court-fees Act by our taxing officer, or by the Chief Justice, or the Judge appointed under that section, is not, as I have pointed out, a decree within the meaning of s. 2 of the Code of Civil Procedure.

The decision of our taxing officer is not an "order" as defined in s. 2 of the Code of Civil Procedure; his decision is not the decision of a Civil Court. It would be anomalous to hold that, although the decision of our taxing officer was not an order as defined in s. 2, the decision of the Chief Justice, or of the Judge appointed under s. 5 of the Court-fees Act on a reference under that section by the taxing officer, is an "order" as defined by s. 2 of the Code of Civil Procedure. I am consequently of opinion that a decision under s. 5 of the Court-fees Act is not a decree or order within the meaning of s. 623 of the Code of Civil Procedure. A further reason for that opinion is that the taxing officer is not a Court within the meaning of that section.

S. 647 of the Code of Civil Procedure obviously does not apply.

Even if a decision under s. 5 of the Court-fees Act could be held to be an order within the meaning of s. 2 of the Code of Civil Procedure, it is not an order within any of the clauses of s. 588 of that Code, and an appeal from it under the Code of Civil Procedure is consequently prohibited by that section.

[158] A decision under s. 5 of the Court-fees Act of our taxing officer, or of the Chief Justice, or of the Judge appointed under that section, cannot be an order within the meaning of s. 591, as, amongst other reasons, it arises on the memorandum of appeal, and consequently could not be set forth as a ground of objection in the memorandum of appeal.

I have consequently come to the conclusion that not only did the Legislature intend that decision under s. 5 of the Court-fees Act of the taxing officer of the High Court, or of the Chief Justice, or the Judge appointed under s. 5, should for all purposes be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such a decision might be questioned. Whether or not such decisions ought to be open to appeal, review or revision is another question as to which I do not feel bound to express an opinion.

At one period of the argument the vakil for the appellant contended that no difference had arisen within the meaning of s. 5 of the Court-fees Act between the officer whose duty it was to see that a fee was paid under chapter ii of that Act and the appellants or their vakil. I am strongly inclined to think that a difference arose as soon as that officer reported that the stamp was insufficient. In any case we must assume, until the contrary is shown, that our late taxing officer did not act under s. 5 until the difference had arisen and the question had been referred to

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him, particularly when we find that his decision was accepted without demur by the appellants and acted upon by them.

To take the view that no difference had arisen, and that the taxing officer had made no decision on the question, would be equally fatal to the appellants' case. In that event the report of the officer Dip Chand must, under the circumstances, be deemed to be correct, and it must follow that the memorandum of appeal when tendered to this Court was insufficiently stamped. If the question as to the sufficiency of the stamp, which was on the memorandum of appeal when it was tendered, is still open, then that is a question not for us or for the Bench which has referred to us for our opinion the [159] question as to the limitation, but for the taxing officer, and the appeal under the conditional order of my brother Brodhurst is not, even apart from any question of limitation, yet admitted. The appellants, by supplying through their vakil the deficiency in the stamp, adopted and acted upon the decision of the taxing officer, which their vakil would not have allowed them to do if the question had not been referred to and decided by the taxing officer.

Another contention of the vakil for the appellants was that the order of the taxing officer was an order by the head of an office within the meaning of the second paragraph of s. 28 of the Court-fees Act, and that the order having been complied with, the memorandum of appeal must under that paragraph be treated "as valid as if it had been properly stamped in the first instance." That contention is not, in my opinion, a sound one. "The head of the office" in that section does not refer to the head of the office of a Court, at any rate to the head of the office of the High Court, but to the head of one of the public offices, as, for instance, the Board of Revenue. In one sense no doubt the late taxing officer, as our Registrar, was the head of the office of this Court. He was not, however, in deciding the question before him acting as the head of the office but as the taxing officer of this Court. As head of the office of this Court he had no power to make an order under s. 28 of the Court-fees Act. Such an order could only be made by a Judge of the Court.

No memorandum of appeal can be lawfully filed, registered or used in this Court until it has been admitted by a Judge of the Court. There was in this case, as I read my brother Brodhurst's order of the 9th November 1887, and in view of the stamp report and the decision of the taxing officer, no admission of the memorandum of appeal.

Prior to 1886, no appeal was entered in the register until it was finally admitted. I have now for the first time become aware of the fact that in 1886 an unauthorized practice was introduced of entering in the register appeals which had been only condi- [160] tionally admitted and before it had been ascertained that the stamps on the memoranda of appeal were sufficient.

Owing to our not having been unanimous as to the meaning of the term "final" in s. 5 of the Court-fees Act, the vakil for the appellant was permitted to argue that the memorandum of appeal was properly stamped in the first instance, that is, when it was tendered to my brother Brodhurst on the 9th November 1887. On this question Mr. *Kashi Prasad* cited the following cases: *Chunia* v. *Ram Dial* (1), *Gulzari Mal* v. *Jadaun Rai* (2), *Dildar Fatima* v. *Narain Das* (3), *Naryan Rav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (4), *Shama Soondary* v. *Hurro*

(1) A. 360. (2) 2 A. 63. (3) 11 A. 365. (4) 4. B. 529.

Soondary (1), *Mahadei* v. *Ram Kishen Das* (2) *Chedi Lal* v. *Kirath Chand* (3) and two unreported cases of this Court, namely, Second Appeal No. 1342 of 1879, decided by Pearson and Oldfield, JJ., on the 3rd of May 1880, and First Appeal No. 119 of 1879, decided by the same learned Judges on the 23rd of December 1880.

Holding the view which I did and still do as to the finality of the decision of the taxing officer, I considered, and still consider, that the question was not open to the appellants. As, however, there was and may be doubt in the minds of some on that question, I shall express my view on it.

In order to do so and before commenting on the cases cited by Mr. *Kashi Prasad* for the appellants, or referring to the cases relied upon by Mr. *Hill* and Mr. *Spankie* for the respondents, it is necessary to see what was the relief sought by the plaintiffs in the plaint, what reliefs were decreed and what were the reliefs sought in the memorandum of appeal.

The respondents, who were plaintiffs below, asked in their plaint that it might be declared that the property mentioned at the foot of the plaint is the joint property of the plaintiffs, and that is not liable to attachment and sale in execution of the decree, dated the 6th June 1883, held by the defendant No. 4 against the defen- **[161]** dant No. 1. In order to found a case for the latter relief asked for, the plaint alleged collusion, fictitious transactions and want of title.

It has been contended that if the plaintiffs obtained the relief asked for as to the non-liability of the property to attachment and sale, that would have afforded them all the protection which they could require. I propose to show presently why in my judgment that is not the question for the taxing officer to consider. Be that as it may, the plaintiffs were also claiming, as against all the defendants including the decree-holder and Musammat Gijraj Mani Tawarain, a declaration that the property was the joint family property of the plaintiffs. That declaration would not be covered by a declaration that the property was not liable to attachment and sale, nor would a declaration that the property was the joint family property of the plaintiff show without something further that it was not liable to attachment and sale under the decree of the 6th June, 1883. In my opinion, however, it is no part of the duty of a taxing officer or of a Judge or Court on a question as to the sufficiency of a stamp or a fee to consider whether a plaintiff or an appellant is asking for more declarations or reliefs than are required for his protection. A plaintiff or an appellant may have reasons, which, whether they are good or bad, may not be apparent to a taxing officer or taxing Judge for asking for several declarations or reliefs. It is not the province of the taxing officer or the taxing Judge to decide what are the declarations or reliefs which a plaintiff or an appellant may require for his protection. To impose upon a taxing officer or the taxing Judge such a duty would be to impose upon him a duty hardly, if at all, less onerous or difficult than the duty of deciding the case itself.

The contention that because those two reliefs are included in one paragraph of the plaint, they must be regarded as one relief only, does not require an answer.

The decree in the suit gave the plaintiffs the declarations which they in their plaint had asked for. By the memorandum of appeal the defendants seek to get that decree, not in part but in whole, set aside.

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(1) 7 C. 348. (2) 7 A. 528. (3) 2 A. 682.

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[162] The memorandum of appeal was tendered on a stamp of the value of Rs. 10 only.

Now as to the cases cited by Mr. *Kashi Prasad* on this point, the case of *Dildar Fatima* v. *Narain Das* (1) is directly against Mr. *Kashi Prasad's* contention, and the Full Bench case of *Chedi Lal* v. *Kirath Chand* (2), so far as it bears on this contention, is against it and supports my view as to the effect of s. 28 of the Court-fees Act. The case of *Shama Soondary* v. *Hurro Soondary* (3) appears to have little bearing on this contention of Mr. *Kashi Prasad*, but it is a direct authority that no plaint can be accepted or registered until the preliminary questions of valuation and sufficiency of stamp have been determined. The case of *Chunia* v. *Ram Dial* (4) does not support Mr. *Kashi Prasad's* contention as in that case only one relief was asked for, but it is an example of a case in which this Court held that a question of category was not a question of valuation for determining the amount of a fee within the meaning of s. 12 of the Court-fees Act. The case of *Gulzari Mal* v. *Jadaun Rai* (5) is against Mr. *Kashi Prasad's* contention, as there two reliefs were sought, namely, a declaration of the plaintiff's proprietary right to certain grain and the cancelment of an order made by a Munsif disallowing his claim to the grain, and a fee of Rs. 20, that is, Rs. 10 as the fee in respect of each relief, was paid. In *Narayan Rav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (6) the question was whether a declaratory suit could be maintained in that case without a claim for consequential relief. In the case of *Mahadei* v. *Ram Kishen Das* (7) the question was whether the powers conferred by ss. 54 (*a*) and (*c*) and 55 of the Code of Civil Procedure read with s. 582 of that Code and those conferred by ss. 12 or 28 of the Court-fees Act could be exercised after decree made by the Court which made the decree. In the unreported case, Second Appeal No. 1342 of 1879, Pearson and Oldfield, JJ., overruled the decision of the then taxing officer of this Court on the question of the amount of the fee payable on the memorandum of appeal in that case. In [163] the other unreported case, First appeal No. 119 of 1879, the same learned Judges considered the decisions of the then taxing officer of the Court on the question of the amount of the fee payable on the memorandum of appeal in that case. In each of those unreported cases there was also a question as to an alleged deficiency of fee in the Court below, and in neither of them did those learned Judges refer to the provision in s. 5 of the Court-fees Act, that the decision of the taxing officer should be final. In the latter of those two cases I find in the papers on the record the following memorandum signed by Pearson and Oldfield, JJ. :—"The Registrar's attention is drawn to the circumstance that costs in this case have been incurred because the opposite party was summoned before the question of court-fees had been settled. It would be desirable that such questions should be settled before the admission of appeals." I would have said that it was required by law. On this contention now under consideration, Mr. *Spankie* relied upon the two Full Bench cases of *Ram Prasad* v. *Sukh Dai* (8) and *Lachmi Narain* v. *Gowri Shankur* (9), each of which cases was directly in point and against Mr. *Kashi Prasad's* contention, and showed that the stamp of Rs. 10 in these cases was not sufficient. Mr. *Spankie* also relied on some of the cases cited by Mr. *Kashi Prasad*.

It is sufficient for me to say that if I was not bound by the Full

(1) 11 A. 365. (2) 2 A. 682. (3) 7 C. 348 (4) 1 A. 360. (5) 2 A. 63. (6) 4 B. 529. (7) 7 A. 528. (8) 2 A. 720. (9) 6 A.W. N. (1886) 54.

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Bench rulings of this Court on which Mr. *spankie* relied, I should still be of opinion that the stamp of Rs. 10 on which this memorandum of appeal was tendered to my brother Brodhurst on the 9th November, 1887, was an insufficient stamp, inasmuch as two distinct declarations were asked for and obtained and were by the appeal sought to be set aside. What my brother Straight said in delivering his judgment in the case of *Lachmi Narain* v. *Gouri Shankar* (1) at page 55 would apply to the present case, and in that judgment the then Chief Justice and the other three Judges of the Court concurred. That was probably the case which the taxing officer followed here.

[164] The result is that I am of opinion that there is now before this Court no valid appeal as to the merits of which this Court can give a decision.

TYRRELL, J.—I concur in everything that has been said by the learned Chief Justice.

STRAIGHT, J.—I have had the great advantage of perusing the long and learned judgment of the learned Chief Justice, and I think it right to say, in expressing my entire concurrence therein, that I was at one time disposed to arrive at a contrary conclusion to that at which he has arrived, but that his convincing and exhaustive judgment has satisfied me that the question referred to this Full Bench is open to no other answer than that proposed by him.

BRODHURST, J.—I entirely concur with the learned Chief Justice.

MAHMOOD, J.—I confess that when the case was argued before the Full Bench, I entertained serious doubts as to whether or not the answer given to the reference by the learned Chief Justice in this case should be the answer given. I entertained these doubts principally because I had difficulty in considering the statute, Act VII of 1870, known as the Court-fees Act of that year, which begins without a preamble, and leaves it to the Judges to decide what its objects were, and to gather those objects from the enacting clauses. The difficulty about the absence of preamble was further enhanced in my mind at the hearing by the circumstance that many of the provisions contained in that Act might possibly give rise to difficulty as to whether they are or are not inconsistent with the provision of the Code of Civil Procedure. Also the difficulty arose in my mind that inasmuch as this Court-fees Act (VII of 1870) is an enactment anterior to the Code of Civil Procedure, whether Act X of 1877 or Act XIV of 1882, the provisions in these later statutes might not by implication abrogate any of the provisions contained in the earlier Act. My difficulty further arose from the circumstance that I felt, in the absence of a preamble in this Court-fees Act, whether it was intended to regulate [165] questions of procedure, or to regulate the method of the collection of revenue, that is to say, fiscal questions for the purposes of the obtainment of money from the tax-payer in order to achieve such results as the State had in view to carry on the administration of the country.

These were the reasons why in the course of the hearing of the case I entertained serious doubts upon what should be the answer to the question put to the Full Bench. But those doubts have now been removed in common with the view taken by my brother Straight, by the learned judgment delivered by the learned Chief Justice, and in which I entirely concur, especially with reference to the interpretation of the specific requirements of this legislation, Act VII of 1870.

(1) 6 A.W.N. (1866) 54.

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But whilst giving my full concurrence to the views therein expressed, I think it is within my province to point out clearly as a Judge of this Court that I do not understand that the provisions of this Court-fees Act, as they now have been interpreted, can operate otherwise than to retard and in many cases obviate the possibility of justice being done to the parties who did not happen to have sufficient pecuniary means to abide by the stringent requirements of the letter of the statute itself. The enactment, as the learned Chief Justice has explained, is most anxious to collect money from those who seek to obtain justice, but there is not one word in that statute to enable the litigant who is to be subject to these stringent rules to re-obtain the sum of money which he, by dint of a wrongful user of the powers given to the taxing officer, does pay as court-fee, say, for example, Rs. 3,000 instead of Rs. 10, as may be the case where difficulty may arise as to whether a suit or an appeal deals with a declaratory claim or a claim including reliefs of a consequential character. I mention this on purpose, as I hope that this enactment will soon be considered fit to be amended, and that a difficulty such as has arisen in this case may not arise in future, and that no pleas *ad misericordiam* such as were addressed in this very case might be made the subject of consideration by the Judges of a whole High Court established by Her Majesty's Charter. **[166]** The stringency of the Act as it has been now interpreted is probably a good thing for the litigant, because it indicates the necessity of amendment in his behalf. I hold, following the views of Jeremy Bentham, that law taxes, the more stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice, but make the administration of justice difficult and in many cases impossible.

With these remarks, I concur in the judgment delivered by the learned Chief Justice.

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12 A. 166=10 A.W.N. (1890) 19.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

FAZAL IMAM AND OTHERS (*Defendants*) *v.* FAZUL RASUL (*Plaintiff*).* [11th December, 1889.]

Suit to recover costs by way of damages—Costs incurred in prosecuting case in Criminal Court.

Held that a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a criminal Court.

[F., 32. C. 429 (430) ; 15 C.P.L.R. 129 (130).]

THIS case was referred by Mahmood, J., to a Bench of three Judges. The order of reference was as follows :—

" This appeal has arisen out of a suit for recovery of Rs. 500, which amount consisted of the following items :—

(1) Rs. 50, expenses of prosecuting the defendant in the criminal Court.

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* Second Appeal No. 1285 of 1887, from a decree of H.P. Mulock, Esq., District Judge of Shajahanpur, dated the 22nd April 1887, confirming a decree of Maulvi Muhammed Safi, Munsif of Shahjahanpur, dated the 10th December, 1886.

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(2) Rs. 40, loss of professional occupation.

(3) 410, damages for disgrace and mental and bodily suffering.

The quarrel appears to have arisen in consequence of the defendants having assaulted and beaten the plaintiff-respondent, and, in consequence of such assault and beating, he made a complaint to the criminal Court against the defendants, who were fined in the sum [167] of Rs. 20 each by order of the criminal Court, dated 11th January 1886.

The plaintiff-respondent thereafter brought the present action in the civil Court for recovery of damages, and both the Courts below have concurred in holding that he was entitled to maintain the action, that he was entitled to Rs. 40 as damages for the costs of the prosecution which he successfully carried on in the criminal Court, and to Rs. 30 as damages for loss of occupation, and to Rs, 30 as damages for mental and bodily sufferings.

Mr. *Jogindro Nath Chaudhri*, who appears for the appellant, in arguing the appeal, has foregone all points except the one relating to the sum of Rs. 40 claimed as the expenses of the criminal presecution. The learned pleader argues that those expenses, even upon the findings arrived at by the Courts below, cannot form part of the damages to be awarded in such an action.

In support of this contention the learned pleader relies upon two points.

(1) That the rule relating to expenses incurred in defending a malicious prosecution is not applicable to expenses incurred in prosecuting a criminal case.

(2) That inasmuch as in the criminal prosecution which ended in the decision of 11th January 1886, the Magistrate could have awarded compensation to the plaintiff under the provisions of the Criminal Procedure Code, therefore the expenses of the criminal prosecution could not form part of a civil action.

For the first of these propositions Mr. *Jogindro Nath* relies upon the English law of torts and for the second he relies upon *Mahram Das* v. *Ajudhia* (1), which was approved in *Kadir Baksh* v. *Salig Ram* (2).

It seems, however, and the learned pleader frankly admits that the ruling of a Division Bench of this Court in *Ram Lal* v. *Tula Ram* (3) is opposed to his contention, especially the remarks of Oldfield, J. at page 101 of the report.

[168] I think the case is a fit one to be referred to a Bench of two Judges, and I refer the case accordingly, with the further direction that the case be laid before the learned Chief Justice for orders as to whether the case is not a fit one for decision by a Bench consisting of three Judges.

Babu Jogindro Nath Chaudhri for the appellants.

The respondent was not represented.

JUDGMENT.

EDGE, C. J.—The plaintiff prosecuted the defendant in a criminal Court for assault. The defendant was convicted. The plaintiff in this suit sues the defendant for, amongst other damages, the expenses which the plaintiff was put to in prosecuting the defendant in the criminal Court. In respect of that head of claim, Rs. 40 have been decreed. The defendant has appealed here on the ground that he is not liable for the expenses of the prosecution or any part of them. There is a judgment of Mr. Justice

(1) 8 A. 452. (2) 9 A. 474. (3) 4 A. 97.

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Oldfield in the case of *Ram Lal* v. *Tula Ram* (1) which justified the Court below in decreeing those damages. My brother Straight and I have on previous occasions dissented from that portion of the judgment of Mr. Justice Oldfield. I am clearly of opinion that the plaintiff cannot maintain his suit so far as that head of claim is concerned. The case of a defendant in a malicious prosecution bringing a civil suit against the prosecutor and obtaining as damages the expenses he was put to in defending himself on the criminal trial has no analogy to the present case. The same view has been held by my brother Mahmood and myself in the case of *Chandan* v. *Sumera* (2). The appeal is decreed, the decree of the lower appellate Court is modified by decreasing the decree of the Court below by Rs. 40. The plaintiff will have proportionate costs in the Courts below, and the appellant will have the costs to the extent of his success here and below.

STRAIGHT, J.—I agree.

TYRRELL, J.—I agree. *Appeal allowed.*

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12 A. 169 = 10 A.W.N. (1890) 36.

[169] CIVIL REFERENCE.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAZI-UD-DIN (*Plaintiff*) v. KARIM BAKHSH (*Defendant.*)*
[2nd January, 1890.]

Act XVIII of 1879 (*Legal Practitioners Act*), ss. 27, 28, 29, 30—*Suit by pleader to recover fee from client*—*Agreement for fee*—*Agreement not in writing and filed in Court.*

Ss. 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangements or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. They do not provide as to matters which relate to the opposite party, or the fees that he has to pay to the legal practitioner of the opposite party, but provide what, as between the pleader and his client, shall be the method in which certain special arrangements are to be entered into. They make provision for agreement between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation; and were framed upon the principle which regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client. They were intended to protect necessitous, improvident or careless litigants, from being taken advantage of by unscrupulous legal advisers. *Rama* v. *Kunji* (3) approved and followed.

[Diss.—27 M. 512 (515,516) = 14 M.L.J. 274; 136; P.R. (1893) Appr., 25 C. 805(806,807); R., 28 A. 764 = 3 A.L.J. 579 = A.W.N (1906) 235 = 1 M.L.T. 242; 29 A. 649 = A. W.N. (1907) 230 = 4 A.L J. 535; 14 M. 63 (65), 16 M. 278 (297), 1 P.R. (1909) = 21 P.L.R. (1909); 17 C.W.N. 45 (48) = 15 C.L J. 660 = 13 Ind. Cas. 43.]

THIS was a reference under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Allahabad. The order of reference was as follows:—

"The plaintiff who is a pleader, has brought this suit to recover from the defendant Rs. 58-1-3 as his fees for having acted as the defendants's pleader in a certain suit. The defendant has not appeared to contest the claim.

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* Reference under s. 617 of the Civil Procedure Code by Babu Promoda Charan Banerji, Judge of the Court of Small Causes, Allahabad, dated the 13th November 1889.

(1) 4 A. 97. (2) 7 A.W.N. (1887) 104. (3) 9 M. 375.

"It has been proved that the defendant engaged the plaintiff as his pleader, under a *vakalatnama*, dated the 5th January 1886, and that the suit in which the plaintiff's services were engaged terminated on the 24th September, 1886. It is admitted that there was no agreement in writing between the parties as to the plaintiff's fees. It is, however, stated in the plaint that there was an agreement to [170] pay to the plaintiff his share of the "legal fees" payable to the defendant by his adversary, and the plaintiff has deposed that the agreement was made orally.

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"The question which arises for consideration is whether the agreement is valid, having regard to the provisions of s. 28 of the Legal Practitioners Act, which runs thus :—'No agreement entered into by any pleader, mukhtar, or revenue agent with any person retaining or employing him respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such pleader, mukhtar, or revenue agent, shall be valid unless it is made in writing signed by such person.'

"According to the provisions of the section quoted above, the agreement on which the plaintiff's claim is founded is not valid, as it was not made in writing.

"It has been urged that s. 28 of the Legal Practitioners Act does not relate to the fees fixed by the High Court as payable by a party in respect of the fees of his adversary's pleader, and that it refers 'to agreements to pay more than such fees.' This contention is supported by a ruling of the Madras High Court in *Rama* v. *Kunji* (1).

"With due deference to the learned Judges who decided that case, I am of opinion that there is nothing in the provisions of the Legal Practitioners Act to support the view which they have taken of the twenty-eighth section of that Act. That section is very general in its terms, and it declares every agreement between a pleader and his client respecting the amount and manner of payments for the services of the former to be invalid unless made in writing and filed in Court. There is nothing in that or any other section of the Act from which it may be gathered that the Legislature intended to restrict its provisions to agreements for higher fees than at the scales provided by the High Court for pleaders' fees payable as between party and party. The intention of the Legislature in enacting that [171] section was stated in the report of the Select Committee, dated the 21st August 1879, on the Bill No. 3 (which was afterwards passed into law with certain modifications) in the following terms :—'We have carefully considered the question which has more than once been discussed and has now again been raised, as to the necessity of placing some restriction upon contracts regarding remuneration for services performed by legal practitioners.........We think it desirable to provide, as we have done in s. 28, that such agreements when made should be in writing, and should be filed in Court.' The Hon'ble Mr. Whitley Stokes, in placing the report of the Select Committee before the Legislative Council made the following observations in regard to the alterations made in the Bill :—'One was the provision in s. 28 that agreements between pleader and client regarding the remuneration for services rendered by the former, *should always* be in writing and be filed in Court.'

"These extracts are very useful in enabling one to judge what the object of the Legislature was in enacting s. 28. That section did not appear in the Bills Nos. 1 and 2, but was added to the third Bill, in order,

(1) 9 M. 375.

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as the Select Committee said, to place some restriction upon contracts between pleader and client regarding the remuneration of the former, and to enable the Court to be informed of the nature of such contracts, and as it was worded in such a way as to include all contracts between pleader and client regarding the former's remuneration, I fail to see how an agreement, whether for prescribed fees or for any other fees, can be valid unless, as required by that section, it be made in writing and filed in Court. The object of the section is to place a check upon contracts between legal practitioners and their clients, and to afford some protection to the clients, and had the Legislature intended to exclude any class of contracts from the scope of the provisions of that section, nothing was easier than to say so in clear terms.

"I am accordingly of opinion that as the contract between the parties in this suit was not reduced to writing and filed, the plaintiff cannot maintain this suit. As, however, my view is opposed to the ruling of the Madras High Court cited above, and there is no report-[172] ed ruling of the High Court of these Provinces on the point, and as the question is one of general importance, I submit this case for the decision of the Hon'ble the High Court on the following question:

"Whether an agreement between a legal practitioner and his client for the payment of the fees of the former at scale prescribed by the High Court in respect of fees payable by a party for the fees of his adversary's legal practitioner, is valid unless made in writing and filed in Court, as required by s. 28 of the Legal Practitioners Act."

OPINION.

STRAIGHT, J.—This is a reference by the Judge of the Small Cause Court of Allahabad under s. 617 of the Civil Procedure Code. The suit to which it relates was instituted by the plaintiff, a pleader of the subordinate Courts, to recover a sum of Rs. 58-1-3, as his share of the amount of fees allowed upon taxation to the defendant as a successful party in a suit brought against him, in which the plaintiff with three other persons, acted as his pleader. No appearance was entered by the defendant to the suit, nor was any defence set up on his behelf. The point that has been taken by the learned Small Cause Court Judge, and which he refers for the decision of this Court, is very fully set out in the order of reference, from which I may quote the following passage:—

"It is admitted that there was no agreement in writing between the parties as to the plaintiff's fees. It is, however, stated in the plaint that there was an agreement to pay to the plaintiff his share of the 'legal fees' payable to the defendant by his adversary, and the plaintiff has deposed that the agreement was made orally."

The question in terms referred to us is:—

"Whether an agreement between a legal practitioner and his client for the payment of the fees of the former at the scale prescribed by the High Court in respect of fees payable by a party for the fees of his adversary's legal practitioner, is valid unless made in writing and filed in Court, as required by s. 28 of the Legal Practitioners Act."

[173] There is no doubt that the defendant did upon taxation receive into his hands in respect of the amount of pleader's fees allowed at that taxation against the unsuccessful adversary the sum of Rs. 232-5 0; and there is equally no question that the plaintiff's share of that amount was Rs. 58-1-3. The learned Subordinate Judge, having regard to the terms of s. 28 of the Legal Practitioners Act, is of opinion that as there was,

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upon the admission of the plaintiff, an oral arrangement between himself and the defendant that the remuneration of him, the plaintiff, should be limited to his share of the taxed costs allowed as against the unsuccessful party, for pleader's fee, he cannot maintain this suit and it must be defeated because such agreement was not reduced into writing. His reason for referring this matter under s. 617 of the Civil Procedure Code is that there is a ruling of the Madras High Court in *Rama* v. *Kunji* (1) which takes a contrary view; with which he was not disposed to agree,

Before expressing my opinion with regard to the interpretation to be attached to s. 28 of the Legal Practitioners Act and the kindred sections connected with it, I am constrained to remark that I do not think that, in preparing his order of reference, the learned Small Cause Court Judge was right in referring to the object and reasons which led to the preparation of the Bill which subsequently became the present Act. To say the least, it is an inconvenient practice, and, moreover, it is one that is quite irregular.

Now the provisions of the Legal Practitioners Act, with which I am more particularly concerned in disposing of this reference, are ss. 27, 28, 29 and 30 of that statute. S. 27 provides that this Court may by rules fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate, pleader, vakil, mukhtar, &c., in the subordinate Courts, and those fees have been by rule of this Court declared and determined and are based on a particular rate in reference to the valuation of the suit. Having made that provision the statute then goes on, in ss. 28, 29 and 30 to provide not as to matters that relate to the opposite party or the [174] fees that he has to pay to the legal practitioner of the opposite party, but to provide what as between the pleader and his client shall be the method in which certain special arrangements are to be entered into; and in my opinion these sections do not relate to any arrangement or agreement which is made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. Otherwise this extraordinary state of things would arise, that if there was no agreement, the pleader would get nothing though entitled to his fees; that is to say, he could not succeed in getting them because he had not entered into any written agreement with his client. The result would work grave mischief in this way, that as in the present case the litigant, having received the full amount of the taxed pleader's fee allowed against his adversary, could put them into his pocket and say:—"You, the pleader, are not entitled to a pice of the money, because there was no agreement to pay you the taxed fee, and therefore you have no claim against me." I cannot believe that the Legislature ever contemplated or intended anything so absurd, or that they meant that in every case there was to be a written agreement. Until corrected by higher authority, I will not construe the statute in such a way as to make it appear so ridiculous. What these sections, in my opinion, did contemplate, was to make provision for agreements made between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation. They were framed upon the principle which rightly recognises and regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client,

(1) 9 M. 375.

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They were intended to protect necessitous, improvident or careless litigants from being taken advantage of by unscrupulous legal advisers. I think the justification of what I am saying is to be found in s. 29 of the Legal Practitioners Act, which says that where a suit is brought to enforce any such agreement as is mentioned in s. 28, it lies, as it always does lie, upon a person standing in the position of active confidence to show that the agreement was a fair and reasonable agreement; and if he does not do so, "the Court may reduce the amount pay-[175] able thereunder, or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made."

Now it seems to me that the very terms of that section give an index of the nature of the agreement in contemplation in s. 28; because the terms of s. 29 would be wholly inapplicable to a case in which a man had agreed to take only and nothing more than the amount allowed on taxation, as in such a case no question could arise as to the fairness and reasonableness of the agreement. That being so, and this being the fair construction to be placed upon these sections, I am very clearly of opinion that the ruling of the Madras High Court was a right ruling and that we ought to follow it. With this intimation I direct that this reference be returned to the Small Cause Court Judge for him to proceed with the case. The costs of this proceeding here will follow the result.

BRODHURST, J.—I concur.

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12 A. 175=10 A.W.N. (1890) 60.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SHADI LAL (*Plaintiff*) *v.* THAKUR DAS AND OTHERS (*Defendants*).*
[3rd January, 1890.]

Mortgage—Hypothecation of "our zemindary property"—Ascertainment of mortgagor's zemindari interest at date of mortgage—Mortgage not void for uncertainty—Act IX of 1872 (Contract Act), s. 29—Act IV of 1882 (Transfer of Property Act), s. 58.

A deed of simple mortgage described the mortgaged property as "our zemindari property" (*zemindari apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two zemindaris.

Held that the words "our zemindari property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific zemindari interest; and that the mortgage was therefore not void for uncertainty.

[176] *Kanhia Lal* v. *Muhammad Husain Khan* (1), *Bishen Dayal* v. *Udit Narain* (2), *Ramsidh Pande* v. *Balgobind* (3), *Rae Manik Chand* v. *Behari Lal* (4), *Deojit* v. *Pitambar* (5), *Tailby* v. *The Official Receiver* (6), and *Tadman* v. *D'Epineuil* (7) referred to.

[R., 14 A. 162 (164); 11 M.L.J. 27.]

THE plaintiff in this case sued to enforce a deed of simple mortgage against the defendants, by whom the deed had been executed. By it the

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* Second Appeal, No. 542 of 1889, from a decree of H.P. Mulock, Esq., District Judge of Shahjahanpur, dated the 1st February 1889, confirming a decree of Maulvi Fida Husain, Munsif of Sahaswan, dated the 20th March 1888.

(1) 5 A. 11. (2) 8 A. 486. (3) 9 A. 158. (4) N.W.P.H C.R. 1870, p. 263.
(5) 1 A. 275. (6) L.R. 13 App. Cas. 523. (7) L.R. 20 Ch. D. 758.

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defendants hypothecated "our zemindari property" (*zemindari apni*), without further specification or description of such property. The sum secured by the mortgage was Rs. 50. The deed bore date the 29th June, 1873. The suit was instituted on the 7th March, 1888, in the Court of the Munsif of Sahaswan.

The Court of first instance dismissed the suit. On appeal, the District Judge of Shahjahanpur affirmed the Munsif's decree upon the following grounds:—

"The wording of the deed is bad for ambiguity, and the plaint is bad for omission. The instrument begins by describing the mortgagors as residents of Tarapur. It goes on to recite the consideration, and states that as security for the loan the mortgagors hypothecate their landed property (*zemindari apni*), without any other detail of such property. Now it is admitted that, at the time of the mortgage, the mortgagors possessed shares in two villages, Tarapur and Sidhpur. The plaintiff prays for enforcement of his lien against Tarapur only, and not Sidhpur, and makes his witnesses say that they remember, fifteen years after, that the mortgagors expressed verbally the fact that Tarapur alone was hypothecated. Even if this evidence were admissible, I think it worthless after so long a lapse of time.

"But I think the indefinite hypothecation is too vague and general to be acted upon.

"The High Court of these Provinces in *Deojit* v. *Pitambar* (1) a case almost exactly similar to the present, has ruled that "distinctness in the description of property mortgaged is essential." The Madras High Court has also ruled in *Bheri Dorayya* v. *Maddipatu* [177] *Ramayya* (2), that a promise to pay out of the debtor's property indefinitely cannot create a charge on specific property.

"The plaintiff has elected to proceed against one particular property, and I hold that the hypothecation in the bond is of too general a nature to admit of a decree being given against that particular property. The bond must therefore be regarded in the light of a simple money-bond, and as such its recovery is barred by limitation. The appeal is dismissed with costs.

The plaintiff appealed to the High Court.

Mr. *A. Strachey* and Pandit *Sundar Lal*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

STRAIGHT, J.—There is only one question raised in this second appeal, and that is whether the learned Judge was right in holding that the terms of the mortgage-deed in this case were such as to render it bad for ambiguity. The suit was one brought upon a simple mortgage, dated the 29th June 1873, and by the instrument of mortgage the mortgagors hypothecated until payment of the principal sum of the mortgage with the interest thereon "our zemindari property." It is found as a fact in the case and is not disputed, that at that date the mortgagors had a certain ascertained and definite fractional share in the zemindaris of Tarapur and Sidhpur, and I have no doubt whatever that when the instrument of mortgage was made, it was those interests that they intended to charge in favour of the plaintiff. From that time until the institution of the present suit it was never suggested that the charge held by the mortgagee was ineffectual to bind the zemindari interests of the mortgagors in those

(1) 1 A. 275. (2) 3 M. 35.

1890 JAN. 3. — APPELLATE CIVIL. — 12 A. 175 = 10 A.W.N. (1890) 60.

two villages. The learned Counsel on behalf of the plaintiff, who is seeking to enforce his security against one of those villages, namely, the village of Tarapur, has contended that looking to the fact that the mortgagors were owners of the zemindari interest in those two villages at the date of the mortgage there is no ground for saying that the terms of the mortgage-deed were, as, described by the learned Judge, bad for ambiguity. In support of his contention he has referred to a number of cases, among them [178] to *Kanhia Lal* v. *Muhammad Husain Khan* (1), *Bishen Dayal* v. *Udit Narain* (2) and *Ramsidh Pande* v. *Balgobind* (3), and two other cases are *Rae Manick Chand* v. *Behari Lal* (4) and *Deojit* v. *Pitambar* (5). He has also called our attention to the cases of *Tadman* v. *D' Epineuil* (6) and *Tailby* v. *The Official Receiver* (7).

On the other side Mr. *Durga Charan*, in support of the judgment of the learned Judge, has relied upon the cases reported in I.L.R., 1 All. 275, I.L.R., 2 All. 449, I.L.R., 3 Calc. 336, and I.L.R., 7 Calc. 196.

No doubt all the authorities referred to are useful and instructive as guides to assist in the determination of the question raised, though it is not one for the decision of which any general rule can be laid down, because in my opinion its decision must turn upon the exact terms used in the particular instrument, and upon the particular circumstances that led up to and surrounded the creation of that instrument.

Now the contract law of this country provides that agreements the meaning of which is not certain or capable of being made certain are void, and in reference to contracts of mortgage it is also clear that a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of the money advanced, or for any other of the purposes mentioned in s. 58 of the Transfer of Property Act. What then I have to ask myself, looking at the terms of this contract of mortgage of the 29th June 1873, is this, is the meaning of the language used so uncertain or incapable of being made certain, that it should be regarded as a void contract, for this is what the defendant in point of fact asks us to do, namely, to treat this instrument as nothing more than an instrument which rendered him liable personally to pay the amount of the mortgage-debt. Now in my opinion the words "our zemindari property," looking to the fact that at the date of that instrument the two mortgagors were possessed of specific interests in [179] immoveable property in the two villages of Tarapur and Sidhpur, were sufficiently certain, or at any rate were capable of being made certain, as they have been made certain by the proof given in this case of the fact of the mortgagors being the owners of a specific zemindari interest at the date of the mortgage-deed. The case recently decided by the learned Chief Justice and my brother Tyrrell of *Ramsidh Tande* v. *Balgobind* (3), undoubtedly goes a long way, and with the most profound respect for the two learned Judges who gave that judgment, I confess that I should have had some difficulty in assenting to the conclusion at which they arrived ; though at the same time there is as much to be found in the judgments in the case of *Tailby* v. *The Official Receiver* (7) already mentioned, which goes to support their view. I must add that I find it difficult to reconcile the views expressed by this Court in the two cases of *Rae Manick Chand* v. *Behari Lal* (4), and *Deojit* v. *Pitambar* (5).

(1) 5 A. 11. (2) 8 A. 486. (3) 9 A. 158. (4) N.W.P.H.C.R. 1870, 263.
(5) 1 A. 275. (6) L.R. 20 Ch. D. 758. (7) L.R. 13 App. Cas. 523.

I think that the learned Counsel on behalf of the appellant has made good the only point that he has taken in support of his appeal and decreeing the appeal I reverse the decision of the learned Judge and remand the case to him for restoration to his file of pending appeals and disposal according to law. Costs will be costs in the cause.

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BRODHURST, J.—

Appeal allowed.

12 A. 179 = 10 A.W.N. (1890) 53.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood

FAKIR-ULLAH AND ANOTHER (*Judgment-debtors*) v. THAKUR PRASAD (*Decree-holder*)* [7th January, 1890].

Execution of decree—Application for execution withdrawn by decree holder—Rule in Sarju Prasad v. Sita Ram explained—Civil Procedure Code, ss. 373, 647.

The ruling in *Sarju Prasad* v. *Sita Ram* (1) only decided that where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent [180] application made by that decree-holder for execution is prohibited by s. 373 read with s. 647 of the Civil Procedure Code.

But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution.

A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader "that at present the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad* v. *Sita Ram* (1) explained and followed. *Ram Rup* v. *Laji* (2), *Mahta Kuaj* v. *Sham Sundar Lal* (3) and *Hira Singh* v. *Joti Prasad* (4) distinguished.

Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under s. 647 of the Civil Procedure Code, the provisions relating to proceedings in suits are to be followed and adopted in execution-proceedings, so far as they may be fairly and properly applicable thereto.

[Reversed on appeal, 17 A. 106 (P C.); N F., 18 C. 635; F. and Appr., 12 A. 392; R., 13 A. 564 (568): 26 B. 76 = 3 Bom.L.R. 431; 8 O.C. 227 (231); 11 Ind. Cas. 385 (386) = 13 C.L.J. 532.]

THE facts of this case were as follows:—On the 11th April 1883, a decree was passed by the High Court reversing a decree of the Court of first instance, dated the 21st December 1881, which had dismissed the suit of the plaintiff, Thakur Prasad, against the defendants Fakirullah and Kamaruddin. The effect of the High Court's decree was to enforce a deed of simple mortgage executed in 1869, by which the judgment-debtors, in consideration of an advance of Rs. 1 000, hypothecated to the decree-holder their immoveable property.

* First Appeal, No. 26 of 1889, from an order of Pandit Bansidhar, Subordinate Judge of Allahabad, dated the 18th December 1888.

(1) 10 A. 71.
(2) 8 A.W.N. (1888), 259.
(3) 8 A.W.N. (1888), 272.
(4) 9 A.W.N. (1889), 204.

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On the 29th August 1885, an application was made on behalf of the decree-holder for execution of the decree. On the 5th January 1886, the Court executing the decree (the Subordinate Judge of Allahabad) passed an order of which the following is a translation :—

"To-day this case came on for hearing; on behalf of the decree-holder, no prosecution has taken place, and the pleader of the decree- [181] holder states that at the present the case may be struck off. It is ordered that this case, for want of prosecution, be struck off from arrears, with present costs."

On the 24th August 1888, fresh application for execution of the decree was made on behalf of the decree-holder. This application was resisted by the judgment-debtors, on the ground that it was barred by s. 373 read with s. 647 of the Civil Procedure Code, in reference to the ruling in *Sarju Prasad* v. *Sita Ram* (1).

The Court of first instance disallowed the objection, and granted the application for execution. The judgment-debtors appealed to the High Court. The appeal came in the first instance before Mahmood, J., who passed an order referring it for disposal to a Bench of two Judges.

Munshi *Ram Prasad*, for the appellants.

Mr. *C. Ross Alston*, for the respondent.

JUDGMENTS.

STRAIGHT, J.—This is a first appeal on the execution side from the order of the Subordinate Judge of Allahabad, dated the 18th December 1888. The case came before my brother Mahmood in the exercise of his jurisdiction as single Judge, and he thought it desirable, having regard to the questions raised, that it should be referred to a Division Bench of two Judges. Consequently it has come before my brother Mahmood and myself for disposal, and we have heard Mr. *Ram Prasad* on behalf of the judgment-debtors appellants and Mr. *Alston* on behalf of the decree-holder respondent. If I may say so, I think it is so well that my brother Mahmood did refer this case in order that this Bench, which decided the case of *Sarju Prasad* v. *Sita Ram* (1), might in no uncertain tones express definitely what the meaning of that ruling is, and so, as far as possible, guard against future misinterpretation or misunderstanding, I think it my duty by way of preliminary remark to say this much, that my experience, sitting as a Judge of this Court, has been to show that in a large number of instances decrees are obtained by persons against others more particularly upon bonds and mortgage [182] securities, not so much for the purpose of executing those decrees as to enable them to hold them *in terrorem* over their judgment-debtors while for a long period of time interest is allowed to go on accumulating. I therefore feel strongly that it is incumbent upon as to press on the subordinate Courts the necessity for strictness in the procedure in regard to proceedings in execution. In the present case the first decree with which we are concerned was dated the 21st December 1881, and the appellate decree was one of this Court, dated 11th April 1883. The first application for execution was made upon the 29th August 1885. The decree related to a simple mortgage transaction, evidenced by a deed of mortgage of the year 1869, by which the judgment-debtors mortgaged their immoveable property for an advance of the sum of Rs. 1,000. The application of the plaintiff now, which is the subject-matter of the present

(1) 10 A 71.

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proceedings, was made upon the 24th August 1888, and it demands to realize as against the judgment-debtors the sum of Rs. 10,320. Now I am not allowing myself, in deciding this question of law, to be influenced by the circumstance that an original debt of so small an amount has swollen to so large a sum. I am well aware that both as regards the lenders of money and the persons who borrow, there are faults on both sides, and I know that persons who borrow money often throw difficulties in the way of their creditors obtaining payment of their debts. But equally clear it is that decree-holders are extremely dilatory in the enforcement of their decrees. In the present case I will not say that the decree-holder has been dilatory, but I am bound in dealing with the question of law to ascertain the rule that applies, independent of any consideration as to whether there has or has not been dilatorines on the part of the decree-holder. Now experience shows me that proceedings in execution in the subordinate Courts are too often treated as a very subordinate part of the duties they have to discharge, and thus decree-holders come to look upon them only as a matter of form, and think that all they have to do is to put in applications for execution from time to time, without taking any steps to deposit process fees or to do anything further for their prosecution; the object simply being to protect themselves from the operation of the limitation law. As **[183]** I have said, the proceeding before us was inaugurated by a petition dated 24th August 1888, and the sole question to consider is whether that application was or is prohibited by any rule of the law of procedure.

In the case of *Sarju Prasad*, the name of which has become so familiar to the practitioners at the Bar, and I have no doubt is equally well known to decree-holders, the point decided was neither more nor less than this, that where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder was prohibited by the rule of s. 373 of the Civil Procedure Code read with s. 647 of the same Act.

Now I desire to say emphatically, and the subordinate Courts will do well to take notice of it, that procedure in execution is not to be conducted in a slipshod and slovenly fashion as if it were a very unimportant branch of the work they have to do in the administration of justice. It ought to be conducted with as much gravity, care and decorum as the procedure in suits, and, if anything, with more care and attention, because of the difficulties, that so frequently arise. The Courts are bound to look to the Civil Procedure Code for the procedure they should follow in those execution proceedings, for s. 647 provides that "as far as it can be made applicable," the procedure in suits is to be followed and adopted in such procedings; of course those provisions cannot in every respect be strictly applied, but as far as they may be fairly and properly applicable to execution proceedings, so far they should be applied.

In *Sarju Prasad's* case my brother Mahmood and I, not lightly but after most anxious consideration, came to the conclusion that the principle of s. 373 was properly applicable to execution-proceedings, and it seemed to us that where a decree-holder was represented in an execution-proceeding by a pleader who came into Court and said, "at present I am not desirous to proceed with this application, owing to errors in its form, and I ask that it may be struck off", **[184]** he must have contemplated and intended that it should be struck off, and if he did not ask the sanction

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of the Court to put in a fresh application, he was in no better position than a pleader who appears for a plaintiff in a suit and says the same thing, in which case s. 373 would admittedly apply. In *Sarju Prasad's* case the decree-holder was represented by a legal adviser whose duty it was, if he wished to protect his client's interests, to have applied to the Court, when withdrawing his application, for such a permission as left it open to him to come with a fresh application. This is all that the case of *Sarju Prasad* decided. And it has been approved by the learned Chief Justice in L.P. Appeal No. 14 of 1888, and I believe by the other Judges of this Court. It is said by Mr. *Alston* for the decree-holder that there are rulings to be found in *Weekly Notes*, 1888, pp. 253 and 272 and *Weekly Notes*, 1889, p. 204, and an unreported ruling, S.A. 371 of 1888, all of which were decided by my brother Mahmood as single-Judge; and that in them he has departed from the principle of *Sarju Prasad's* case, and that to this extent the authority of that ruling has been diluted. I have examind all these rulings, and I am satisfied that they are in no sense departures from the ruling in *Sarju Prasad's* case. What I understand my brother Mahmood to have said in those cases, and what appears to me to be the broad distinction that he has drawn in those cases as differentiating them from *Sarju Prasad's* case is that where a Court of its own motion and without being moved either by the decree-holder or by his pleader takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Civil Procedure Code which would stand in the way of or bar a decree-holder from coming with a fresh application, or a renewal of such irregularly disposed of application. Speaking from memory and not having the case to hand, I believe the learned Chief Justice has expressed himself much to the same effect, and I myself have said the same thing in a judgment not long since delivered. It is obvious that the striking off of an execution application under circumstances not warranted by any provisions of the Civil Procedure Code cannot be regarded as a bar to any subsequent application. On the other hand, where an appli-[185] cation is made by a decree-holder's pleader of the kind that is covered and contemplated by s. 373, it does come within the provisions of that section, and unless permission is granted the subsequent application is barred. This is the shape in which this case presents itself to my view, and I have simply to ask myself whether the proceeding recorded by the Subordinate Judge on the 5th January 1886, is a bar to the present application of the 24th August 1888. It is recorded by the learned Subordinate Judge in the proceeding of that date that the decree-holder's pleader said "at present let the case be struck off. It is ordered that the case for want of prosecution be struck off from arrears with costs."

Now I say no more than this with reference to some remarks that appear in the course of the learned Subordinate Judge's order, that I think it a pity he has made one or two statements which seems to me to show a want of recognition of the principles of law and the rules of procedure which should direct and control the Courts in discharging their functions in connection with the administration of civil justice I take no further note of those remarks because I am bound by the Subordinate Judge's order as recorded by him upon the 5th January 1886; that is to say, in the exact form and terms of the order as then made. Then the question is, is that order such an order as is covered by the decision in *Sarju Prasad's* case? I am unable to draw any distinction, and it seems to me directly applicable. Under these circumstances, I am of opinion that

this appeal should be decreed, that the order of the Subordinate Judge should be set aside, and that the application of the 24th August, 1888, should be held to be barred by the rule of s. 373, and that the judgment-debtors should have their costs throughout the execution-proceedings.

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MAHMOOD, J.—I agree in what has fallen from my learned brother, and I should not have desired to add anything to what he has said but for the circumstance that this is a case which has come before a Bench of two Judges by reason of my referring order of the 26th April 1889, for the specific purpose of the question being considered whether or not the ruling of this very Bench in *Sarju Prasad* v. *Sita* [186] *Ram* (1) had or had not been properly interpreted by me in the single Bench when dealing with these execution cases without the help of a colleague. The first case before us and the leading case upon the subject is the case of *Sarju Prasad* v. *Sita Ram* (1) to which I have referred. I believe the first occasion upon which I had to deal with it in the single Bench, at least so far as the printed cases go to show, was the case of *Mahtab Kuar* v. *Sham Sundar Lal* (2), and in reference to the ruling of my brother Straight and my own I summed up our conclusions. To use my own words, "we then concurrently held that with reference to the second paragraph of s. 373 read with s 647 of the Code, a decree-holder was precluded from again applying for execution when a previous application for execution was withdrawn by him on account of formal defects, and he withdrew from prosecuting such application without obtaining permission to file another application which would not be open to objection." This was my interpretation in that case. Then comes the case of *Ram Rup* v. *Lalji* (3) which perhaps is the only case which might even furnish the semblance of the suggestion made by Mr. *Alston* that I had departed from the rule laid down in *Sarju Prasad* v. *Sita Ram* (1). What really was the case in *Ram Rup* v. *Lalji* (3) is best represented by the judgment, and there the words I think are clear enough, when I said referring to the case of *Sarju Prasad* v. *Sita Ram* (1),—"But that ruling is limited to cases where the decree-holder himself withdraws the application for executing the decree, and cannot be applied to cases such as those where no such withdrawal of the execution application by the decree-holder has been made, and here this last application for execution is within the period of limitation.

The same was the reason in the case of *Hira Singh* v. *Joti Prasad* (4) where I again held, pointing out the specific scope of the ruling in *Sarju Prasad* v. *Sita Ram* (1), that the mere fact of an application for execution of decree being struck off for default of prosecution was not to be regarded as barring a subsequent application by reason of s. 373 of the Civil Procedure Code, read with s. 647 of the same. [187] It seems to me that in dealing with this class of pleas which bar either a regular suit or any miscellaneous proceedings under the Code of Civil Procedure, there is often much confusion between pleas such as *res judicata* and pleas other than the plea of *res judicata* arising out of other provisions of the law of Civil Procedure. It is needless to say that the plea arising out of s. 373 of the Code is not a plea of *res judicata*, and is to be dealt with within the four corners of the provisions of that section itself. Now that section, as my learned brother has just pointed out, must be taken to be the solitary authority, by dint of s. 647 of the Code, which would render any procedure

(1) 10 A. 71. (2) 8 A. W. N. (1888) 272. (3) 8 A.W.N. (1888) 253.
(4) 9 A. W. N. (1889) 204.

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such as that formulated in the Subordinate Judge's order of the 5th January 1886, to be applicable to such a case, that otherwise there could have been no such order. The words of the order are, in the original Hindustani, very clear :—

"Aj yeh muqadma pesh hua minjanib digridar ke koi pairawi amal man nahin ai aur vakil digridar ne bayan kia ke bilfal yeh muqadma kharij kar dia jawe.

Hukum hua ke yeh muqadma adam piarawi men mae kharcha hal habiyat se kharij ho."

I translate these words literally in the following manner :—

"To-day this case came on for hearing. On behalf of the decree-holder no prosecution has taken place, and the pleader of the decree-holder states that at present this case may be struck off. It is ordered that this case for want of prosecution be struck off from arrears with present costs."

Now I have translated this order literally to show that the effect of it is identical with the terms used in the case of *Sarju Prasad* v. *Sita Ram*(1), where my brother Straight in delivering his judgment quotes the passage of the prayer of the decree-holder to be in the following terms :—

"For the present we are not anxious to carry on the execution proceedings, and we therefore apply that the case may be struck off." I fully agree with my learned brother in thinking that the [188] case is not distinguishable from the case of *Sarju Prasad* v. *Sita Ram* (1) and that we should really be shaking the authority of that ruling were we to lay down a rule other than that which governed that case.

It was in pursuance of that ruling that I decided S. A. 211 of 1887, by my judgment of 6th February 1888, which judgment was the subject of L. P. Appeal No. 14 of 1888, and which appeal was heard by the learned Chief Justice and my brother Straight. In that case, which is not reported, full consideration of the rule laid down in *Sarju Prasad* v. *Sita Ram* (1) seems to have been before the appellate Bench, and the learned Chief Justice then said,—"With regard to that judgment of my brothers Straight and Mahmood all I need say is that I thoroughly agree with it, and I have reason to know that all the other Judges of this Court agree with it. I think it is well founded in law."

Now I am proud to quote this, because I think, and my learned brother will agree with me in saying, that after this expression of opinion, the ruling in *Sarju Prasad* v. *Sita Ram* (1) is practically of as great an authority as a Full Bench ruling; because none of my brother Judges has attempted to dissent from it. To the views there expressed, and subject to the clear distinction which I have drawn in the cases of *Ram Rup* v. *Lalji* (2) and *Hira Singh* v. *Joti Prasad* (3), I still adhere. And I am particularly satisfied after the considerations which my brother Straight has expressed in delivering his judgment in this case, that that ruling should be adhered to and its authority not shaken by any argument which may render it possible for decree-holders to hold their decrees *in terrorem* over the heads of the judgment-debtors, or to play with the Court for the purposes of execution by making applications without desiring to execute them. One more consideration in favour of this view is that I think the law when it prescribes rules of limitation and rules of procedure such as s. 373 of the Civil Procedure Code, must have anticipated that

(1) 10 A. 71. (2) 8 A.W.N. (1888) 253. (3) 9 A.W.N. (1889) 201.

civil Courts of justice are not merely instruments and agents for collecting money, but tribunals for doing [189] justice. I am not going beyond the limits of judicial etiquette when I say that in many of these money-claims the decree-holders instead of obtaining the satisfaction of decree by ordinary process, instead of employing agents who may go round and collect debts as would ordinarily be the way in civilized countries, money-lenders and decree-holders in this country sue for the debt to obtain a decree and take out the process of law for doing that which might easily have been done otherwise if proper and ordinary precaution had been taken. The Courts of justice are bound to accede to the prayer even of such decree-holders and where their duty consists in being mere collecting agents for those persons. But then those debts must be such as do not go beyond the Procedure Code. And s. 373 is one of the most important checks upon the abuse of judicial process which the Legislature in its wisdom has thought fit to place upon decree-holders. I agree in the order which my brother Straight has made.

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Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HANUMAN SARAN SINGH AND ANOTHER (*Defendants*) v. BHAIRON SINGH (*Plaintiff*).* [7th February, 1890.]

Mortgage—Foreclosure—Regulation XVII of 1806, *s.* 8—*Notice of foreclosure—Notice not signed by Judge.*

Held that where the notice of foreclosure under s. 8 of Regulation XVII of 1806 was signed not by the Judge but only by the Munsarim, the foreclosure proceedings were void *ab initio*.

Held also that the notice which was upon the record of the foreclosure proceedings and bore the mortgagor's signature must be regarded as the original notice in the matter; and that the acknowledgment of receipt of notice by the mortgagor did not cure the inherent defect of its non-signature by the Judge.

This was a suit for redemption of a mortgage dated the 25th December 1856. The defendants resisted the claim on the ground that they had acquired an absolute title to the property in suit by reason of certain foreclosure proceedings taken on the 20th June [190] 1868, since which date they had been in possession as owners. The application for foreclosure was made on the 17th March 1868. The plaintiffs alleged that the foreclosure proceedings were invalid on the ground that the notice of foreclosure was not signed by the Judge, and was not served upon them.

The Court of first instance (Munsif of Benares) found that the notice of foreclosure on the record, and dated the 8th April 1868, had been signed by the Munsarim instead of by the Judge, as required by s. 8 of Regulation XVII of 1806, and did not bear the seal of the Court. It held, referring to *Basdeo Singh* v. *Matadin Singh* (1) and *Sitla Bakhsh* v. *Lalta Parsad* (2), that the irregularity vitiated the foreclosure proceedings, and that it was therefore unnecessary to consider whether the notice had or had not been served on the plaintiffs. The Court decreed the claim.

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* Second Appeal No. 1080, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 30th March 1887, confirming a decree of Pandit Raj Nath, Munsiff, dated the 10th December 1886.

(1) 4 A. 276. (2) 8 A. 388.

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The defendants appealed to the District Judge of Benares, who dismissed the appeal and affirmed the Munsif's decree. The material part of the judgment of the learned Judge was as follows:—

"There was a point raised which was held to be a fatal defect in foreclosure proceedings—*Seth Harlall* v. *Nanick* (1)—that the notice of foreclosure does not bear the official signature of the Judge. That this is a defect is also noted in the Privy Council ruling in *Madho Prasad* v. *Gajudhar* (2) though the Judges do not state explicitly that this defect alone would have caused them to regard the proceedings of foreclosure as invalid.

"In *Doma Sahu* v. *Nathai Khan* (3) the Court was not satisfied that the signature of the Judge's sheristadar was sufficient, but at the same time there are remarks in the judgment that leave it in some doubt whether, in a somewhat different state of things, they might not have formed a somewhat different opinion.

"In *Basdeo Singh* v. *Matadin Singh* (4) referred to in the Calcutta case just quoted, the Court seems to have had before it a [191] notice not signed by anyone, but only sealed with the Judge's official seal.

"The plaintiffs mortgagors did not in this case produce a notice. They refer evidently to the duplicate of the notice upon which the (alleged) acknowledgment of the mortgagor was taken. Now this paper in the record of the forceclosure file does not bear the Judge's signature, only the initials of the Munsarim. It is argued that the Judge's signature may have been on the copy alleged to have been served. But against this there was the necessity that the *record* should contain good evidence of compliance with the requirement of the law, and the mortgagee should have seen that such evidence was secured independently of anything the mortgagor might do or say.

"Assuming that a notice was served, I should consider that it was just as necessary for the copy retained on the record to bear the Judge's official signature as for that handed over: in fact, more necessary. If the question were fresh, there could be much said in favour of the view that the irregularity was not material, but the Allahabad ruling of 1871 is on all fours with the present, and I consider that I am bound by it. I must refuse to interfere with the Munsiff's disposal of the case, and dismiss the appeal of the mortgagees with costs."

The defendants appealed to the High Court.

Munshi *Juala Prasad*, for the appellants.

Pandit *Sundar Lal* and Babu *Gaya Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—It is not denied that the defendants-appellants originally got possession of the property to which the suit relates as mortgagees. They have now obtained an entry in the revenue records of their names as proprietors. The plaintiff as the representative of the original mortgagor under the mortgage of the 25th December 1856, objects to the entry and says, you are still in possession of the property as mortgagees. In my opinion the original possession obtained by the defendants admittedly being that of mortgagees, they are bound to establish that they are not now in [192] possession as mortgagees but as proprietors. They took their stand upon certain foreclosure proceedings adopted in 1868.

(1) N.W.P.H.C.R. (1871) p. 176. (2) 11 C. 111. (3) 13 C. 50. (4) 4 A. 276.

and it rested with them to prove that those foreclosure proceedings were regularly and properly had so as to give them a good title. The learned Judge has found that those proceedings were bad *ab initio* by reason of the circumstance that notice of foreclosure to the mortgagor was not signed by the Judge of the Court issuing it. This finding of fact that the notice was an invalid one and the conclusions drawn therefrom by the District Judge are consistent with numerous rulings both of this Court and of their Lordships of the Privy Council. It is said by Mr. *Juala Prasad*, for the appellants, that the learned Judge had no materials from which he was entitled to draw the conclusions that he did. The learned Judge says that the notice of foreclosure was only signed by the Munsarim and not by the Judge, and that this is correct is shown by the notice itself, which is upon the record of the foreclosure proceedings and bears the signature of the mortgagor. It seems to me that this must be regarded as the original notice in the matter, and that its acknowledgment of receipt by the mortgagor did not cure the inherent defect that there was in it by reason of its non-signature by the District Judge. There was in my opinion material before the District Judge to warrant the conclusion at which he arrived, and I dismiss the appeal with costs.

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TYRRELL, J.—I concur. *Appeal dismissed,*

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12 A. 192=10 A.W.N. (1890) 71.

EXTRAORDINARY ORIGINAL CIVIL.

Before Sir John Edge, Kt. Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED. [28th February, 1890.]

Company—Winding up—Application by Official Liquidator for sanction to sale of Company's property—Act VI of 1882 (Indian Companies Act), s. 144 (c)—Lease—Covenant against assignment—Covenant not applying to assignments other than by act of parties—Act IV of 1882 (Transfer of Property Act), ss. 10, 12.

The power of the Court under s. 144 (c) of the Indian Companies Act (VI of 1882) to give sanction to an Official Liquidator to sell the property of the Company, overrides a private contract against assignment made by the Company.

[193] A covenant in a lease to a Company provided that the lessees should not "assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns." The Company having gone into liquidation, and the Official Liquidator having applied, under s. 144 (c) of the Indian Companies Act, for sanction to sell the Company's property, it was objected on behalf of the lessors' assigns that the proposed sale would be in contravention of the covenant.

Held that the covenant did not apply to assignments by operation of law or assignments authorized by statute.

Ss. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties.

[R., 10 Ind. Cas. 374 (375)=10 C.L.J. 585 (587)].

[For earlier proceedings see 11 A. 349, *supra*.]

THIS was an application made on behalf of the Official Liquidator of the West Hopetown Tea Company Limited now in process of winding up in the High Court. The former proceedings in the winding up are fully set forth in the report at I.L.R., 11 All 349. By an order passed on the 21st March 1889 the Official Liquitator's application to place the shareholders of the Company on the list of contributories was disallowed.

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Subsequently the present application was made under s. 144 (*c*) of the Indian Companies Act (VI of 1882) for sanction to sell the moveable and immoveable property of the Company, consisting of its tea garden, machinery, &c., by private contract either as a whole or in separate lots.

The application was opposed by the trustees of a deed of trust of the 11th September 1885. The property of the Company, called the West Hopetown Estate, was held by the Company under a lease, dated the 14th December 1883, and in the following terms :—

"Whereas Mr. H. Vansittart, late B.C.S., and Mrs. M. A. Vansittart are the proprietors of the West Hopetown Estate, and whereas an agreement for a lease was made with the Manager of the West Hopetown Tea Company, Limited, on the 22nd March 1882, on certain conditions of a plot of ground of four hundred acres situate in Mulookawala in one square block, now demarcated by boundary pillars, and stretching thence towards Fatehpur between the two ravines the banks of which with a breadth thirty feet were reserved by the lessors for and during the term of one thousand years from the first day of January 1862, at a yearly rent of [194] Company's rupees two thousand payable by two half-yearly instalments on the 1st day of January and 1st day of July in each and every year and subject to certain conditions, and whereas a formal lease was either not written or if written has been lost, but nevertheless the rent has been duly paid from time to time to Mr. H. Vansittart, and whereas the present West Hopetown Tea Company, Limited, is the representative of the lessee and whereas it is desirous to secure its title, and whereas the said Mr. Vansittart and Mrs. M. A. Vansittart are willing to confirm the title of the said Company and that there should be a formal lease: It is therefore agreed between the said Mr, Vansittart on the one part and the said West Hopetown Tea Company, Limited, on the other part as follows: The said Mr. Vansittart and Mrs. Vansittart for themselves and for their heirs, executors, administrators and assigns (hereinafter called the lessors) in consideration of the rents and conditions hereinafter agreed to be paid and performed do hereby lease to the West Hopetown Tea Company, Limited, its successors and assigns all those four hundred statute acres (portion of eight thousand statute acres belonging to the said lessors) on the land known as Mulookawala in the Western Dun now demarcated by boundary pillars and known as the Estate of the West Hopetown Tea Company, Limited, during the term of one thousand years from the 20th day of December 1883, at the yearly rent of rupees two thousand payable by two equal half-yearly instalments on the first of January and the first July of each and every year, and the first half-yearly payment of rent, after satisfaction of all past rents now due to be made on the 1st day of July 1884, free from all taxes, rates, assessments, municipal or local taxes, and deductions whatever. The said West Hopetown Tea Company, Limited, for itself, its successors or assigns covenants not to assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns, but the said lessors shall not be required to show their title to grant the said lease, and the said West Hopetown Tea Company, Limited, for itself, its successors or assigns agrees and covenants that the lessors on non-payment of the annual rent of two thousand rupees or any part thereof for twelve [195] months next after the same shall have become due, and the same having been first demanded by the said lessors, shall have a right of re-entry on the land leased, and the lessors agree that it shall be lawful for the said

West Hopetown Tea Company, Limited, for itself, its successors or assigns to put an end to the said lease on giving, through their Secretary or other legal representative, to the said lessors two years' previous notice in writing of their intention so to do. In witness whereof the said parties have hereunto set their respective hands and seals on this fourteenth day of December eighteen hundred and eighty-three."

The deed of trust of the 11th September 1885 was executed by the lessors, Mr. H. Vansittart and Mrs. M. A. Vansittart, and was as follows:—

"We, the undersigned, being desirous to settle our immoveable property in consideration (valued at Rs. 3,00,000) of natural love and affection for our children and of the satisfaction of promises made to some of them, do hereby give and grant all our immoveable property belonging to us or either of us comprising the Phœnix Lodge Estate at Mussooree and the estates of West Hopetown, Chorba, the villages of Dhaki and Rampur in western Dun with all leases, rights, titles and interests of any kind that we or either of us have therein unto and to the use of Henry Vansittart, B.C.S., retired, one of the undersigned, and three of our sons, Henry, Herbert Dobbie and Eden, in trust for the following purposes: First, the said Henry Vansittart, one of the undersigned, to have the whole income of the said estates for life; second, after the death of the said Henry Vansittart one of the undersigned should he predecease his wife, Mary Amelia Vansittart, the other undersigned, to pay the whole net income thereof unto the said Mary Amelia Vansittart for her life; and third, after the death of both the undersigned the surviving trustees to hold the said estates on the following trusts, *viz.*, to divide the said trust-estate into seven equal shares (and their division and apportionment of shares shall be indisputable by any of the beneficiaries under this deed or anyone claiming through them) and to give and deliver one of such shares unto each of my said three sons, Henry **[196]** Herbert Dobbie and Eden (or if dead to his heirs or assigns), for his own use and benefit absolutely and free from all trusts and to hold a further, that is, the fourth share jointly by them, the said three sons for their own use and benefit absolutely and free from all trust and to hold the fifth, sixth and seventh shares in trust to pay the income of one such share to each of our three daughters, Edith, Katherine Rosamond, Agatha and Florence Mary for their respective lives and should they predecease their husbands to their husband's for their respective lives, provided that should any of the said daughters have issue then one such share to be delivered to her for her own use and benefit absolutely (or if dead to her heirs) and regarding those shares the incomes of which are to be paid to the daughters who die without issue (after the death of their husbands if any) to hold as part of the trust-estate and to be divided in accordance with the previous provisions. The trustees or the survivors of them shall have full power at any time to sell any or all the trust-property and to invest the moneys as they shall think fit, such moneys and investments to represent the estate and to be subject to all the trusts above mentioned, and they will have power to add to their number, and the last surviving trustee can by his will appoint a trustee or trustees and such of the provisions of Act XXVIII of 1866 as are not conflicting with the provisions of this deed shall apply to this deed. Signed and delivered on the 11th day of September 1885."

The trustees under this deed, who had acquired the rights of the lessors under the lease of the 14th December 1883, opposed the present

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application on the ground that the sale of which sanction was prayed under s. 144 (*c*) of the Indian Companies Act, would be in contravention of the covenant in the lease which prohibited the Company from assigning, under-letting or parting with any part of the property leased unless with the express consent in writing of the lessors or their assigns.

The application was also opposed by Mr. David Hay, one of the shareholders, upon grounds which it is unnecessary, for the purposes of this report, to state.

[197] Mr. *A. Strachey*, for the Official Liquidator cited *Vyankaraya* v. *Shivram Bhat* (1), *Tamaya* v. *Timapa Ganpaya* (2) and *Subbaraya* v. *Krishna* (3).

Mr. *C. Ross Alston*, for the trustees under the deed of the 11th September 1885, referred to ss. 10 and 12 of the Transfer of Property Act (IV of 1882).

Mr. *J. C. Mullaly*, for Mr. David Hay.

JUDGMENT.

EDGE, C.J.—This was an application on behalf of the Liquidator of the West Hopetown Tea Company, Limited, for sanction under s. 144 of the Indian Companies Act to sell the moveable and immoveable property of the Company by private contract with power to transfer the same to any person or Company either as a whole or in separate lots. The application is objected to by Mr. *Alston*, who appears on behalf of the trustees of a deed of trust of the 11th September 1885, and by Mr. *Mullaly* on behalf of Mr. Hay, one of the shareholders of the late Company. Mr. *Alston's* objection is that the lease contained a covenant against assignment without the previous consent of the lessors, and he relies on ss. 10 and 12 of the Transfer of Property Act. The covenant is not a covenant against assignments by operation of law, or against assignments authorized by statute. The group of sections among which ss. 10 and 12 come relate to transfers of property by act of parties. That group of sections is headed by a portion of the Act which indicates that the sections relate to transfers by act of parties. Under s. 144 (*c*) of the Indian Companies Act the Court has power to give sanction to a liquidator to sell, and that power overrides a private contract against assignment by the parties. Mr. *Alston's* objection, in my opinion, consequently fails.

Mr. *Mullaly* objects on the grounds that, in the opinion of his client, the liquidator should proceed to investigate some dispute between the shareholder whom he represents and some other persons whom he alleges to have brought the Company to grief. How those disputes, if any such exist, should be allowed to interfere [198] with the realization of the assets of the Company and the liquidation of its debts, is a matter which I fail to understand. In my opinion, we should give sanction to the liquidator to sell the interests of the Company in the property either as a whole or in lots. The liquidator's costs will be paid out of the estate; the other persons who have objected here to-day will bear their own costs.

STRAIGHT, J.—I am of the same opinion.

Application allowed.

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(1) 7 B. 256. (2) 7 B. 262. (3) 6 M. 159.

12 A. 198=10 A.W.N. (1890) 59.

CIVIL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1890 JAN. 2.

CIVIL REVISIONAL.

12 A. 198= 10 A.W.N. (1890) 59.

RAM DAYAL (*Petitioner*) v. RAMADHIN (*Opposite party*).*
[2nd January, 1890.]

High Court's Powers of revision—Civil Procedure Code, s. 622—Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—Act XII of 1881 *(N.W.P. Rent Act)*, ss. 183 199.

The High Court has no power to revise, under s. 622 of the Civil Procedure Code, an order passed by a Collector under s. 183, of the N.W.P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. *Hur Pershad* v. *Lalu* (1) distinguished.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Juala Prasad*, for the petitioner.

Munshi *Madho Prasad*, for the respondent,

JUDGMENT.

STRAIGHT, J.—This petition has been presented ostensibly under s. 622 of the Civil Procedure Code for the purpose of inducing this Court to exercise its revisional powers under that section. It appears that a suit was instituted by the petitioner in the Court of the Assistant Collector of the second class for recovery of arrears of rent, amounting to the sum of Rs. 78-14-9. For the purpose of disposing of this case it is not necessary for me to say more in regard to the defence set up in answer to the claim than [199] that it was based upon a technical objection to the form of the plaintiff's suit. The first Court dismissed the claim, and there was an appeal by the plaintiff to the Collector of the district as provided in s. 183 of the Rent Act. The Collector of the district upheld the decision of the Assistant Collector of the second class, and it is this order of the Collector in appeal which is made the subject-matter of this application for revision. It is objected by Mr. *Madho Prasad*, on behalf of the opposite party, that this Court has no jurisdiction to entertain such an application, for as by s. 183 of the Rent Act the decision of the Collector of the district was final, and as by s. 199 of the same statute, provision is made to enable the Board of Revenue as the paramount revenue authority to revise orders of all Courts subordinate to a Commissioner, therefore, there being special provision within the four corners of the Rent Act itself for the revision of such an order as that which is attacked here, this Court cannot exercise its powers under s. 622 of the Civil Procedure Code.

I am of opinion this is a good contention and must prevail. Mr. *Juala Prasad* in support of the petition has referred us to the Full Bench ruling of this Court in *Hur Pershad* v. *Lalu* (1). But with regard to that case it is to be observed that it was before the present rent law came into operation and when Act X of 1859 was in force, in which no provision in the terms of s. 199 of the present Rent Act was to be found. If I were to adopt that ruling as applicable to this case and to accept Mr. *Juala Prasad's* contention, this grave inconvenience and confusion of judicial authorities must ensue, namely, that both the Board of Revenue under s. 199 of the Rent Act, and this Court under s. 622 of the Civil

* Miscellaneous Application No. 276 of 1888 for revision under s. 622 of the Civil Procedure Code.

(1) N.W.P.H.P.R. 1871, p. 60.

1890 JAN. 2. — CIVIL REVISIONAL. — 12 A. 198 = 10 A.W.N. (1890) 59.

Procedure Code, would have co-ordinate jurisdiction to revise orders of the kind to be found in the present case. I think I am bound in dealing with a question of this kind to guard against so grave a dilemma arising, which I feel sure could never have been intended, and to leave to the Board of Revenue, to whom the power in specific terms is given by the statute, the exclusive jurisdiction [200] thereby in my opinion contemplated and provided. This will certainly procure uniformity of procedure, because while looking to the terms of s. 199 of the Rent Act the Board of Revenue's jurisdiction to deal with those cases in which an appeal lies under s. 189 of the Rent Act is in terms excluded, and naturally because they go to the Civil Court Judge and to this Court, on the other hand, it leaves their jurisdiction untouched to deal with those cases to which s. 189 of the Rent Act is not applicable. I therefore am of opinion that we have no jurisdiction to entertain this application for revision, and I accordingly dismiss it with costs upon that ground.

BRODHURST, J.—I entirely concur. *Application rejected.*

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12 A. 200 = 10 A.W.N. (1890) 23.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

SANKALI (*Defendant*) *v.* MURLIDHAR AND OTHERS (*Plaintiffs*).*
[7th January, 1890.]

Appeal—Death of plaintiff-appellant—Rival applicants for substitution—Order under Civil Procedure Code, s. 367, substituting one applicant—No appeal from such order—Unsuccessful applicant attempting to appeal from final decree on appeal—Civil Procedure Code, s. 591—"Error, defect, or irregularity, affecting the decision of the case."

Pending an appeal before the lower appellate Court, the plaintiff-appellant died, and two persons separately applied to be substituted as the deceased's representative. The Court, applying ss. 367 and 582 of the Civil Procedure Code, decided in favour of one of the applicants, and brought him upon the record. No appeal was made against this order by the unsuccessful applicant. The lower appeallate Court decided the appeal adversely to the successful applicant. Subsequently the unsuccessful applicant established by a separate suit that she was the deceased's legal representative, and that her opponent was not. She attempted to appeal to the High Court against the lower appellate Court's decree dismissing the appeal.

Held that the appellant not having been a party to the decree below, and the order below having decided that she was not entitled to be a party to the proceedings of the lower appellate Court, she was not entitled to maintain the appeal to the High [201] Court, and s. 591 of the Civil Procedure Code was not applicable to the case. *Har Narain* v. *Kharag Singh* (1) distinguished.

Where an order under the group of sections in the Civil Procedure Code relating to representatives has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands.

Error, defect or irregularity within the meaning of s. 591 of the Code, means error, defect or irregularity in procedure or in law, and not in matters of fact. In the present case there was no error, defect or irregularity within the meaning of the section, and even if there were, it did not affect the decision of the case in appeal below.

[Appl., 27 B. 162 (187, 188).]

THE facts of this case are sufficiently stated in the judgment of the Court.

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* Second Appeal, No. 1719 of 1887, from a decree of G.J. Nicholls, Esq., District Judge of Ghazipur, dated the 15th August 1887, confirming a decree of Munshi Chedi Lal, Subordinate Judge of Ghazipur, dated the 14th May, 1887.

(1) 9 A. 447.

1890
JAN. 7.
APPELLATE
CIVIL.
12 A. 200 = 10 A.W.N. (1890) 23.

The Hon. *T. Conlan* and Mr. *G. T. Spankie*, for the appellant.
Mr. *G. E. A. Ross*, for the respondents.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.— A preliminary objection has been taken by Mr. *Ross* to the hearing of this appeal. In the Court below, one Chedi was apellant. Chedi died before the decree in the Court below, and upon his death Musammat Sankali, the appellant here, applied to be brought on as his representative. One Ram Kishan Ram also applied to be brought on as his representative. The Judge below, applying ss. 367 and 582 of the Code of Civil Procedure to the case, decided that Ram Kishan Ram was the representative of Chedi and Musammat Sankali was not, and brought on to the record Ram Kishan Ram as representative of Chedi. From this order Musammat Sankali could have appealed, but she did not appeal. The Court below decided the appeal against Ram Kishan Ram as the representative of Chedi. Musammat Sankali without permission brought this appeal from the decree in appeal of the lower Court. The preliminary objection is that she has no *locus standi* as an appellant.

Mr. *Spankie* has contended that under s. 591 he is entitled to question in this appeal the order of the Court below which dismissed Musammat Sankali's application and brought Ram Kishan Ram on to the record. He has also contended that as his client, the [202] appellant, has since established by a separate suit that she is the representative of Chedi, and that Ram Kishan Ram is not, she was entitled to file this appeal and that permission might be given now after the appeal has been filed. In the case of *Har Narain* v. *Kharag Singh* (1), we decided that an objection to an order of this kind might be taken on the hearing of appeal, but there is a wide difference in our opinion between that case and this. In that case the appellant who challenged in his appeal an order which had been made by the Court below bringing on a representative of a deceased party, was in fact a party to the decree below and therefore formally entitled to appeal, being dissatisfied with that decree ; but in this case Musammat Sankali was not a party to the decree below, and the order below had decided that she was not entitled to be a party to the proceedings below. The question as to whether the order below was right or wrong went to the very root of the question as to her right to be a party to the proceedings below, or to come here at all in appeal. We are of opinion that where an order under the group of sections relating to representatives has been made excluding a person from the record, that person must seek his or her remedy on appeal against the order, and is not entitled to appeal against the decree so long as the order stands. There is another reason why we think that s. 591 does not authorize the raising of this question here in appeal, and that is, that it does not appear to us that there was any error, defect or irregularity within the meaning of s. 591 in the order below. Error, defect or irregularity within the meaning of that section mean, in our opinion, error, defect or irregularity in procedure or in law, not in matters of fact ; and even if there were any error, defect or irregularity in the order, we do not see how any such error, defect or irregularity affected the decision of the case in appeal below. For these reasons we are of opinion that this appeal must be dismissed with costs, and it is so dismissed accordingly.

Appeal dismissed.

(1) 9 A. 447.

1890
FEB. 7.

APPELLATE CIVIL.

12 A. 203 = 10 A.W.N. (1890) 87.

12 A. 203 = 10 A.W.N. (1890) 87.

[203] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HIKMATULLA KHAN AND ANOTHER (*Plaintiffs*) *v.* IMAM ALI AND OTHERS (*Defendants*)*. [7th February, 1890.]

Mortgage, usufructuary—Act VI of 1882 (*Transfer of Property*) *ss.* 58 (*d*), 98—*Splitting claims—Suit by usufructuary mortgagee excluded from possession for unpaid interest—Cause of action—Subsequent suit for principal and residue of interest barred—Civil Procedure Code*, s. 43.

A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal, together with the residue of interest up to the date of suit.

Held that, inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage-money, the instrument did not strictly fall within s. 58 (*d*) of the Transfer of Property Act (IV of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in s. 98 of that Act.

Held, upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four years, but after their expiration.

Held that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered; that the cause of action to recover the principal accrued at the same time and was the same cause of action; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal; and that the present suit was consequently barred by s. 43 of the Civil Procedure Code.

[R., 10 O C. 14 (16); 28 P.R. (1907) = 93 P.L.R. (1908) = 140 P.W.R. (1907); D., 21 B. 267 (271, 272); L.B.R. (1893—1900) 618 (619).]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

[204] Mr. *Abdul Majid*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT,

STRAIGHT, J.—This is a suit brought by the plaintiffs-appellants against the defendants-respondents to recover a sum of Rs. 300 principal, and interest Rs. 127, or in all Rs. 427 under the following circumstances:—

On the 8th April 1879, one Musammat Kulsum, the ancestress of the defendants, made a mortgage in favour of the plaintiffs for a consideration of Rs. 300. The terms of the instrument are important, because, according as we decide what was the precise nature of the contract between the parties, so must the question of law which has been raised, as the foundation

* Second Appeal, No. 1402 of 1887, from a decree of T. R. Wyer, Esq., District Judge of Shahjahanpur, dated the 19th May, 1887, confirming a decree of Maulvi Muhammad Shafi, Munsif, Shahjahanpur, dated, 1st May 1886.

1890 FEB. 7. — APPELLATE CIVIL. — 12 A. 203 = 10 A W.N. (1890) 87.

for this appeal, be determined. According to the instrument of the 8th April 1879, Musammat Kulsum, after reciting the extent of her zemindari interest in certain properties went on to say:—" Now, of my own free will, I have mortgaged two and a half biswas out of five biswas, and ten biswas out of twenty biswas zemindari aforesaid, together with all the rights, *dakhli* and *kharji*, water and forest produce, groves, tanks, village site self-cultivated, cultivatory holding of tenants and all the items appertaining to the zemindari aforesaid in lieu of Rs. 300 half of which are Rs. 150, to Wilayat-ullah Khan, resident of Ikhtiyaranagar, for a term of four years with interest at the rate of one per cent. Having received the whole and entire mortgage-money from the mortgagee, I have put the mortgagee in possession of the mortgaged property. It is covenanted that the mortgagee having remained in possession will pay the Government revenue, and, after defraying the village expenses, whatever profit will remain, he will credit towards his yearly interest of Rs. 36. Whatever will remain he will credit towards the principal. Should any deficiency arise in the interest, I will pay the same from my own pocket, and the whole money, principal and interest, having been paid at the time of the expiry of the term, the mortgaged property will be redeemed."

The first contention that has been urged before us on behalf of the appellants is that this is not a usufructuary mortgage pure [205] and simple, within the meaning of cl. (b) of s. 58 of the Transfer of Property Act, but that it is a combination of a usufructuary mortgage for a term of four years, and that subsequently to the expiration of those four years it creates a simple hypothecation or charge upon the property theretofore in possession of the usufructuary mortagee. I agree so far with the learned Counsel for the appellant, that the instrument cannot be regarded as strictly falling within the definition of cl. (b) of s. 58 of the Transfer of Property Act, because there is no stipulation in terms that the mortgagee is to remain in possession until payment of the mortgage money, and I think therefore that in dealing with this document I must apply the principles enunciated in s. 98 of the Transfer of Property Act, that is to say, I must determine the rights and liabilities of the parties to this instrument as evidenced in the mortgage-deed.

Now having given the terms of that instrument the best consideration I can, I have come to the conclusion that what was intended between the parties was, that there should be a usufructuary mortgage for a term of four years certain; that if at the expiration of that period the principal sum and interest were paid up by the mortgagor the mortgage would be redeemed, but that in the event of this not taking place either by reason of the profits having been insufficient to pay the mortgage-debt with its interest, or the mortgagor having failed to do so, the mortgage relations between the parties were to continue upon the same terms as theretofore; and that consequently this must be regarded as a usufructuary mortgage not only during the four years but after their expiration. Now having placed that construction upon the instrument, it will be convenient for me to state a few further facts which raise more directly the point that is taken in appeal. I have said the mortgage was dated the 8th Apirl 1879, and immediately upon the execution of that instrument, it is clear that the usufructuary mortgagees, that is, the plaintiffs in the present suit, were entitled to the possession of the mortgaged estate. But they did not get possession, nor to the hour when this suit was instituted, [206] nor at this moment have they ever obtained it. In the month of April 1882 they instituted a suit against the defendants to recover from them the

1890 FEB. 7. — APPELLATE CIVIL. — 12 A. 203= 10 A.W.N. (1890) 87.

unpaid interest due up to that date upon the Rs. 300, and in that suit they succeeded, and subsequently realized the decree by the sale of certain property belonging to their judgment-debtors. It was contended below that the present suit, which is for the recovery of the principal sum, together with the residue of interest to date of suit, was barred by the provisions of s. 43 of the Code of Civil Procedure; that is to say, that the cause of action upon which the plaintiffs now really come into Court is the same cause of action upon which they instituted their suit in 1882 for the recovery of the unpaid interest. The learned Judge below has held that this is a good contention, and it is his decision upon that point which has been attacked by the learned Counsel on behalf of the appellant. The case has been exceedingly well argued on both sides on two occasions, and I have done the best I can to look at it in all its aspects and to come to what appears to me to be that conclusion which is most warranted by the provisions of the law. I cannot help saying in passing that I feel that the conclusion at which I have arrived will have the unfortunate result of enabling these defendants to escape from the payment of a debt which in all honour and conscience they undoubtedly owe to the plaintiff. But there is no rule of procedure which is founded in bettter reason and good sense than that which prohibits persons who bring suits, from what is called splitting their demands. In my opinion the cause of action which took the plaintiffs into Court with their suit in 1882, was the non-delivery of possession of the mortgaged property, by reason of which they had been unable to pay themselves their interest from the usufruct, which they would otherwise have been able to do. That cause of action accrued to them from the very moment the instrument of mortgage came into operation and possession was not given to them; and that was the 8th April 1879. Now, I have before me a ruling of the learned Chief Justice and my brother Tyrrell in *Balgobind Das* v. *Barkat Ali* (1) which goes into this question and [207] decides that for the purposes of limitation, there is no continuing breach where the mortgagor fails to give possession of the mortgaged property to his mortgagee under a usufructuary mortgage; but that there is from the very first moment of such non-delivery a breach, and from the date of which time runs. Agreeing as I do in this view, it seems to me that the reasoning in that case with reference to the question of limitation may by analogy be adopted in reference to the question which now arises under s. 43 of the Code of Civil Procedure. In my opinion the plaintiff's cause of action to recover their principal sum of Rs. 300 accrued to them upon the date when possession of the mortgaged property was first refused to them, and this was the same cause of action which entitled them to claim interest in the month of April 1882, and that when they brought their suit to recover the unpaid interest, which unpaid interest could be only due to them upon the view that the contract to give possession had been broken, they were bound to sue for the principal amount and were not entitled to wait until the four years had expried.

That being the view I have of the case, I am of opinion that the learned Judge was right in the view he took, and I dismiss the appeal with costs.

BRODHURST, J,—I concur.

Appeal dismissed.

(1) 8 A. W. N. (1888) 15.

12 A. 207 = 10 A.W.N. (1890) 76.

1890 FEB. 12. APPELLATE CIVIL. 12 A. 207 = 10 A.W.N. (1890) 76.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

JEMA AND OTHERS (*Plaintiffs*) *v.* AHMAD ALI KHAN (*Defendant*).*
[12th February, 1890.]

Limitation—Exclusion of time—Act XV of 1877 (*Limitation Act*), *s.* 14—"*Other cause of a like nature.*"

The words "other cause of a like nature" in s. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction.

Where a suit was dismissed on the ground that the debt sued for was due not to the plaintiff alone, but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequently brought a fresh suit for the same debt, making his co-partner a party.

[208] *Held* that the case was not within s. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. *Ram Subhag Das* v. *Gobind Prasad* (1) and *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* (2) referred to. *Deo Prasad Singh* v. *Pertab Kairee* (3) not followed.

[R., 23 C. 821 (826); 14 Ind. Cas. 437 = 6 L.B.R. 43 D., 22 A. 248 (259) (F.B.)]

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Srish Chandra Banerji*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.—The appellant here brought a suit against certain defendants for a debt which was due to the firm of which the appellant was one partner, the other partner in that firm not having been joined in the suit. That suit was dismissed in this Court on the ground that the liability of the defendant was a liability to the plaintiff and his partner and not a liability of the defendant to the plaintiff alone; in other words, that the plaintiff could not maintain that suit for a debt due to the partnership without bringing his co-partner on the record. It was not merely a case of procedure. It was a case of a plaintiff coming into Court and failing to prove a cause of action in himself against the defendant, and thus failing to establish the defendant's liability to him, the plaintiff, in the suit. After that suit was dismissed, he brought the present suit for the same debt, having taken the precaution to make his co-partner a party to the suit. The second suit was brought after the period of limitation applicable to the debt, and on that ground the first Court dismissed the suit, and on appeal the lower appellate Court confirmed the decree of the first Court. It is contended here that this is a case within s. 14 of the Indian Limitation Act (XV of 1877) and that the plaintiff's first suit was prosecuted in good faith in a Court which "from other cause of a like nature" within the meaning of s. 14 was unable to entertain it. In our opinion the decision of this Court in *Ram Subhag Das* v. *Gobind Prasad* (1) and that of Sir Barnes Peacock, C.J.,

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* Second Appeal No. 482 of 1888, from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 15th December 1887, reversing a decree of Babu Ganga Saran, Munsif of Saharanpur, dated the 18th July 1887.

(1) 2 A. 622. (2) 6 W.R. 184. (3) 10 C. 86.

1890 FEB. 12. — APPELLATE CIVIL. — 12 A. 207= 10 A.W N. (1890) 76.

[209] and Mr. Justice Trevor in *Chunder Madhub Chukerbutti* v. *Ram Coomar Chowdry* (1) are in point, although the latter decision was given on the former Act. We do not follow the decision of the Calcutta Court in *Deo Prosad Singh* v. *Partab Kairee* (2). In our opinion "other cause of a like nature" must mean some cause analogous to defect of jurisdiction. We see no analogy between a case where a suit was dismissed for defect of jurisdiction and a case like the first suit of this plaintiff, which was dismissed because he had not shown a liability in the defendants to him alone. In the plaintiffs' first suit there was nothing like a defect of jurisdiction. In every respect the Court had ample jurisdiction to hear and determine the suit. The reason why that suit failed was, as we have said, because the contract was to pay the partners, and not to pay one of them alone. We dismiss the appeal, and confirm the decree below with costs. *Appeal dismissed.*

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12 A. 209=10 A.W.N. (1890) 83.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

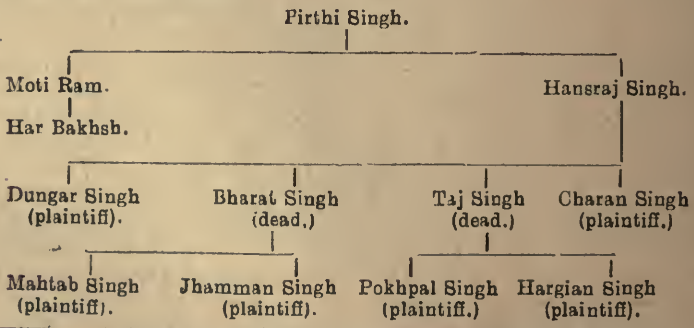
RAM DAYAL AND OTHERS (*Defendants*) *v.* DURGA SINGH AND OTHERS (*Plaintiffs*).* [24th February, 1890.]

Hindu Law—Joint Hindu family—Money-decree against father alone for his personal debt—Attachment of joint family property—Suit by sons to set aside attachment.

Where in execution of a simple money-decree obtained against the father only in a joint Hindu family in respect of a bond-debt incurred by him personally, the decree-holders attached the whole of the joint family property, and before sale in execution took place, the sons of the judgment-debtor objected to the attachment under s. 278 of the Civil Procedure Code, and, the objection having been disallowed, sued for a declaration that they were entitled to a share in the property and for its release from attachment,—*held* that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch and which therefore could not be attached under it and that they were in a position to ask to have those interests exempted from the threatened sale in execution.

[Overruled—27 A. 16 (F.B.)=1 A.L.J. 310=A.W.N. (1904) 151; Not F.—1 O.C. 112 (113, 115); 4 O.C. 178 (179); R.—1 O.C. 169 (170); 16 C.P.L.R. 19.]

[210] THE following genealogical table shows the relative positions of the plaintiffs in this case:—



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* First Appeal No. 72 of 1887 from a decree of Babu Abinash Chandar Banerji Subordinate Judge of Aligarh, dated the 21st March 1887.

(1) 6 W.R. 184.

(2) 10 C. 86.

1890 FEB. 24. — APPELLATE CIVIL. — 2 A. 209= 10 A.W.N. (1890) 83.

The suit was instituted in the Court of the Subordinate Judge of Aligarh on the 12th March 1886. The plaintiffs, as will be seen from the above table, were the two surviving sons and the four grandsons of Hansraj, and the first defendant was Hansraj Singh, who died since the litigation commenced and the second and third defendants, Ram Dayal and Behari Lal, by a guardian *ad litem*, the minor sons of one Todar Mal, deceased, the obligee of a single bond of the 20th August, 1873, for Rs. 10,000, of which Hansraj Singh was the obligor. This bond was put in suit by these minors through a guardian, and on the 1st October 1880, they obtained a simple money-decree against Hansraj Singh. In execution thereof they attached—

(1) 3 biswas 6 biswansis $13\frac{1}{4}$ kachwansis of mauza Gharbara.
(2) $\frac{1}{3}$ of 5 biswas of mauza Mour.
(3) 10 biswas of mauza Khanadiya.

To this attachment the present plaintiffs preferred objections under s. 278 of the Civil Procedure Code, but they were disallowed. Hence the present suit for a declaration that out of the properties attached they were entitled to a four-fifths share and to its release from attachment and sale, and they further prayed that such four-fifths share might be partitioned, and that they might be given possession of the same.

[211] They based this claim upon the allegations that the property was ancestral and joint, that Hansraj Singh and his sons and grandsons acquired a right in such ancestral and joint property from the dates of their respective births, and "that under the Hindu Law, one-fifth of the whole property belongs to Hansraj Singh, and the rest four-fifths to the plaintiffs, whereof the plaintiffs are in possession."

The third paragraph of the plaint stated "that under the Hindu law, the plaintiffs are entitled to compel Hansraj Singh to partition their shares of which they can take separate possession, but the defendants, second party, have attached in execution of their decree for a simple debt, transferred by this Court to the Revenue Court of the district for sale of the property, the whole property, as the property of Hansraj Singh, judgment-debtor, and have advertised it for sale; that the joint ancestral property is not at all liable for the satisfaction of a simple debt like this; and that especially the shares of the plaintiffs cannot by any means be attached and sold in execution of a decree for a simple debt. Moreover, the decree was contracted without any necessity whatever, for unlawful and immoral purposes. But even if it be assumed that the debt was not incurred without necessity, still Hansraj Singh, judgment-debtor, alone is personally responsible for its payment." The suit of the plaintiffs was thus directed against the attachment that had been maintained on the whole property by the establishment of their right to four-fifths of such property, as provided in s. 283 of the Civil Procedure Code, and it rested on two grounds: first, that the decree against Hansraj Singh was personal to him and affected him alone; secondly, that the debt to which it related was contracted without necessity and for unlawful and immoral purposes.

The Court of first instance (Subordinate Judge of Aligarh) decreed the suit. The defendants appealed to the High Court.

Mr. *G. E. A. Ross* and the Hon. Pandit *Ajudhia Nath*, for the appellants.

Mr. *Abdul Majid* and Pandit *Bishambhar Nath*, for the respondents.

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APPELLATE CIVIL.

12 A. 209 = 10 A.W.N. (1890) 83.

JUDGMENT.

[212] STRAIGHT, J.— In the case of *Beni Madho* v. *Basdeo Patak* (1) I went at length into the more recent decision of their Lordships of the Privy Council bearing on the points which arise in the present appeal, and stated what appeared to me to be the outcome of these decisions. The case of *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kouden* (2) is most apposite to the suit out of which this appeal has arisen, the only difference being that in that case, despite the objections of the son to the attachment, the sale went on, and the decree-holder purchased the property, while here there is an attachment of the whole property, but as yet no sale has taken place.

Upon the authority of that ruling it seems to me that if in the present case the sale had taken place, and the decree-holder had purchased the whole property, and had obtained a sale-certificate for the whole, it must have been held that the whole had passed to the purchaser, unless the plaintiff could have shown that nothing but the interest of Hansraj Singh was sold, or that, if the whole purported to have passed, their interests were exempted by reason of the debt on which the decree was founded being one which they were not bound to pay, because it had been contracted for immoral or illegal purposes.

The first question for consideration then is whether the bond of the 20th August 1873, and the decree founded upon it, justified an attachment of anything more than the interests of the judgment-debtor, Hansraj Singh. I have read both documents, and I have no doubt that the decree was a simple money-decree purely personal to Hansraj Singh, and for a debt incurred by him personally. Under such circumstances, I think the plaintiffs were entitled to come into Court to impeach the attachment upon the ground that it affected interests which the decree could not touch, and which therefore could not be attached under it, and that they were in a position to ask to have their interests exempted from the threatened sale in execution. Having establised this much, I agree with the learned Subordinate Judge that the question of the immorality of the debt did not arise, and in adopting this view, while adhering to what I [213] said in *Beni Madho* v. *Basdeo Patak* (1), I am glad to think that it is also in accordance with the opinion expressed by the learned Chief Justice in *Balbir Singh* v. *Ajudhia Prasad* (3). I may add that the plaintiffs and their advisers have no one but themselves to blame. It must have been perfectly well known to them when they brought their suit in 1880 against Hansraj Singh, that he was a member of a joint Hindu family along with his sons and grandsons, and as they were suing him for a simple bond-debt, if they wanted to bind his co-parceners, they should have arrayed them as defendants, and obtained a decree against them.

I dismiss this appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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(1) 12 A. 99. (2) 16 I.A. 1. (3) 9 A. 142.

12 A. 213=10 A.W.N. (1890) 80.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

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SARAT CHANDRA CHAKARBATI (*Petitioner*) *v.* FORMAN AND ANOTHER (*Opposite Party*).* [23rd July, 1889.]

Minor—Custody—Guardianship—Act IX of 1861, *ss.* 1, 3, 4—*Jurisdiction—Civil Procedure Code, s.* 17—*Act IX of* 1875 (*Majority Act*), *s.* 3—*Discretion of Court under Act IX of* 1861, *s,* 3,

An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore.

Held that, under ss. 1 and 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad where the cause of action arose, and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.

Under s. 3 of Act IX of 1875 (the Indian Mojority Act) a person under the age of eighteen is a minor within the meaning of Act IX of 1861.

No such restriction as is imposed by s. 27 of Act XL of 1858, prohibiting the appointment of a guardian of any minor whose father is living and is not a minor, [214] applies to persons applying under s. 1 of Act IX of 1861. Where the father of a minor was old and unable to work from age and weakness, and the minor's elder brother had been maintaining and educating the minor at his own expense,—*held* that, under the circumstances, the brother was competent to apply under s. 1 of Act IX of 1861, and to ask for a certificate of guardianship.

The words in s. 3 of Act IX of 1861, "and thereupon proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor" confer on the Court an absolute discretion to make an order as to custody or guardianship, or to refain from making such an order where the circumstances do not call for such an order being made.

Where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up appeared to be well able to take care of and provide for himself, and preferred to be left as he was, and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship.

[R., 16 B. 307 (319) ; D., 14 A. 35 (38).]

THE facts of this case are sufficiently stated in the Judgment of Straight, J.

Babu *Dwarka Nath Banerji* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. J. *E. Howard*. Mr. *C. Ross Alston* and Mr. J. *Simeon*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This an appeal from an order of the officiating District Judge of Allahabad dated 21st February 1888, dismissing an application of the appellant, one Sarat Chandra Chakarbati, preferred under Act IX of 1861, for the custody of his minor brother Satya Saran Chakarbati. The connection of the respondents with the matter is stated

* First Appeal No. 77 of 1888 from an order of W.G. Jackson, Esq., District Judge of Allahabad, dated the 21st February 1888.

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thus in the petition of the appellant:—"That the respondents being connected with the Jumna Mission School and having got their influence over the said minor, on the 25th December 1887, without the knowledge or consent of the petitioner or other relatives of the said Satya Saran, baptised the said Satya Saran in the Jumna Mission Church, and the said petitioner became cognizant of this fact on the 26th December 1887. That on the 29th December 1887, the said Satya Saran, having intimated by letter to the said defendants his intention to renounce the Christian religion, the said defendants came to the [215] petitioner's home and demanded from the petitioner the surrender of the said Satya Saran, which the petitoner refused to do. That on the 30th December 1887 the defendants without the knowledge or consent of the petitioner improperly removed the said Satya Saran from the guardianship of the petitioner, and are now keeping him in their custody without any legal authority or permission from the petitioner to do so."

The respondents in reply to these allegations denied the charges contained therein and that the minor Satya Saran was in their custody or possession, and further asserted that the minor had left his home because his ill-treatment there drove him from it.

The learned Judge disposed of the application upon the following ground:—"The application is for the custody of the minor, and in order to succeed, assuming applicant to be otherwise entitled to the relief he seeks, it was necessary for him to show that the boy was in the custody of the respondents and within the jurisdiction of the Court. This is clearly not the case. He is now at Lahore beyond the jurisdiction both of this Court and of the High Court to which it is subordinate, and it does not appear in whose custody he is, or in fact whether there is any custody at all in the matter. The assistance, pecuniary and otherwise, given by the present respondents does not give the Court jurisdiction. The application is dismissed, but seeing that petitioner had sufficient grounds for believing that the minor was under the respondents' control, respondents will pay their own costs."

The appeal first came before my brother Mahmood and myself for hearing upon Friday the 22nd March last, and upon that date we had an able and elaborate argument addressed to us for the appellant by Mr. *Banerjee*, his learned Counsel, who was followed by Mr. *Alston* on behalf of the respondents. At the close of the day's proceedings we intimated to Mr. *Alston* that his clients would, looking to all the facts disclosed before us, act wisely and in their own best interests if they took steps to produce the minor before us on Friday the 5th April, to which date we adjourned the further hearing. Upon that day the minor was not in attendance, but, an [216] affidavit was filed by one of the respondents, Mr. Forman, to the effect that Satya Saran was at Saharanpur, within our jurisdiction, but, that he refused to come to this Court. We therefore caused a summons to issue to Satya Saran, and in obedience thereto he, on Thursday April 18th, appeared before us and we had an opportunity of seeing him, and examining him on oath as well as his brother, the petitioner-appellant. I may add that upon the same date an affidavit of Satya Saran was filed, which in substance came to this, that he objected to return to his brother's house and custody for fear of ill-treatment. At the close of that day's proceedings we took time to consider our judgment, making no order as to temporary custody or guardianship of the minor on his undertaking to appear before us when called upon to do so. I now proceed to dispose of the appeal.

The four questions that arise are, first, was the Judge right in

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dismissing the appellant's petition for want of jurisdiction? second, if the Judge had jurisdiction, was Satya Saran a minor within the meaning of Act IX of 1861? third, if the Judge had jurisdiction, was the appellant a person who could properly apply for the custody and guardianship of the minor? fourth, what is the nature of the powers conferred by s. 3 of Act IX of 1861, and what is the proper order to be made in the case?

As to the first question, namely, that of jurisdiction, I am very clearly of opinion that the learned Judge below was wrong. By s. 1 of Act IX of 1861 it is provided that an application made thereunder is to be addressed " to the principal civil Court of original jurisdiction in the district, by which such application, if preferred in the form of a regular suit, would be cognizable," and by s. 4 it is declared that " in cases instituted under this Act the Court shall be guided by the procedure prescribed in the Civil Procedure Code in so far as the same shall be applicable and material."

The rules therefore of Act XIV of 1882 regulating the " place of suing" must be looked to for guidance. From the terms of the petition filed by the appellant it is clear that the grounds upon which he claimed the intervention of the Court were, that his [217] brother Satya Saran had by the acts or with the connivance and assistance, pecuniary and otherwise, of the respondents been removed from his custody and guardianship in Allahabad, in other words, that the respondents by what they had done in Allahabad had either removed Satya Saran or caused him to be removed and had thereby infringed the right of the appellant to his minor brother's custody and guardianship. The infringement of such right would, in my opinion, be equivalent to the giving a cause of action for a suit, and in that view of the matter s. 17 of Act XIV of 1882 (Civil Procedure Code) would be the guide, and the proceedings under Act IX of 1861 would be entertainable in the Court of the Judge of Allahabad within the local limits of which the acts of the respondents whereof the appellant complained were charged to have been done. I do not think that the fact that at the time of the trial in the Judge's Court the minor was out of the jurisdiction is of any material importance, if upon the facts stated in the petition it appeared that the defendants were responsible for his removal. As I pointed out at the hearing, to place so narrow a construction upon the statute would render it practically inoperative, and enable persons bent upon defeating it by successive removals of the person of a minor from one place to another to deprive any Court of jurisdiction. Apart from the terms of s. 17 of the Civil Procedure Code, if the exigencies of the case required it, I should have no hesitation in holding that the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that office under Act IX of 1861 had full power to entertain and deal with the application of the appellant. The Judge was, therefore, in my opinion wrong, and if there are materials on the record sufficient to enable us to do so, we must, reversing his order, proceed to deal with the matter on the merits.

The second question is, is Satya Saran a minor within the meaning of Act IX of 1861? It is not denied that at the present moment he is under the age of 18 years, the assertion for the appellant being that he is not yet 16 years of age, while he himself alleges that he is above that age, and I have little doubt that at the time [218] the application was made in the Judge's Court up to end of 1887 and early in 1888 he was under 16. But having seen him and heard his statement upon oath, I am disposed to think that he is now quite 16 and I should say

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probably 17. He is a strong well developed youth, and from the fact that as far back as March 1887, he passed the University Entrance Examination and speaks English well, it is obvious that his intellectual capacity is considerable. By s. 26 of Act XL of 1858, it is declared that "for the purposes of this Act, every person shall be held to be a minor, who has not attained the age of eighteen years." That statute made provision for the care of the persons and property of minors having property, and they were made subject to the jurisdiction of the Civil Court. But Act IX of 1861, "to amend the law relating to minors," in no way abrogated Act XL of 1858, but was a sort of supplement to it, and has to be read along with it. That last mentioned Act contains no section qualifying or altering s. 26 of the former statute. But it appears to me that the law to which we must now look is that to be found in Act IX of 1875, by which with certain exceptions the age of the majority is declared to be 18 years. I think therefore that Satya Saran Chakarbati was and is a minor within the meaning of Act IX of 1861. The third question is, is the appellant a person who could properly apply for the custody and guardianship of the minor? For the respondents our attention was called to s. 27 of Act XL of 1858, which says "nothing in this Act shall authorize the appointment of a guardian of the person of any minor whose father is living and is not a minor;" and it was argued that as Jaudub Chandra Chakarbati, the father of the appellant and of Satya Saran, the minor, is alive, this was a direct prohibition to the prayer of the appellant's petition being granted.

However that maybe in reference to Act XL of 1858 if it stood alone, no such restriction is to be found in Act IX of 1861, and "any relative or friend of a minor, who may desire to prefer any claim in respect of the custody or guardianship of a minor may make an application." The petitioner in the present case is the elder brother of the minor, who, until December 1887, lived with the petitioner [219] and his other brother as the member of a joint Hindu family. His father, Jaudub Chandra Chakarbati, is an old man, unable to work from age and weakness, and has gone to Benares to end his days there. The petitioner is employed in the Locomotive Department Clerks' branch of the East Indian Railway, and upon his shoulders has fallen the expense of maintaining and educating the minor, and admittedly he has been doing so. I think under these circumstances, and looking to the terms of s. 1 of Act IX of 1861, that he was competent to put in his petition in the present case and to ask for a certificate of guardianship. Then remains the fourth and last question, namely, what is the nature of the powers conferred by s. 3 of Act IX of 1861 and what is the proper order to be made in the case? I may premise by saying that I have carefully read and considered the evidence of the respondents given in the Court below, and that it leaves no doubt upon my mind that they individually and jointly, if they did not actually instigate him to do so, did countenance and assist the minor in leaving his brother's roof and withdrawing himself from his custody and guardianship. However excellent the motives that animated them, I cannot but regard such a proceeding on their parts as unwise and calculated under other circumstances than fortunately exist here, to cause very grave difficulties and to provoke controversies and mischief, which it should be the object of all of us to avoid, and which happily have not arisen in the present case.

Then I have to consider what in regard to the language of Act IX of 1861 is the proper order to be made? In dealing with this question the terms of the section must be looked at. It says "and thereupon shall proceed to make such order as it shall think fit in respect to the custody or

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guardianship of such minor." It might be argued, and indeed it has been suggested by my brother Mahmood, that, under the language of the section, the Court is bound in every case, where it has a minor before it, irrespective of his age and all other circumstances of the case to make some order as to his custody and guardianship. But upon careful consideration of this view I am unable to adopt it, and I think that to put such a construction upon the section would at times place the Courts in positions [220] of great difficulty. For it must be remembered that now we are treating the question of the bare custody and guardianship of a minor possessed of no property. Could it be seriously said that if a person had applied for custody and guardianship of a minor and the Court considered such person unfit to have a certificate, such Court was bound to look about and find some other person, though no one had come forward? I could not adopt such a view for a moment. In my opinion the words I have quoted confer an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances of the case do not call for such an order being made. This leads me to examine the circumstances of this case and the materials we have before us for the purpose of guiding us in the exercise of that discretion. I have already stated what the personal appearance and apparent intellectual capacity of the minor was whom we examined in this Court, and I do not think for the purpose of throwing light upon the matter that I can do better than read at length his deposition taken before us. It was made in excellent English and with great ease and self-possession.

"My name is Satya Saran Chakarbati. Sarat Chandra is my elder brother. He is my own brother. He is about nine or ten years older than I am. I came to Allahabad in 1882 from Lahore. My brother was then employed in Lahore in a merchant's office as a clerk, and left employment, and was going to Calcutta to take up some trade, when we all halted at Allahabad, were he was fortunate enough to get some work, and so we settled here. I came with him. I was born at Lahore, and was bred up to my ninth or tenth year at Lahore. My father had given up his work, and I was living with my brother. He took care of my education during all that time; I mean my brother took care of my education. In 1882, when we came from Lahore, my father came along with us. In 1882 I took up residence in Allahabad with my brother. My brother Sarat Chandra is the managing member of the family. I had no ill-treatment from him during that period when I was under his care. I was very young and, as a matter of course, he used to beat me and my younger brothers. It was for our good. He never tried [221] to poison me, he never wished to put an end to my life in any other manner. He gave me no religious instruction. It was after my baptism that I first left the house. My baptism took place on the 25th December 1887, and I left my house on the 30th December. I fear being badly hurt if I go to my brother. He might beat me or keep me locked up or do anything else of the sort. My mother is living with my brother; she will not do me any harm, she is a loving mother. I would not have left the house but for my brother. She could prevent Sarat Chandra from harming me, but he will not hear her. The feeling that they (the members of my family) have towards me, I entertain towards them. I would like very much to live in Allahabad, but not live with them, unless they be Christians. As my brother has said he does not care for caste, but cares more for me, I think he would not count it a great loss to turn Christian

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and leave his lodging in the city and take up his residence in the mission compound. I can make up my own arrangement for my food. I can be employed somewhere as a private teacher and go on with my studies. If my brother does not support, I can still pay my own expenses. The exact amount that I should require for such expenses is Rs. 10, three rupees being for my college fees and the balance for my food and lodging. I can get that sum without the aid of my brother. I am not willing to go back to my brother.

"*Q.*—You have heard what your brother said just now, your old mother is at home, she is crying her eyes out, and your brother says he will not interfere with your religion. What objection have you then to go back to him?

"*A.*—Since I am a Christian I must have my neighbours Christians. I cannot live with my family because they are not Christians.

"*Q.*—Have you any real objection to being made over to your brother when we make it impossible for him to harm you?

"*A.*—I think I shall be more happy if I live away; as they are my well-wishers, why should they object if I live away when by so doing I shall be happy?

[222] "The affidavit was prepared by Mr. *Alston*; I gave him instructions. The things were of all my own description; I had not written them down. I first mentioned them to Kr. Lucas. I first saw that affidavit this morning and it was read over to me by Mr. *Alston*. I found what I told Mr. Lucas in the affidavit. There are some things in the affidavit which Mr. Lucas did not show me. I have thought a good deal upon questions of religion and morality and have come to the conclusion that all my ancestors ever since the beginning of things were wrong.

"*Mahmood, J.*—You have often thought upon questions of morality?

"*A.*—What do you mean by morality?

"*Mahmood, J.*—I mean good conduct or ethics.

"*A.*—I do not know the meaning of the word 'ethics.' I have undertaken to change my religion without consulting my brother because so my Lord says. I think I know enough of the Hindu religion and Christianity to distinguish between the two. I was about 15 years when I was baptized."

The impression left upon my mind by personal observation of the minor and by his evidence was and is that he is well able to take care of himself, and that from the sources provided by his own successful studies he is in a position to provide for himself and to defray the expenses incident to the further prosecution of those studies. I think also that a point not to be lost sight of is that he personally prefers to be left as he is, and that he has ample mental capacity and power of discrimination to make the choise and to judge what is best and happiest for himself. I have already said that, in my opinion, the minor is above the age of 16 years, that is to say, two years beyond the point of age at which s. 361 of the Penal Code provides for the protection of male minors from kidnapping.

The section of course only shows the extent to which the Legislature has thought it necessary to throw the protection of the criminal law over male minors or to restrict their personal liberty [223] of action, and I have only referred to it by way of analogy for the purpose of seeing at what point of age we, in dealing with a case like the present, may in exercising our discretion take into account the fact that the minor has passed to age up to which the criminal law treats him as having no

discretion of his own in regard to his personal custody and guardianship. Enough, then, I think, has been said to show why, under the circumstances of this case, I do not feel called upon to make any order for the custody and guardianship of Satya Saran. I may here observe that the appellant-petitioner in his deposition in this Court was asked, "If he (the minor) comes back to your house, are you willing to let him remain with you without any interference with his wishes about his religion?" to which his answer was "Certainly, I am willing;" and at an earlier stage of his evidence he said "I do not care whether my neighbours would approve my doing so or not, or whether my caste-men will like it or not, but I am willing to take him back into my family and live with him and keep him."

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The petitioner himself was brought up at a mission school, and he not only countenanced Satya Saran, the minor, going to the Jumna Mission School, but also another of his brothers, and it was clear to my mind from his tone and demeanour, while giving his evidence before us, that his real objection to the action of the respondents did not seriously rest on religious grounds, but was mainly concerned with his having been induced to leave the joint family house and circle, and to withdraw himself from a position that would, if continued, hearafter require him to contribute towards the common family fund from his earnings. For the preceding reasons I dismiss the appeal, but the case is not one in which I feel called upon to make any order as to costs.

MAHMOOD, J.—The decision of this case has been delayed partly because of the consent of my brother Straight in reserving judgment to enable me to consider the exact interpretation to be placed upon s. 3 of Act IX of 1861, as to whether or not in cases of this character where custody of a minor is claimed, this Court or indeed any Court to which such application has been made, is bound [224] absolutely to make an order one way or the other as to the minor's custody as distinguished from refraining to make any such order. The question has been matter of much anxious consideration by me, but I have come to the conclusion, in concurrence with my brother Straight's view, that the wording of the section as it occurs there, "and shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor" does not necessitate a Court of justice in every case to deliver a minor to the custody of any person, and that, as my brother Straight has stated, the wording is broad enough to enable us to hold that the Court may hold its hand and desist from making any order as to the custody of a minor in respect of whose custody under the circumstances of the case, such as it may be, no such order is necessary.

It is therefore clear that in this case this Court as a Court of appeal from the order of the learned District Judge has jurisdiction within the law to refrain from making any order as to the delivery of the minor to the custody of the petitioner or to the custody of any other person.

Having thus expressed my concurrence with my brother Straight upon this point, which, as I have said, seems to me to be the prominent point in the case, and one of considerable importance, as it would involve the question whether the custody of the minor was to be made over to his brother, the petitioner-appellant, or to the Rev. Mr. Forman, one of the respondents, or to the Rev. Mr. Lucas, another of the respondents, I need only go further so far as the legal aspect of the case requires after the disposal of this question.

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My brother Straight has stated that under the definition given in s. 26 of Act XL of 1858, which because it is *in pari materia* can be read with the Minors Amendment Act (IX of 1861), the age of majority would be eighteen years, and my brother has also said that the minor Satya Saran is below that age and as such a minor. My learned brother has also called my attention in his judgment to the applicability of the Indian Majority Act, IX of 1875, which again defines accurately what the age of majority is. Even with reference to the definition contained in that enactment, the minor [225] Satya Saran is a minor, and as such subject to such rules of law as to the custody of minors as may be applicable.

It would be a waste of time to dwell upon the circumstance that before the passing of the enactments to which I have referred the law in British India stood as it did before the accession of the British rule, that is to say, in the case of Hindus, the Hindu law was applicable and in the case of the Muhammadans, the Muhammdan law was applicable in respect both of contractual capacity and other matters independent of contract. That undoubtedly was the law, and to this day our Contract Act (IX of 1872) in s. 11 still refers to the personal contractual capacity of the contracting party for purposes of age, as the age of such capacity. Now I have said enough to show that the present minor had no capacity to enter into any contract, because then it would be necessary to refer to the provisions of the Indian Majority Act (IX of 1875) to indicate what the age of his contractual capacity would be, and that age, as pointed out, would be the age of 18 which the minor has not yet attained. But the question here is of a vaster description than any question of contractual capacty. What we are called upon to consider is, whether or not under the terms of s. 3 of Act X of 1861, we are to make such decree or order as this Court can make forcing the minor Satya Saran to go into a custody which he declines to enter into, subject himself to a guardianship which he abhors and detests and to be subjected to such penalties as the disobedience of our mandate would naturally involve under the law. This is the question which we are called upon to consider, and the circumstances of the case have been so fully stated by my learned brother Straight that it would be repeating what he has said if I were to refer to them further. It is clear from them that the boy Satya Saran is not an infant in arms, nor a youth without understanding. He is not an illiterate or an ignorant boy, but has prosecuted his studies in a language not his own and has succeeded to the extent of obtaining such reward as academical success in his position can achieve. By dint of his academical success he had won a scholarship amounting to Rs. 5 a month, and is now in a position to be able to support [226] himself and to be independent both of the petitioner, his elder brother, and the rest of his family for purposes of ordinary sustenance.

Even under circumstances where a precocious intellect would enable a child to achieve academical rewards sufficient to support him or to earn his livelihood otherwise, I should be willing to apply the provisions of s. 3 of Act IX of 1861, and in the exercise of the discretion which a Court has, to force the child to go into the custody of his natural guardians and to subject himself to their control and direction. I would be the more willing to make such an order, because in my opinion both the practice in English Courts and in this country fully justifies us to make such an order, when the reason why the legal custody has been relinquished by the child is either at the instigation or at the advice of persons who are not his legal guardians or legal advisers as to his temporal or spiritual welfare.

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But such is not the case here. What I have to consider is, whether this boy is of such an age as to require me in the exercise of such jurisdiction as this Court has, to restrict his personal liberty by an order which in its nature at least is not dissimilar to an order passed by a Criminal Court practically making him over bodily to the custody of his brother. This is the point which I have to consider. Now my brother Straight has stated that Act IX of 1875 is the Act to which we should refer for the purpose of deciding the question as to the minority or majority of the boy Satya Saran; and my learned brother has also introduced what I consider a very cogent and intelligible distinction as to the age at which the personal desire of the child ceases to have any effect, and before which age his removal from one custody to another would amount to the offence of kidnapping. He has also said that here Satya Saran had passed the age of being dealt with as if he was incapable of making his own choice as to the custody or guardianship under which he chooses to live, because he is admittedly above the age of fourteen.

In passing the Indian Majority Act, IX of 1875, the Legislature had a most delicate matter to consider, because it was, as is obvious [227] not only from the preamble, but from the rest of the enactment, that the Legislature was then desirous to provide as much as it could against interfering with what are called Native personal laws namely the Hindu and Muhammadan law of nonage and majority. It is significant that in s. 2 of that enactment express provision is made to the effect that that enactment shall not affect the capacity of any person to act in matters of marriage, dower, divorce and adoption; and the Native law was to be left untouched as it was before the passing of the statute. So also is clause (*b*) which is one upon which I wish to lay some emphasis and that clause says that nothing contained in the statute is to affect "the religion or the religious rites and usage of any class of Her Majesty's subjects in India." It is clear from that provision that the age of majority was intended to be non-applicable to matters of religion, and that the provision was made in deference to the religious sentiments and prejudices of Her Majesty' Indian subjects here. But when that clause is to be interpreted, surely it is not to be interpreted entirely in favour of the Hindus and Muhammadans, but also in favour of persons other than Hindus and Muhammadans, such as Buddhists and Christians.

The solitary ground upon which this minor Satya Saran left his parental roof, or rather the house of his elder brother, was change of religion. For such a change of religion the law has provided no age of majority. The whole law is silent on that point and if there is any indication, it is to be found in the clause which I have just cited, namely, that the Majority Act does not apply to matters relating to religion. In the present case, if after the examination which we made of the boy Satya Saran I had arrived at the view that he was not of the age of discretion as distinguished from the age of legal majority, if I had felt that he could not take care of himself, if I could hold upon the evidence that he had been so far misled or seduced into the way of thought as to religion by reason of any fraud or any other improper method such as would present evidence of his being incapable of understanding what he was doing, I should have with due respect to my learned brother differed from him and passed [228] an order that the boy should be bodily made over to his brother the petitioner and remain under his coutody under such terms as the Hindu law of guardianship prescribes. My learned brother has pointed out that such is not the case, and neither the Legislature nor any rule of

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justice equity or good conscience which would otherwise be applicable to such matters, requires us to force this grown up boy to be made over to the custody of his brother whose kindness he does not admit, whose religion he abhors, whose way of thought does not suit him, and practially to make this Act an Act more in the nature of a criminal statute directing compulsory custody instead of what the law according to the interpretation of my brother Straight and myself contemplates, namely, jurisdiction only in such cases where discretion in the minor is wanting and the child is of such an age as to be dealt with by persons other than those who have taken him away from proper guardianship.

In the present case I have no doubt that in a country like India, where not only numerous religious customs prevail, but also where the missionary endeavours to convert the Hindu and the Muhammadan population to the religion which Christianity prescribes, are carried upon a considerable scale, questions of this character arise, and it is not a matter of infrequent occurrence that it devolves upon the Court to have to deal with cases and circumstances where the strong hand of the law is asked to be employed to prevent the excess of the one party or the excess of the other in crossing the religious straight line which distinguishes right from wrong in the legal sense which the Courts of justice have been established to enforce. The duty of the Courts under these circumstances is very clear. They have got to see what the law directs ; they would not interfere unless they found that the child is, by reason either of want of education or of other influences which have been brought to bear upon him in the ordinary course of life, in a position not to understand what he is doing. Parents, as in this case the mother, may weep, because their son has become a Christian ; so in other cases great misery may arise in the shape of grief to the nearest relatives of the boy. But the law provides no remedy for [229] such sorrow, because if it did it would be taking away the principle of human liberty and religious toleration under every civilized form of government.

I have considered it necessary to say what I have said not because I thought that any word that had fallen from my learned brother Straight required any addition, but because it should be clear that neither my brother nor I have decided this case upon any ground other than the strict requirements of the law, and that we have desisted from making any order as to the custody, because with reference to the circumstances of Satya Saran, his age, his intellectual capability of looking after himself and maintaining himself, and with reference to the other circumstances of the case, we are not called upon to make any order under s. 3 of Act IX of 1861. My learned brother has already pointed out how the petitioner-appellant had *locus standi* to maintain the petition ; how the District Judge had jurisdiction to entertain the case ; how we had jurisdiction to pass any order we like ; and he has also stated his reasons why in this case no interference is necessary. I agree in dismissing the appeal without costs.

Appeal dismissed.

12 A. 229=10 A.W.N. (1890) 93.

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APPEL-LATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

ABBAS ALI (*Plaintiff*) v. MAYA RAM AND OTHERS (*Defendants*).*
[3rd August, 1888.]

Pre-emption—Muhammadan Law—Shias—Property owned by more than two co-sharers.

The prevalent doctrine of the Muhammadan Law governing the Shia sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. *Shaikh Daim* v. *Asooha Beebee* (1) and *Tafazzul Husain* v. *Hadi Hasan* (2) dissented from.

[R., 14 A. 429 (450); 32 C. 982 (986)=9 C.W.N. 826.]

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. *Amiruddin*, for the appellant.

[230] Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

MAHMOOD, J.—This is an appeal which has arisen out of a suit for pre-emption relating to a sale, dated the 22nd March 1885, in which the vendors were Hasan Ali Khan, Nadir Ali and Nijabat Ali, with whom the plaintiff-appellant, Sayyid Abbas Ali, was a co-parcener in the property sold. There is no doubt that the property in suit was a *Sarai* and land appertaining to it, and that the plaintiff's share in it, whatever it may have been, would, under the Muhammadan law of the Sunni school, entitle him to maintain a suit for enforcement of the pre-emptive right. Nor is there any doubt that the purchasers being Hindus would be governed by the law to which the pre-emptor and the vendors were subject in connection with matters of pre-emption. This point was fully considered and unanimously agreed upon in the Full Bench case of *Gobind Dayal* v. *Inayat Ullah* (3), which in principle also governs this case, although the vendors and pre-emptor are Shias and the purchasers Hindus. If it was necessary to go further into the matter, I might point out that the Shia school of the Muhammadan law taking, a much less liberal view of natural or religious distinctions in connection with pre-emption than the rules adopted by the Sunni school of law, goes the length of saying (Baillie's Digest of the Imameea Law, page 180) that, "The right of *Shoofa* is established in favour of an infidel against a purchaser of his own persuasion, but not against a *Mooslim*, even though he should have purchased from a *Zimmee* or infidel subject. But it is established in favour of a *Mooslim* against a *Mooslim* and an infidel." I have mentioned this without in the smallest degree laying down that a question of this kind would necessarily be governed by the passage. It is enough to say that the Full Bench ruling of this Court has settled the point, and that the case must be governed by the Muhammadan law.

The question then is, which school of the Muhammadan law is to be applied to the case? Their Lordships of the Privy Council, so long ago as 1841, in the case of *Rajah Deedar Hossein* v. *Ranee* [231] *Zuhooroon*

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* Second Appeal, No. 158 of 1887, from a decree of J.C. Leupolt, Esq., District Judge of Moradabad, dated the 8th November 1886, confirming a decree of Maulvi Mazhar Hasan, Munsif of Nagina, dated the 25th March 1886.

(1) N. W. P. H. C. R. 1870, p. 360. (2) 6 A.W.N. (1886), 139. (3) 7 A. 775.

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Nissa (1) distinctly laid down the rule, in interpreting Regulation IV of 1793, which was worded in terms similar to those contained in s. 24 of the Bengal Civil Courts Act (VI of 1871) and the corresponding section of the present Civil Courts Act, that in the case of Shias, in matters regarding succession, inheritance, marriage and caste, and all religious usages and institutions, Muhammadan laws with respect to Muhammadans, and Hindu laws with respect to Hindus, are to be considered as the general rules by which Judges are to form their decisions, according, to the true construction of which the Muhammadan law of each sect ought to prevail as to the litigants of that sect, and not the general or Sunni Muhammadan law (2)

This view is not only in full accord with the practice of this Court in connection with Shia litigants, but also proceeds upon the same principle as that whereby the Courts of British India have fully applied any particular school of Hindu law in cases in which the parties are governed by the particular school of Hindu law. I have therefore no doubt that the case is governed by the Shia law and not by the Sunni law, it having been found by the Courts below that the pre-emptor and vendors are both Shias.

Next comes the question, which I think is the main question in the case, namely, whether, under the circumstances, we are to follow a Division Bench ruling of this Court in *Shaikh Daim* v. *Musammat Asocha Beebee* (3), where Turner, Offg. C. J., and Turnbull, J., having considered the authorities of the Shia law, came to the conclusion that, inasmuch as there were indications of some difference of opinion existing in the Shia School of the Muhammadan law, as to whether the right of pre-emption exists in connection with property where there are more than two co-parceners, therefore the absence of reported cases for the last fifty years showing that such doctrine was adopted, was a circumstance which required adopting the practice of the Court that such cases should be decided according to the Sunni law. I have considered that judgment with respect, especially because it refers to some authoritative names of books of [232] the Shia law. The judgment of the learned Judges, however, does not contain the exact passages upon which they relied for holding that the Shia doctrine upon this point was open to such doubt as would not entitle the Court to decide which side of the view was to be accepted. Having taken time to consider the matter, I entertain no doubt that, although there do exist in the Shia law, as in any other system of law, certain variations and difference of opinion, the Shia law itself is very specific as to what is the prevalent doctrine in connection with the right of pre-emption. The book of the greatest importance as representing the Shia doctrine, is the *Sharaya-ul-Islam*, and it states that "when there is more than one claimant by right of pre-emption, opinions are divided as to the establishment of the right. According to one of these it is established absolutely, whatever be the number (of the claimants). According to another it is established with a plurality of partners when the claim is for land, but not when it is more than a single slave, and according to the third, it is not established with respect to anything when there is more than *one* (co-sharer). And *this* (last opinion) is the most prevalent."

Now this book, as I have already said, is a work of the greatest authority among the Shias; and next to it is the authority of

(1) 2 M. I. A. 441. (2) See *Hayat-un-nissa* v. *Muhammad Ali Khan*, 12 A. 290, *post.*
(3) N. W. P. H. C. R. 1870, p. 360.

Tahrir-ul-Ahkam, which says :—"According to most of the doctors, the right of pre-emption is extinguished in the case of there being several *Shafis*, or claimants by right of pre-emption, and this doctrine is adopted by the modern lawyers."

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The same principle has been laid down in the *Mafatih*, another book of the highest authority among the Shias, which says—"According to the prevalent doctrine there should be only one co-sharer (of the seller), and the right of pre-emption is extinguished in the case of there being many part proprietors." These passages occur at page 447 of the Tagore Law Lectures for 1874, and there is no doubt that they lay down the real and accepted doctrine of the Shia law upon this particular point.

The ruling of this Court in *Shaikh Daim* v. *Asooha Beebee* (1) has been followed by another Division Bench of this Court in *Tafazzul* [233] *Husain* v. *Hadi Hasan* (2), and it has indeed been in consequence of the respect which is due to those two rulings that I have considered it necessary to go further than mearly relying upon the expressions of difference of opinion which no doubt occur in the authorities of the Shia law; but so far as I am aware the prevalent doctrine is that the right of pre-emption does dot exist in connection with the sale of property when more than two co-sharers or co-parceners have rights in such property. The authoritative books of the Shia law themselves do not contain any discussion of the case in which there is more than one pre-emptor, in other words, there is no provision made for cases in which two or three or more pre-emptors claim pre-emption in respect of one and the same property in respect of one and the same sale. Upon this matter the Shia doctrine is vastly different from the Sunni doctrine. The best authority of the Sunni Muhammadan law is the *Fatawa-i-Alamgiri*, which was compiled by five hundred doctors of law under the directions of the Emperor Aurangzib and contains chapters dealing with the question of rival pre-emptors, and those passages, sections and chapters lay down very intricate rules to deal with the complications which may arise in consequence of rival claimants. The *Shharaya-ul-Islam*, on the one hand, and the other authorities of the Shia law, on the other, are totally silent upon the matter: and I have no doubt that they do not deal with the doubtful Shia doctrine of law, because such doctrine in this respect has not been adopted, and we cannot resist the conclusion that we are obliged to adopt the prevalent doctrine that no right of pre-emption exists where more than two co-partners are the owners of the property to which the quarrel relates.

This being so, I am afraid it is necessary from my point of view to dissent from the two rulings of the Division Bench of this Court which I have mentioned and in saying so, I would only add that most probably the exact authorities upon which the Shia law upon the matter proceeds were not duly placed before the learned Judges and that in dealing with the matter on the principle of the Shia [234] doctrine, the learned Judges went too far in holding that, in the absence of authority in the reported cases among the Shias, the Sunni doctrine was prevail.

Under these circumstances, I think that the admitted fact that the plaintiff Sayyid Abbas Ali was a co-parcener with three others, the defendants-vendors, in the property which was sold on the 22nd March 1885, is a circumstance upon which, under the principles of the very law

(1) N.W.P.H.C.R. 1870, p. 360. (2) 6 A.W.N. (1886) 139.

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which governs him, he is not entitled to maintain the claim for pre-emption. The suit was therefore, according to my view, rightly dismissed by the lower Courts, though not upon the exact grounds which I have stated.

I would therefore dismiss the appeal with costs.

STRAIGHT, J.—I entirely concur. *Appeal dismissed.*

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12 A. 234 (F.B.)

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst Mr. Justice Tyrrell, and Mr. Justice Mahmood.

DEOKINANDAN (*Defendant*) *v.* SRI RAM AND ANOTHER (*Plaintiffs*). [19th December, 1889.]

Pre-emption—Decree for pre-emption—Profits of property accruing between sale and decree becoming final.

In a suit for pre-emption based on the *wajib-ul-arz* of a village, the plaintiff pre-emptor did not ask for a declaration that he was entitled to be treated as a purchaser as from the date of the sales to the vendees, defendants, nor that he was entitled to the rents and profits as from the date of the sale, nor did he ask for mean profits. The decree in his favour did not grant him any such relief. The *wajib-ul-arz* was silent as to whether the purchaser or the pre-emptor was entitled to the profits accruing subsequently to the date of the sale being avoided.

Held by the Full Bench that the decree merely avoided the sale and divested the original owners of all interest in the property as from the date when the decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emptive price decreed, and vested in the pre-emptor the rights of ownership from that date, and his rights were not postponed until he had obtained possession of the property.

Held that the profits of the property which accrued between the date of the sale and the date when the pre-emptor, in accordance with the decree, paid the decreed [235] pre-emptive price, belonged not to the pre-emptor, nor to the original vendor, but to the original vendees.

Held by Mahmood, J., that the vendees-defendants were entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree.

Observations by Mahmood, J., upon the texts of the Muhammadan Law applicable to the case by way of analogy; upon the contention that there is a Hindu Law of pre-emption applicable to Hindus under s. 37 of the Bengal Civil Courts Act (XII of 1887); and upon the relation of the Muhammadan Law to cases in which pre-emption is claimed on the basis of contract or custom embodied in the *wajib-ul-arz* of a village.

[R., 26 A. 61 (68) = A.W.N. (1903) 196; 92 P.R. (1902) (F.B.); 134 P.L.R. (1902), 562 = 94 P.R. 1902.]

THE facts of this case, which was a reference to the Full Bench, are fully stated in the judgments of Edge, C. J., and Mahmood, J.

The Hon. Pandit *Ajudhia Nath* and Munshi *Nawal Behari Bajpai*, for the appellant.

Munshi *Ram Prasad* for the respondents.

JUDGMENTS.

EDGE, C. J.—The plaintiffs in this case purchased certain bighas of land in a village. The defendant, who was a co-sharer in the village, brought a pre-emption suit in respect of that sale in which the plaintiffs were defendants, and, having established his right under the *wajib-ul-arz* of the village to pre-empt the property, got a decree. In that suit the

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present defendant did not ask for a declaration that he was entitled to be treated as a purchaser as from the date of the sale to the present plaintiffs, nor did he ask to have it declared that he was entitled to the rents and profits as from the date of the sale to the present plaintiffs, nor did he ask for mesne profits

In the present suit, which was instituted in a revenue Court, the plaintiffs seek to recover the profits which accrued in respect of the property which was in question in the pre-emption suit for rabi 1290 fasli and kharif 1291 fasli. In the revenue Court the Deputy Collector dismissed the plaintiffs' suit, holding that the effect of the decree in the pre-emption suit was to vest the property in the present defendant as from the date of the purchase by the now plaintiffs, and that the plaintiffs not being recorded co-sharers [236] in the village at the date of the institution of the present suit, could not maintain the suit in the revenue Court.

On appeal the District Judge, holding that until a pre-emption decree is actually enforced by possession being obtained, the original vendee and not the pre-emptor is entitled to the profits of the property sold, and that under s. 93, cl. (*h*) of the Rent Act (XII of 1881), a person who was a recorded co-sharer when the profits accrued can sue for his share of the profits notwithstanding that at the time of suit he is no longer a recorded co-sharer, set the decree of the Deputy Collector aside and remanded the suit for trial on the merits. From that order of the District Judge this appeal has been brought.

The suit having gone on appeal to the District Judge, it is in my opinion immaterial now to consider whether or not the suit was instituted in the right Court, as the District Judge had under ss. 206, 207 and 208 of the Rent Act (XII of 1881), jurisdiction to dispose of it as therein provided, irrespective of the question as to whether or not it had been instituted in the right Court. It appears to me that the question as to whether or not the plaintiffs are entitled as against the defendant to the profits or any part of them claimed, is to be determined by the decree which the present defendant obtained in the pre-emption suit. If the pre-emption suit had been differently framed and a declaration asked for that the present defendant was entitled to the property as from the date of the sale to the now plaintiffs, and such a declaration had been decreed, it is clear to my mind that the present suit could not be maintained so long as such a decree stood. I express no opinion as to whether such a decree could have been obtained. I must regard the decree in the now-defendant's pre-emption suit as one which merely avoided the sale to the now-plaintiffs as from the date when that decree became final by the payment in accordance with the decree by the present defendant of the pre-emption price which was decreed, and as vesting in him the rights of ownership as from that date only.

From that date the now-plaintiffs, original vendees, became in law divested of all interest in the property, and consequently in my [237] opinion could not be entitled to any profits which subsequently accrued due, whether at that date or subsequently the successful pre-emptor obtained possession of the property.

To hold that the successful pre-emptor's rights would in such a case be postponed until he had obtained possession of the property, would be to vary or stultify the decree which had been made, and would encourage defeated defendants in a pre-emption suit to resist and obstruct as long as possible the execution of a decree which had been duly obtained.

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It is to my mind unnecessary to consider what may or may not have been the rights of a pre-emptor and a displaced vendee respectively, according to the Muhammadan Law of pre-emption, as what we would have to see in such a case in execution would be that the decree of our Courts was enforced, and the party obtaining his decree got the fruits of it. Besides, the right to pre-empt in this case depended on the contract or custom embodied in the *wajib-ul-arz* and not upon the Muhammadan Law of pre-emption.

In my opinion, the case as to the profits which accrued between the date of the sale and the date when the present defendant in accordance with the decree paid the decreed pre-emption price, stands thus. The vendor having parted with his interest by the sale could not be entitled to those profits. The decree did not entitle the pre-emptor to those profits. It follows that the original vendees must in this case be the persons who are entitled to them.

For reasons which differ as I have indicated from those of the District Judge, I am of opinion that this case was properly remanded and that this appeal should be dismissed.

I would also order that costs here and below should abide the event.

STRAIGHT, J.—I am of the same opinion.

BRODHURST, J.—I concur.

TYRRELL, J.—I am of the same opinion.

MAHMOOD, J.—I understand the facts of this to be the following. On the 4th of January, 1883, one Radha Ballab exe- [238] cuted a sale whereby he conveyed his share in certain zemindari estate to Sri Ram and Chet Ram, and the sale-deed was registered on the 5th of January 1883.

On the 6th of March, 1883, Deokinandan, defendant-appellant, being a co-sharer in the estate of which a portion was sold as abovementioned, sued to enforce his right of pre-emption under the *wajib-ul-arz* of the village. The clause relating to the right of pre-emption is in the following words in that document:—

" دفعہ ۱۸ ذکر انتقال حقیت و حق شفع ہر ایک حصہ‌دار کو اپنے
اپنے حق و حصہ کے انتقال کرنے کا اختیار ہے. اول اپنے بھائی بھتیجوں کے
ہاتھ جو حصہ‌دار ہوں اور بصورت انکار اُنکے دیگر مالکان تھوک کے پاس
بعدہ مالکان تھوک ثانی کے ہاتھ اور جو وہ بھی نہ لینگے تو جسکے پاس
چاہیگا منتقل کریگا - اور اگر کمی بیشی قیمت پر باہم بائع شفیع کے تکرار
پیش آویگی تو دیہات ملحقہ کی قیمت کے مطابق فیصلہ کیا جاویگا "

Now, these are Hindustani words, and as they are words of my own language I will undertake to translate them into English as literally as possible in the following words:—

"Every sharer has the power to alienate his share, but first to the hands of his brother and nephews who may be sharers, and in case of their refusal to other owners of the *thoke*, then to the hands of the owners of a second *thoke*, and if even they do not take it then the transfer may be made in favour of anyone he may like. And if in respect of the diminution or excess of price between the seller and the pre-emptor (*shafi*) any controversy comes in front, then according to the value of land in the adjacent villages the decision shall be made."

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The reason why I have translated this clause of the *wajib-ul-arz* so minutely will appear from what I shall have to consider later on in delivering my judgment. Meanwhile it seems enough to point out that the clause begins by saying that every co-sharer of the village has power to transfer his share, and, after this statement, which only affirms one of the necessary incidents of ownership, it subjects the general right of transfer to conditions requiring that the intending seller should in the first instance offer to sell his [239] share to his co-sharers in the order mentioned in the clause, which also provides that in case of dispute as to the price, the question was to be settled with reference to the value of the land in adjacent villages. It is even more important for the purposes of what I am going to say further in this judgment, that whatever the nature of the right created by this clause in the *wajib-ul-arz* may be, that clause must be interpreted in the terms in which it has been framed, and that in considering those terms two points must not be lost sight of. The first point is that in referring to the right which the clause in the *wajib-ul-arz* either recognised or created, the term used for the person intended to possess such a right is the word "*shafi*," which is a very technical term of the Muhammadan Law of pre-emption, and signifies the pre-emptor with all such rights and obligations as that law prescribes for him.

The second point to be noticed in that clause of the *wajib-ul-arz* is that whilst it prescribes a specific rule as to the order in which pre-emption might be claimed and the manner in which the disputes as to the price are to be settled, it is *totally* silent as to the exact point involved in this case, namely, whether the purchaser or the pre-emptor is entitled to the profits of the vended share for the period intervening between the sale and the acquisition of possession by the pre-emptor under the decree of Court whereby pre-emption was actually enforced. It is unnecessary to refer more minutely to the terms of the pre-emptive clause of the *wajib-ul-arz* which I have already quoted. It is enough to say that the terms of the clause are such as fall within the purview of a Full Bench ruling of this Court in *Karim Baksh Khan* v. *Phula Bibi* (1) where all the learned Judges then constituting this Court, concurred in holding that such clauses in the *wajib-ul-arz* are covenants which run with the land, and (as I gather from the judgments) are independent of the doctrine of notice as understood in equity in cases such as those contemplated by s. 40 of the Transfer of Property Act (IV of 1882) and the *illustration* to that section. I have referred to the effect of the Full Bench ruling, only by the way, not only because [240] it enunciates the rule of law unanimously adopted by the whole of this Court, as then constituted, requiring my deference to the view, but also because in the vast majority of cases, such clauses in the *wajib-ul-arz* would in equity amount to notice, and at any rate the exigencies of this case do not render it necessary to reconsider the question.

I therefore proceed to state the facts of this particular case further.

The pre-emptive suit of Deokinandan, defendant-appellant, which he had instituted on the 6th of March, 1883, resulted in a decree enforcing pre-emption in his favour passed on the 8th of September, 1883, and under that decree the price was deposited in Court on the 15th of November, 1883, and possession was obtained by him formally on the 1st of December, 1883.

(1) 8 A. 102.

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What happened next was that in consequence of the success of the pre-emptive suit, the name of the purchasers Sri Ram and Chet Ram, plaintiffs-respondents, under the sale-deed of 4th January, 1883, was struck out of the Government revenue records, and the name of Deokinandan the successful pre-emptor was entered (by proceedings known was *dakkil kharij* or mutation of names) on the 17th of March, 1884.

The defendant, besides being the successful pre-emptor, is also the lambardar of the village, and this fact explains the circumstance, that in this litigation he appears not as plaintiff but as defendant. The litigation originated in a suit filed by Sri Ram and Chet Ram in the revenue Court for recovery of their share of the profits for rabi 1290 and kharif 1291 fasli, the period being covered by the interval between the date of the sale to the plaintiffs and the date upon which the defendant obtained formal possession under his pre-emptive decree.

The suit was resisted upon various grounds, but the only ground with which we are concerned here was the plea that inasmuch as by reason of the defendant's pre-emptive decree he was substituted for the plaintiffs purchasers in the sale of 4th January, 1883, the [241] plaintiffs were not entitled to any profits for the period intervening between the sale and the date on which the defendant was formally put in possession of the pre-empted share in execution of his pre-emptive decree. The Court of first instance accepted this plea in defence, and dismissed the suit without trial of the other issues which arose in the case.

On appeal by the plaintiffs to the lower appellate Court the learned Judge reversing the decree of the first Court remanded the case to that Court, under s. 562 of the Civil Procedure Code, for trial on the merits, holding that the plaintiffs were entitled to claim the profits for the period between the sale to them and the time when the defendant obtained formal possession under this pre-emptive decree.

In holding this view the learned Judge expressly relied upon a ruling of Oldfield, J., and myself in *Deodat* v. *Ramautar* (1), with special reference to my judgment in that case. In the course of that judgment I said:—

'A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a tresspasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property which he can take only upon duly making such payment."

After saying this I went on to cite certain rulings, and to those which I then cited I may now add the case of *Emam-ood-deen Sowdayur* v. *Abdool Soobhan* (2) as having some bearing upon the question now under consideration, though the report is much too meagre to enable me to decide how far it may be taken to support the view which I expressed in the passage which I have quoted. [242] In the same judgment, however, after relying on the ruling of this Court in *Baldeo Pershad* v. *Mohun* (3) I went on to say :—

(1) 8 A. 502. (2) 7 W.R. 117. (3) N.W.P.H.C.R. (1866) Rev. Ap. 30.

"The same rule was laid down by Straight, J., in *Ajudhia* v. *Baldeo Singh* (1) which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed: and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan Law, have shown that the principle is a necessary consequence of the very nature and incidents of the right of pre-emption itself."

Those exigencies have, however, arisen in this case, owing to the manner in which the case has been argued with especial reference to Muhammadan Law by the learned pleaders for the parties, and I must therefore refer to the original texts of that law. But before doing so, I wish to mention that the learned District Judge is right in pointing out that the rule which I laid down in *Deodat* v. *Ramautar* (2) is consistent with that laid down in *Ajudhia* v. *Baldeo Singh* (1), and that my misreading may have been superinduced by the circumstance that in the phrase "when the subsequently *awarded* sale to the plaintiff took place," the word 'awarded,' is (as my brother Straight assures me) a misprint for the word "*avoided*." The question then is, what is the rule of the Muhammadan Law of pre-emption on the point now under consideration? In expressing my opinion on this subject I shall presently have to refer to the original texts of that law, but meanwhile I may cite the ruling of Roberts and Turner, JJ., in *Buldeo Pershad* v. *Mohun* (3) to show how those learned Judges propounded that law in a case similar to the one now before us, because that also was a suit by a purchaser for profits against the *lambardar* of property which had subsequently been pre-empted. They do not seem to have doubted that the principles of the Muhammadan Law of pre-emption would by analogy be applicable to such cases, for they go on to say :—

[243] "On referring to the treatises on Muhammadan Law, we find it clearly laid down that the original purchaser is entitled to hold the land or other subject of pre-emption without rent or hire, while it remains in his hands, and if he has sown the land, the pre-emptor must wait for the ripening of the crops. In other words, he is entitled to the enjoyment of it, and if he may enjoy it, it is clearly immaterial whether the enjoyment of it be by himself personally or his tenants, and this doctrine seems most in accordance with equity. The purchaser has in most instances paid the purchase-money; is he to lose all interest and profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption, and is the pre-emptor who has kept his money in his pocket, till it suited his purpose to exercise his right, to obtain profit which will be the greater in proportion to his delay?"

This view is in accord with what I laid down in *Deodat* v, *Ramautar* (2) and I now proceed to show that it is the necessary result of the most authoritative texts of the Muhammadan Law of pre-emption. And in order to do so with clearness, I think it will be convenient to deal with the subject under two separate heads as propositions in themselves.

(1) That the enforcement of pre-emption is deemed to have taken place when, by virtue of his pre-emption, the pre-emptor obtains possession of the pre-emptional tenement, either under a voluntary surrender thereof by the seller or the buyer, or under a decree; and that unless and until such enforcement has taken place, the buyer continues to remain the

(1) 7 A. 674. (2) 8 A. 502. (3) N.W.P.H.C.R. (1866) Rev. Ap. 30.

1889 DEC. 19. — FULL BENCH. — 12 A. 234 (F.B.).

owner of the pre-empted property and it does not till then rest in the pre-emptor.

(2) That the buyer, during his possession as such is entitled to appropriate the profits accruing from the pre-emptional tenement and if pre-emption is enforced against such buyer, the pre-emptor is not entitled to claim such profits for any period antecedent to the enforcement of his pre-emption. In support of the first of these propositions I cite the following orginal authorities of the Muhammadan [244] Law of pre-emption, taking the Hedaya as the first and highest in that system of jurisprudence (1). "The *shafi* does not become proprietor of the house until the purchasers surrender it to him, or until the Magistrate pass a decree, because the purchaser's property was complete, and cannot be transferred to the *shafi* but by his own consent or by a decree of a Magistrate; (in the same manner as in the case of a retraction of a grant, where the property of the grantee being completely established by the grant, it cannot be transferred to the grantor, but by the surrender of the grantee, or by a decree of a Magistrate) the use of this law appears in a case where the *shafi* after having preferred his claim before witnesses previous to the decree of the Magistrate or the surrender of the purchaser, dies or sells the house from whence he derived his right; or where the house adjoining to that to which the right of *shufa* relates is sold: for in the first of these instances the house is not a part of his hereditaments, because it was not his property; and the right of *shufa* fails in the second instance, as the fundamental principle of that right is extinguished previous to his becoming the proprietor; and in the third case, he has no right of *shufa* with respect to the house which is sold, since the house from which he would have derived that right is not his property."—(Hamilton's Hedaya by Grady, page 550).

This is a good paraphrastic translation of the original Arabic text of the Hedaya which I have cited, and I adopt it because it [245] brings out in clear light the point of law which that text lays down. Next in authority is the text of the *Fatawa-i-Kazi-Khan* (J) ;—

"A pre-emptor cannot acquire ownership until a decree for pre-emption be passed, or the pre-emptor obtain possession by mutual consent. If, therefore, another house situated beside the house in respect of which pre-emption is claimed be sold and the *kazi* pass a decree for pre-emption

(1) تملك بالاخذ اذا سلمها المشتري او حكم بها الحاكم لان الملک للمشتري قد تم فلا ينتقل الى الشفيع الا بالتراضي او قضاء القاضي كما في الرجوع في الهبة و يظهر فائدة هذا اذا مات الشفيع بعد الطلبين او باع داره المستحق بها الشفعة او بيعت دار بجنب الدار المشفوعة قبل حكم الحاكم او تسليم المخاصم لا يورث عنه في الصورة الاولى و تبطل شفعة في الثانية ولا يستحقها في الثالثة لانعدام الملک له *

(هدايه صفحه ۷۹۲)

(J) ولا يملكها الشفيع الا القضاء او رضاء حتى لو بيعت دار اُخري بجنب الدار المشفوعة ثم قضى القاضي للشفيع بالشفعة ثم دفعها اليه لا يكون لهذا الشفيع ان ياخذ الدار بالشفعة لان الشفيع لم يكن جار للدار الثانية قبل قضاء القاضي *

(قاضي خان جلد ۲ صفحه ۵۶۳)

in favour of the pre-emptor subsequent thereto, and then the house (pre-empted) be surrendered to him, the pre-emptor is not entitled to take that other adjacent house by right of pre-emption, for he was not a neighbour of that house at the time of its sale."

Then come two texts from the *Fatawa-i-Alamgiri* (A), "With regard to pre-emption the rule is that it is lawful to demand pre-emption at the time of the actual occurrence of its cause, that this right is, in a manner, strengthened after such demand, and that a pre-emptor acquires a right of ownership by virtue of a decree of the *kazi* or of possession by mutual consent."

This is the first text and the next is (B) :—

" A pre-emptor does not become owner on preferring a claim for pre-emption until the *kazi* passes a decree for pre-emption, or [246] until the house is surrendered to the pre-emptor by the purchaser (by mutual consent). Hence if (after the institution of the claim and before the passing of a decree) another house adjacent to it (that is the house pre-empted) be sold, and the *kazi* pass a decree of pre-emption after its sale, or the purchaser deliver possession of the pre-empted house to the pre-emptor, the latter is not entitled to the other house by pre-emption. So in the *Muhitus Sarkhasi.*"

I wish to cite two more texts upon the same point, the first being from the *Durrul Mukhtar*, and the other from the *Raddul Mukhtar*, commonly known as *Shami's* commentary on the former work. The *Durrul Mukhtar* has the following (C) :—

" The pre-empted tenement becomes the property of the pre-emptor by taking possession by mutual consent or by decree of the Judge. The decree of a Judge is an alternative addition to taking possession (by mutual consent), because of the establishment of the pre-emptor's ownership by decree alone even before taking possession. So has been affirmed by *Mulla Khusrau.*

Shami's commentary on the above passage is as follows (D) :—

(A) اما حكمها فجواز طلب الشفعة عند تحقق سببها و تاكدها بعدالطلب و ثبوت الملک بالقضاء بها و بالرضاء كذا في النهايه *

(عالمگيري جلد ٥ صفحه ١٢١)

(B) بعد طلب التملک لاثبت الملک للشفيع في الدار المشفوعة الا بحکم القاضي او بتسليم المشتري الدار اليه حتى ان بعد هذالطلب قبل حكم القاضى بالدارله و قبل تسليم المشترى الدار اليه لو بيعت دار اُخرى بجنب هذه الدار ثم حكم له الحاكم او سلم المشتري الدار اليه لايستحق الشفعة فيها كذا في المحيط للسرخسي *

(عالمگيرى جلد ٥ صفحه ١٨١)

(C) و تملک بالاخذ بالتراضي او بقضاء القاضي عطف على الاخذ ثبوت ملک الشفيع بمجرد الحكم قبل الاخذ كما قرره ملا خسرو *

(درمختار صفحه ٧٩٨)

(D) قوله بالاخذ الخ لان ملک المشتري ثم فلاينتقل عنه الا ياخذ هما كالرجوع في الهبة — فلومات او باع المستحق بها او بيعت دار بجنبها قبل الاخذ او الحكم بطلت و لوازال المشتري ثمر احدث بعد قبضه لم يغمهذه و تمامه في الجوهرة — قوله عطف على الاخذ فلو قدمه عليه كما في الغرر لسلم من الابهام — قوله كما قرره ملا خسرو اے تبعا لغيره من الشراح *

(شامي جلد ٥ صفحه ٢١٣)

1889 DEC. 19. — FULL BENCH. — 11 A. 234 (F.B.).

'He' (the author of the *Durrul Mukhtar*) says by taking possession. He says so because the ownership of the purchaser has been perfected and therefore it cannot be transferred from him except by one of the above-mentioned two causes (that is by possession with mutual consent or the decree of the Judge) as is the rule relating to revocation of gift. Therefore if the purchaser has died or has sold **[247]** the property whereby he has acquired the right (that is, the pre-emptive tenement) or an adjacent house has been sold before taking possession of the decree, the right (of pre-emption) is invalidated. And if the purchaser has eaten (that is appropriated) the fruit which came into existence after his possession, he is under no obligation thereof. All this in the *Aljauhara*. He (the author of the *Durgul Mukhtar*) says, that there is an alternative conjunction between taking possession and the decree of the *kazi*. It therefore follows that if he had got it (that is, decree of Court) before '*the taking of possession*,' as in *Alghurar*, he might have saved himself from ambiguity. He says '*according to what has been affirmed by Mulla Khusrau*.' This means that he has done so by following others besides himself from among the commentators."

Now reading these texts carefully (and all of them are authoritative) there can be no doubt that under the Muhammadan Law of pre-emption the *ownership* of pre-empted property does *not* in the case of a successful pre-emptor, vest in him till he has *actually* enforced his right, whether by surrender by the purchaser, or under decree of Court, and that in either case his right of *ownership* does *not* take date from the time of the sale to the purchaser, but from such surrender or decree. As if this was not acknowledged rule of the Muhammadan Law of pre-emption, I have been referred in the course of the argument to certain observations which I made in delivering my judgment in the Full Bench case of *Govind Dayal* v. *Inayatullah* (1) and especially to the observations at page 809 of the report, where I enunciated the rule that the right of pre-emption is not a right of re-purchase either from the *vendor* or from the *vendee*, involving any new cantract of sale; but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. And I went on further to emphasize the rule by saying, "It is, in effect, as if in a sale-deed the vendee's name were **[248]** rubbed out and the pre-emptor's name inserted in its place." I have quoted these passages because they have been relied upon in support of the hypothesis that a pre-emptor's title of *ownership* dates from the date of the sale in respect of which he has enforced his pre-emption. It is enough to say that in the case where these observations were made the point now before us was not the subject of consideration, and that all that had to be considered then was whether the right of pre-emption was a right of re-purchase created by the pre-empted sale itself or an inchoate right which existed before the pre-empted sale so as to render that sale a cause of action for a pre-emptive suit. I held then as I hold still that the right of pre-emption in its inchoate form exists in the pre-emptor antecendently to the sale of which he complains, or if it were not so, jurisprudence would decline to recognize that a right which did not exist at the time of the sale is created by the very sale which is complained of as an *injuria* to the right which that injury itself created. I did hold in

(1) 7 A. 775.

that case as I hold still that the right of pre-emption is nothing more nor less than the right of the pre-emptor to be substituted for the purchaser in the sale in respect of which pre-emption is sought to be enforced. But when I spoke of substitution in that case, and as I speak of it now, I never said nor do I now intend to say that such substitution is independent of the rules of law imposed thereupon as conditions precedent to and governing such substitution itself. Among the conditions of such substitution as the pre-emptor can claim is the condition which the texts which I have cited indicate, namely that a pre-emptor's ownership does not vest in him till he actually enforces his right by one of the two methods which those texts contemplate, that is, either by surrender by mutual consent or by decree of Court. In the present case there is no question of surrender by mutual consent, and the dispute is as to what the defendant acquired under his pre-emptive decree of 8th September, 1883 in execution whereof he obtained formal possession on the 1st of December, 1883,

Now I have already pointed out, that according to the authoritative texts of the Muhammadan Law of pre-emption which I have [249] cited, the defendant as successful pre-emptor could not become owner of the pre-empted property till acquisition of possession by consent of the purchasers, plaintiffs, or under decree of Court. There being no question of surrender by mutual consent, we have to refer to the law as to the decrees of the Court in such cases. That law is contained in s. 214 of the Code of Civil Procedure (Act XIV of 1882) under which the defendant-appellant's pre-emptive decree of 8th September, 1883 was passed, and he obtained possession on 1st December, 1883.

Does that section contemplate that by dint of such decree and such possession thereunder the defendant as successful pre-emptor was entitled not only to the pre-empted property but also to the profits for the period intervening between the sale and the acquisition of possession by the defendant under that decree? There is no contention that the decree contained any such terms as would either be inconsistent with or go in excess of the provisions of this section. I take it therefore that the appellant's pre-emptive decree of 8th September, 1883, was framed in conformity with the requirements of s. 214 of the Civil Procedure Code, and that he obtained possession as successful pre-emptor on the 1st December, 1883, in execution of that decree. I hold therefore that up to that date, namely the 1st December 1883, when the terms of the decree were fulfilled and enforced, the plaintiffs-respondents Sri Ram and Chet Ram as purchasers under the sale-deed of 4th January, 1883, remained owners of the pre-empted share, and that such ownership did *not* vest in the defendant from the date of the sale, notwithstanding his success in the pre-emptive suit, and that his actual substitution as owner of the pre-empted property must date with his possession on the 1st December, 1883.

This leads me to the consideration of the second question as enunciated by me at the outset, and the answer to it is only a corollary to what I have already said. For if the ownership of the pre-empted share did not vest in the defendant-appellant till he obtained possession by fulfilling his pre-emptive decree on the 1st December, 1883, it follows that he had no right to appropriate the [250] profits of the pre-empted share of which till then Sri Ram and Chet Ram, purchasers, plaintiffs-respondents, were owners.

I might have left the matter here, but because much argument has been addressed with reference to the rule of the Muhammadan Law of pre-emption as to the right to the profits of the pre-empted property

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during the interval between the sale and the enforcement of pre-emption by the pre-emptor either under surrender by the purchaser or decree of Court, I wish to state how that law deals with such a question. In doing so it is necessary to refer to some more of the original texts of that law, but before citing them to any purpose it is necessary to explain that the question now under consideration is dealt with by the authorities of the Muhammadan Law of pre-emption as a matter relating to the deduction from the price which the pre-emptor has to pay to the purchaser before enforcement of his pre-emptive right.

Treating the question in this manner, the author of Hedaya (*vide* page 558, Hamilton's Hedaya by Grady) contemplates two cases, namely the case in which land has been sold with the crop of fruit existing thereon at the time of the pre-empted sale, and the case where such fruit is produced after the sale whilst the land is in possession of the purchaser. He then goes on to say (E) :—

"In either of the two preceding cases, if the purchaser have gathered the fruit, and the *shafi* afterwards come and claim his privilege, he is not entitled to the fruit so gathered; for it is no longer an appendage of the ground. It is said in the *Mahsoot*, that if the purchaser have gathered any of the fruit, a proportionate abatement should be made in the price to the *shafi*. The compiler [251] of the Hedaya remarks, that this is in the former only of the two above mentioned cases; for the fruit being produced at the time and being actually and expressly included in the sale, it is natural to suppose that a part of the price was given in consideration of it; whereas, in the latter case, the fruit was not produced, and could only be included in the sale as a consequent, whence no part of the price could have been set against it."

I have again adopted Mr. Hamilton's paraphrastic translation of the original Arabic text, because it brings forth the rule of law therein laid down, and that rule is made clearer by the author of the *Kifaya*, a well-known commentary of the *Hedaya*.

Referring to the above cited text of Hedaya, the commentator goes on to say (F) :—

(E) إن جدة المشتري ثم جاء الشفيع لا يأخذ الثمر في الفصلين جميعا لانه لم يبق تبعا للعقار وقت الاخذ حيث صار مفصولا عنه فلا يأخذه قال في الكتاب وان جذه المشتري سقط عن الشفيع حصة قال رضى الله عنه و هذا جواب الفصل الاول لانه دخل في البيع مقصوداً فيقابله شيئ من الثمن اما في فصل الثاني يأخذ ما سوى الثمر بجميع الثمن لان الثمر لم يكن موجودا عند العقد فلا يكون مبيعا الا تبعا فلا يقابله شيئ من الثمن *

(هدايه صفحه ٨٠١)

(F) قوله فاثمر في يد المشتري قيد لقوله في يد المشتري لانه اذا اثمر في يد البايع قبل القبض ثم قبضه المشتري له حصة من الثمن كما اذا كان موجوداً في وقت الشراء – قوله في الفصلين جميعا اى في فصل ما اذا كان في النخيل ثمر حين وقع الشراء ثم جده المشتري و في فصل ما اذا لم يكن في النخيل ثمر و وقع الشراء على الارض والنخيل فاثمر في يد المشتري ثم جده المشتري لا يأخذ الشفيع الثمر في الفصلين *

(الكفايه على الهدايه صفحه ٩٣٩)

1889 DEC. 19. — FULL BENCH. — 12 A. (F B.).

"He (the author of the Hedaya) says '*and the trees have then brought forth fruit whilst in possession of the purchaser.*' He has placed this restriction according to his saying '*in the possession of the purchaser*' because in a case of the fruit coming forth whilst in possession of the seller before possession and then the purchaser has taken possession, the purchaser has a right to a share out of the price, as would be the case if the fruit existed at the time of the sale. He says '*in both cases;*' this means either in the case when the tress were bearing fruit at the time when the sale took place and then the purchaser removed them, or the case when there did not exist any fruit on the trees, and the sale took place only in respect of the land and the trees, and the latter brought forth fruit whilst in possession of the purchaser, who then separated them. In either of these cases the pre-emptor is not entitled to take the fruit."

[252] It is clear frome these texts that when land with a crop of fruit existing thereon *at the time of the sale* is purchased, an abatement of the price proportionate to the value of such crop will be made in favour of the pre-emptor because he is supposed to have purchased the property knowing that the fruit existed thereon, and that a portion of the price which he paid was in lieu of the crop of fruit then existing. But it is equally clear from the texts that when the crop of fruit comes into existence after the sale whilst the land is in possession of the purchaser, no abatement of the price will be made in favour of the pre-emptor, and he has to pay the full price. The ratio of course is that during his possession as such, the purchaser under a subsequently pre-empted sale is owner of the property which he has purchased till pre-emption is actually enforced agains t him, and that during his possession as such owner he is entitled, as a natural incident of his right of ownership, to the produce of his own property,

That this is the rule of the Muhammadan Law of pre-emption appears further from the following texts of the *Fatawa-i-Alamgiri* which may be taken as the most authoritative work of Muhammadan Law for administering that system in India.

"If the buyer has already gathered the fruit which grew during his possession, and then the pre-emptor has arrived, then whether the fruit is still standing, or has been appropriated by the purchaser, by sale or by eating it, the pre-emptor must take the land and the trees in lieu of the whole price if he chooses, and he has no right to the fruit. So in the *Sirajul Wahhaj* (G)."

The next text is even stronger for showing that the produce of land during possession of the purchaser belongs to him and not to the pre-emptor.

[253] "If the land purchased contained a crop too small to fix its value, and if that crop subsequently ripened and was cut away by the buyer, and then the pre-emptor arrived and took the land by pre-emption, no abatement will be made in the price in his favour on account of the said crop. So in the *Mulutus Sarkhasi* (H)."

(G) فان كان المشتري لما حدثت الثمرة في يده جذها ثم جاء الشفيع وهي قائمة او قد استهلكها المشتري يبيع او اكل فان الشفيع ياخذ الارض والنخل بجميع الثمن ان شاء ولا سبيل له على الثمر كذا في سراج الوهاج *

(عالمگيري جلد ٥ صفحه ٢١٨)

(H) و ان كان ارضا فيها زرع لاقيمة له فادرک المشتري الزرع و حصده المشتري ثم جاء الشفيع و اخذ الارض لايسقط شيئی من ذلک الثمن — كذا في مبسوط السرخسي *

(عالمگيری جلد ٥ صفحه ٢٥٧)

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It is needless to multiply authorities on this point, for the authorities which I have already cited render the contention wholly untenable that under the Muhammadan Law of pre-emption the ownership of the pre-empted property vests in the successful pre-emptor from the date of the pre-empted sale without and before the pre-emptor having actually enforced his pre-emption by mutual consent, or by fulfilling the requirements of a decree of Court. Equally untenable under that law would be the proposition that during the interval between the pre-empted sale and the actual enforcement of pre-emption as above-mentioned, the pre-emptor is entitled to the profits of the pre-empted property of which he was not till such enforcement the actual owner.

That such is the rule of the Muhammadan Law of pre-emption in such cases, I have absolutely no doubt; and if I have referred to the original authorities at such length it is only out of deference to the contention which was seriously urged in the course of the hearing that such was not the rule of the Muhammadan Law of pre-emption.

To the argument so addressed much interest has been added by the contention that the parties to the present suit being Hindus, the Hindu Law would be applicable to them, that there exists in this country a Hindu Law of pre-emption which we are bound to apply to this case under the Civil Courts Act (XII of 1887, s. 37) and according to the rule of justice, equity and good conscience. It was further argued on behalf of the appellant that the rules [254] of the Muhammadan Law of pre-emption are not even by analogy applicable to cases such as this, that the *wajib-ul-arz* represents only a covenant or agreement between co-sharers of a village, and as such a suit for pre-emption under the pre-emptive clause of the *wajib-ul-arz* must be dealt with practically as a suit for specific performance of a contract such as s. 40, of the Transfer of Property Act (IV of 1882) contemplates, the sale in this case being later than the time when that enactment came into force. In dealing with this part of the case as argued before us by the learned Pandit on behalf of the appellant, I will for the purposes of clearness deal with the argument under distinct heads. I will show:—

(1) That there is no law of pre-emption in the Hindu Law.

(2) That entries in the pre-emptive clause of the *wajib-ul-arz* are good *prima facie* evidence of the existence of pre-emption in the village to which such *wajib-ul-arz* relates.

(3) That such custom must in the absence of anything to the contrary be taken to be founded on, and co-extensive with, the Muhammadan Law of pre-emption.

(4) That in cases where it is shown that the custom or compact recorded in the *wajib-ul-arz* is in any respect not co-extensive with the Muhammadan Law of pre-emption or is at variance from such law, the Court may administer a modification of that law according to the circumstances of each case.

(5) That where such custom or compact is silent upon any particular point the Court will follow the analogies of the rules of the Muhammadan Law of pre-emption on that point, so long as those rules are consistent with the principles of justice, equity and good conscience.

Now upon the first of these points the learned Pandit in order to show that the Hindu Law contains definite rules of pre-emption relied upon a text of the *Mahanirvanv Tantra* (Chapter XII, verses 107-112) quoted by Babu Shyama Charan Sarkar Vidya Bhushan, at page 627 of the second volume of his Digest of the Hindu Law named *Vyvastha Chandrika*, where

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the original Sanskrit [255] text of the *Tantra* is also quoted. The text no doubt provides a right of pre-emption, but it has long been the subject of interest to eminent Sanskrit scholars, whose final decision is that it is of a recent date, that the *Mahanirvana Tantra* itself is not a work of authority in the Hindu Law, and that inasmuch as it provides a rule which does not exist in the authoritative works of the Hindu Law, such as the *Smritis*, or even works of less authority, the text is valueless for purposes of laying down any authoritative rule of the Hindu Law such as the Courts would respect and administer. It has indeed been even suspected that the text, occurring as it does *malapropos* in the *Mahanirvana Tantra* itself, is an interpolation made sometime in the reign of the Muhammadan Emperor Akbar, when strenuous efforts were made to bring the Hindu and the Muhammadan populations under practically the same law for temporal purposes. I have had before now to consider the exact authoritativeness of the *Mahanirvana Tantra* as an authoritative work of law. This was in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (1) and what I said upon the subject is to be found at pp. 785-790 of the report, I have no desire to repeat what I said then, because nothing new has been offered in the argument in this case beyond reference to the case of *Omed Roy* v. *Nackched Rai* (2) which is the solitary case which the learned Pandit has pointed out as supporting his contention that a Hindu Law of pre-emption exists and was in that case administered by the Court. The case was decided so long ago as 1830, and the report (at page 71) contains a valuable note in which reference is made to two earlier rulings, and the note ends by saying that Mr. Colebrooke "states the right claimed to be unsupported by Hindu law, but suggests as probable that the claim may be found supported by local custom." The report of the case shows that it was decided upon the ground of local custom and general considerations of equity rather than upon any precepts of Hindu Law, and so far as the case may be understood as an authority supporting the existence of a Hindu Law of pre-emption, I think it is enough to say that it has never been followed in that aspect either by the Sadar Diwani Adalats [256] or by the High Courts. Babu Shyama Charan Sarkar at page 626 of his Digest of Hindu Law, *Vyvastha Chandrika*, Vol. II, does indeed devote a section to the subject of pre-emption, relying upon the text of the *Mahanirvana Tantra*, but he does not point out a single passage in the authoritative works of the Hindu Law, the *Tantra* being a work not upon law but on Mythology. Besides the absence of any reference to pre-emption in the legal authorities of Hindu Law, I am much pressed by the circumstance that if the rule of pre-emption existed in that system many more principles of decision would be provided therein to meet the numerous points which arise in enforcing that right. I wish also to point out that the learned author after quoting from the *Mahanirvana Tantra* ends up his section on pre-emption by saying that "upon the authority of the above, and also according to local usage which appears to have been founded on ideas taken from the Muhammadan, rather than from the Hindu Law, the right of pre-emption has become prevalent among the Hindus of the North-Western Provinces (*vide* p. 628). In the Full Bench case of *Fakir Rawot* v. *Sheikh Emambaksh* (3) Sir Barnes Peacock in delivering the judgment of the whole Court went on to say, "It may be noted as a significant fact that every term empolyed in connection with this right, including the name of the right itself, *shuffa*,

(1) 7 A. 775. (2) S. D. A. Sel. Rep. vol. 5, p. 68. (3) B. L. R. Sup. Vol. 35.

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is borrowed from the Arabic; and that the special appellant's pleader himself a Hindu, could not when questioned by the Court, refer to any term of Hindu origin connected with the subject." In the present case, however, the learned Pandit for the appellant relying upon a foot-note of Babu Shyama Charan's Digest, Vol. II, page 549 (precedents) suggested that the Sanskrit word *prativesikatwa* was the equivalent of the Arabic word *shufa*, just as Dr. Sir Monier Williams in his English-Sanskrit Dictionary has given *prakhyata* as the equivalent of *shufa* or pre-emption. I have no doubt that the Sanskrit language with its large vocabulary and enormous power of making compounds can furnish an equivalent to any idea; but the question is whether either of these terms is a term of the Hindu Law, and whether it is to be met with in any of the legal authoritative works [257] of that system. No such suggestion has been made, and must therefore hold that the mere circumstance of a Sanskrit word being formed to represent pre-emption is no more evidence of the existence of that right as a legal right in the Hindu Law than the Greek word *phonograph* or *microphone* and other similar terms are evidence of the existence of those instruments in ancient Greece. For the reasons which I have stated, I hold now as I did in the Full Bench case of *Gobind Dayal* v, *Inayatullah* (1) that there is no law of pre-emption recognised by Hindu jurisprudence, and that therefore there is nothing in s. 37 of the Civil Courts Act (XII of 1887), to require us to administer a Hindu Law of pre-emption which never existed and does not now exist, and that the decision of this case must therefore rest upon the rule of justice, equity and good conscience as required by the second paragraph of that section.

I now pass on to the second point, and in doing so, I will first refer to the Full Bench ruling of this Court in *Isri Singh* v. *Ganga* (2) where it was laid down that a *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, such evidence being open to be rebutted by any one disputing such custom, and that when such *wajib-ul-arz* records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record, and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders who repudiate such contract to rebut such presumption. This case was followed by my brother Tyrrell and Oldfield, JJ. in *Muhammad Hasan* v. *Munna Lal* (3) and I do not think that its authority has ever been doubted in this Court. And I may add that the manner in which the *wajib-ul-arz* was dealt with in these two cases, so far as they lay down the rule as to custom, is amply supported by the observations made by the Lords of the Privy Council in *Rani Lekraj Kuar* v. *Baboo Mahapal Singh* (4) notwithstanding the qualifying remarks which their [258] Lordships made in the later case of *Uman Parshad* v. *Gandarap Singh* (5).

Applying the priciples laid down by these rulings to the present case, I hold that the entries in the pre-emptive clause of the *wajib-ul-arz*, undisputed as they are, must be taken to represent the existence of a custom of pre-emption in the village, or at least are good evidence which has not been rebutted of a compact or agreement between the co-sharers as to the manner in which such right of pre-emption was to take effect. I have already quoted the pre-emptive clause of the *wajib-ul-arz in extenso*.

(1) 7 A. 775. (2) 2 A. 876. (3) 8 A. 434. (4) 7 I. A. 63. (5) 14 I. A. 127.

and before going any further I wish to point out that the clause comes under the heading of pre-emption, and that whether it be regarded as enunciating the custom of pre-emption or a compact between the co-sharers, the words employed for pre-emptor and pre-emption are *shafi* and *shufa*, which are technical terms of a very definite meaning in the Muhammadan Law of pre-emption. I shall presently have to show that these technical legal terms cannot be disregarded in interpreting the clause of the *wajib-ul-arz*, but meanwhile I pass on to the third point, namely, that the right of pre-emption under the clause of the *wajib-ul-arz* must be taken to be founded on the rule of the Muhammadan Law of pre-emption which, sometimes in its entire integrity and somtimes in a qualified form, has been adopted by Hindu communities in these Provinces. I referred to this matter in delivering my judgment in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (1) in the observations which I made at page 790 of the published report. I still adhere to those views and do not wish to add anything to them beyoned recalling attention to what I said in *Zamir Husain* v. *Daulat Ram* (2) at page 113 of the published report, and also to similar observations which I made in *Sheoratan Kuar* v. *Mahipal Kuar* (3), at page 267 of the published report relative to the manner in which pre-emptive clauses in the *wajib-ul-arz* must be interpreted as representing a custom or compact as founded upon notions of the Muhammadan Law of pre-emp-**[259]** tion, which notions are foreign to Hindu jurisprudence. It is not however upon my own judgments in previous cases that I wish to rely for the rule which I shall again lay down in this case. By far the most important and the most authoritative ruling upon this point is a Full Bench ruling of the Calcutta High Court passed by a Bench consisting of Peacock, C. J., L. S. Jackson, Shumbhunath Pandit, Levinge and Jackson, JJ., in *Fakir Rawot* v. *Shaikh Emambaksh* (4) where those learned Judges unanimously concurred in the judgment delivered by Sir Barnes Peacock, Chief Justice, who, after reviewing an enormous number of previously decided cases to be found in the reports, summed up the results of his judgment in terms which are so definite and clear that I think they cannot be too often repeated in order to save future litigation and discussion upon the point. The learned Chief Justice said :—" We therefore think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognised as prevailing among Hindus in Behar and some other provinces in Western India, that in districts where its existence has not been judicially noticed, the custom will be matter to be proved, that such custom, when it exists, must be presumed to be founded on and co-extensive with the Muhammadan Law upon that subject, unless the contrary be shown ; but the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by the suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record. In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable therefore, to encompass

(1) 7 A. 775. (2) 5 A. 110. (3) 7 A. 258.
(4) B. L. R. Sup. Vol. p. 35.

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it with certain rules and limits lest the right should be exercised vexatiously."

[260] The principles upon which the rule so enunciated rest have never been doubted by the Calcutta High Court so far as I am aware, and I now proceed to show that they have not only not been repudiated by this Court, but that this Court has uniformly acted upon them. I have already pointed out that in *Buldeo Pershad* v. *Mohun* (1) which was a case very similar to this, Roberts and Turner, JJ., applied the principles of the Muhammadan Law of pre-emption regarding profits between the sale and the acquisition of possession by the successful pre-emptor, though that case was between Hindus. But in the course of the argument it has been suggested that the Full Bench ruling of this Court in *Chowdhree Brij Lal* v. *Raja Goor Shai* (2) lays down a rule of law which is inconsistent with the Full Bench ruling of the Calcutta High Court in *Fakir Rawot* v. *Sheikh Emambaksh* (3) which I have already cited. That the judgment of the Full Bench of this Court does not say so is clear from the report, and it is equally clear that the Full Bench ruling of the Calcutta Court was before the learned Judges of this Court when they delivered their judgment in the case which I have just cited.

The question then is to ascertain what was the exact rule of law laid down by the Full Bench of this Court in the case of *Chowdhree Brij Lal* v. *Raja Goor Sahai* (2), how far, if at all, it modifies the rule of law laid down by the Full Bench of the Calcutta High Court in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (3) which I have already cited. This leads me to what I have enunciated as the fourth point of the argumnnt on this part of the case, and since the head-note of the report in the full Bench case of this Court is defective and inadequate, it is necessary for me at the risk of prolixity to quote some passages from the Full Bench judgment of this Court, the more so because I am afraid that the reports containing that case are out of print and not easily accessible.

Now the exact question which the learned Judges in that case had before them was "whether compliance with all or any of the [261] conditions prescribed by the Muhammadan Law, is indispensable to give validity to a claim of pre-emption, preferred under the stipulations of the record-of-right known as the *wajib-ul-arz* prepared on the occasion of making or revising settlement."

Having thus formulated the question before them, the learned Judges of the Full Bench formulated their answer in certain propositions which I quote here *in extenso*. Referring to the question as enunciated by them, they go on to say :—

"We are asked to determine whether in deciding cases which involve the interpretation of pre-emptive stipulations the Courts of these Provinces ought to confine themselves to the terms of the instrument in which the stipulation is embodied or are to import all or any of the peculiar provisions of the Muhammadan Law." The learned Judges then after describing the various grounds upon which pre-emption might be claimed, observe :—"As regards general usage, it was declared by the late Sadr Court of these Provinces (4) that pre-emptive rights do not obtain as an universal custom among Hindus. To this statement we assent, with this addition that in some parts of India the custom has been found to prevail,

(1) N.W.P.H.C.R. (1866) Rev. App. p. 30.
(2) N.W.P.H.C.R.F.B. Rul. (1866-67), p. 128.
(3) B.L.R. Sup. Vol. 35.
(4) 2 Select Reports. p. 477.

accompanied with all the conditions attaching to pre-emptive rights under the Muhammadan Law."

They then refer to certain executive directions promulgated by the local Government to revenue officers in connection with the preparation of the *wajib-ul-arz*, and proceed to observe:—

"We have seen that Settlement Officers were instructed to induce the co-parceners, whose property they engaged in settling, to come to an agreement on all subjects on which disputes were likely to arise; and probably on no point were disputes more likely to arise than on questions relating to the transfer of tenure. As in the case of the undivided family, no member could alienate his share of the common inheritance without the consent of the other members, so in the village community, which often had its origin in an undivided family, nothing could be more opposed to the feelings of the community than the transfer of any interest in the estate to [262] one who was not a member of the village community. Hence at settlement it was not unfrequently admitted as an established usage, or agreed, that no alienation should be made by any co-parcener to a stranger without the consent of the whole body of co-parceners. But a stipulation of this nature practically operated to prevent a co-parcener from obtaining the full value of his share, because it limits the market, that is, the number of persons to whom he could without such permission sell. Consequently a modified provision was more generally adopted, whereby the co-parcener was not restricted from selling for the best price he could obtain in the open market; but it was made incumbent upon him to give the opportunity of purchasing at that price to the other co-parceners, commencing with those who, being co-parceners, were first nearest to him in family, and next co-sharers in the same *thoki* or *patti*. Such a stipulation, (a form of which is likewise given at page 195 of the settlement *misl*) it can easily be seen, was entirely in accordance with the spirit of Hindu law and custom; it obtained still greater importance when the default of a single shareholder in contributing his portion of the revenue rendered the whole of the village or *patti* liable to sale. It seems reasonable to conclude that it was with a view to compass these ends, that is to say, to prevent the intrusion of a stranger into the estate of the family or community, and to exclude any person, whose want of thought or skill might augment the burdens of the other members of the co-parcenary community, rather than from any desire to borrow an institution from their Muhammadan neighbours, that the communities caused stipulations for pre-emption to be inserted in the *wajibi-ul-arz*."

The learned Judges then proceed to point out that the pre-emption provided in the *wajib-ul-arz*, is often in some of its incidents different to the incidents of the right of pre-emption under the Muhammadan Law, and in view of this circumstance, and probably especially with reference as to the surmise that, "pre-emption under the Muhammadan Law is confined to property in towns, such as houses and gardens or small walled enclosures and to such property only, while the *wajib-ul-arz* deals principally with the holdings" [263] of the agricultural community, they sum up their conclusions in the following words:—

"In view of the foregoing considerations, we hold that the pre-emptive conditions which are found in the *wajib-ul-arz* paper, are to be regarded generally as resting on a distinct basis from that of the *huq shufta* under the Muhammandan Law, and that two of the earliest decisions of the late Sadr Court, in which this *dictum* was pronounced are worthy of acceptance (No. 105 of 1846, 2nd December, N.W.P. 166; No. 727 of

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1850, Reports for 1851, p. 214). In support of this ruling, we may also refer to the 14th paragraph of Directions for Collectors of Land Revenue, where the origin of the right, as created generally by stipulation at the time of settlement and as independent of the Muhammadan *shuffa*, is affirmed."

The learned Judges having thus in somewhat emphatic terms expressed the view that the pre-emption provided in the *wajib-ul-arz* must be regarded as founded on or originating from the rules of Hindu Law relating to joint undivided families, go on in specific terms to guard themselves from being misunderstood. They observe in continuation of what I have just quoted:—

"We do not mean to lay it down that a pre-emptive condition in a *wajib-ul-arz* my not be so expressed as to indicate that the Muhammadan custom of pre-emption prevails, and, in such case, it will be undoubtedly the duty of the Court, if called on to decide on the validity of a claim preferred under such a condition, to decide upon its validity, with reference to the special provisions of the Muhammadan Law, but if no clear expression is found that the parties intended that the Muhammadan right of pre-emption should be recorded as prevailing, and if on the contrary the words indicate a course differing from the requirements of the Muhammadan Law to be pursued by the vendor, and the would-be purchaser, then the stipulations of the *wajib-ul-arz* and those stipulations alone are to be regarded, and the Court must pass its decree with reference to the proof afforded that those stipulations have or have not been performed. In our view, if the *wajib-ul-arz* is to be regarded as a contract, the same laws of interpretation are to be applied **[264]** as to other contract; if, on the other hand, it is to be regarded as a record of usage or custom, the custom (if the terms of the instrument be clear) may be assumed to be recorded with all the incidents which are admitted to attach to it, and no new incidents not mentioned in the record ought to be imported into it, unless it be the manifest intention of the parties that they should be so imported."

From so much of the views expressed by the majority of the Full Bench in the above quoted passages, as attributed the historical origin of the right of pre-emption as recorded in the *wajib-ul arz* to notions of the Hindu law governing alienations of their shares by members of joint undivided families, Mr. Justice Roberts, who was one of the members of the Full Bench, expressed his emphatic dissent. Referring to the long course of decision whereby "the rules of law in this respect had become *certain* and *notorious*," he went on to say, "upon the principle of rule of practice *stare decisis*, to abide by former precedents, I would adhere to the principle laid down in the decisions above mentioned. But I also think the decisions were right and in accord with the policy of the last settlement in which the right of pre-emption was generally introduced. Although the alienation of landed property by a separate co-partner does not appear to have been subject to any restriction of pre-emption according to the sages of the Hindu law, inasmuch as it is laid down that separated brethren if they give or sell their shares may do that as they please, for they have power over their own wealth (*Nanarda* 43, Buhler and West, page 357) yet the general and unquestionable acceptance of the right of pre-emption by Hindus at the late settlement shows that the practice was consonant to their ideas and was familiar to them. That the practice and the policy was so known to the Hindus is attributable to their having observed the usage among their Muhammadan neighbours and applied it in many instances among themselves. It is reasonable to conclude, says

Mr. Elberling, that, when the company obtained possession of the country, the Muhammadan Law, modified by local customs was the real law of the land (*vide* Elberling, 3 [265] and 4, and the authorities cited). However this may be with regard to cases of inheritance and of marriage and caste and religious usages and institutions in which the Courts have, as between Hindus, administered their law, yet the right of pre-emption as congenial to Hindus has been derived from the Muhammadan, so much so as to have been recognized as the customary law of some parts of the country."

I confess that upon the question of the origin of the pre-emptive right in India I agree in the dissentient judgment of Mr. Justice Roberts, because with profound respect for the majority of the Full Bench in that case, I cannot help feeling that the conclusions at which they arrived on this point are based more upon theoretical surmises and hypotheses than upon the actual ascertainment of the facts of history in connection with the administration of justice in this part of the country. Nor do I intend to prolong my judgment by entering into a historical disquisition on the subject here. All I need point out is, what Mr. Justice Roberts pointed out, that for centuries before the British rule the law of the land was the Muhammadan Law, that that law had never to contend with any conflicting rules of the Hindu law of pre-emption, because (as I have already shown) no such law existed, that the Muhammadan rule of *shufa* draws absolutely no distinction between Muhammadans and non-Muhammadans, as was pointed out in *Zamir Husain* v. *Daulat Ram* (1); that when the British rule succeeded to the sovereignty of this country it found the Muhammadan law as modified by local customs actually administered as the law of the land; that so far as the rights of *shufa* or pre-emption is concerned that British tribunals, such as the Sadr Courts, continued to administer that law, as is shown by the large number of cases to which Sir Barnes Peacock referred in delivering the judgment of the Full Bench in *Fakir Rawot* v. *Sheikh Emambaksh* (2), arriving at conclusions which were accepted in their integrity by Mr. Justice Roberts as relating also to the state of the right of pre-emption in these Provinces. Those conclusions are not only support- [266] ed by the undoubted fact of the history of law in British India, but also by existing facts of the administration of justice in various parts of the country.

Among those facts is a proposition which cannot be controverted, and which apparently was not pressed upon the attention of the learned Judges forming the majority of the Full Bench from whom Mr. Justice Roberts dissented, that as matter of fact and not one of theoretical surmises or hypotheses, the right of *shufa* or pre-emption is unknown in those parts of India where Muhammadan jurisprudence had not in days gone by had full sway, and where Muhammadan influence was not felt as vigorously as in this part of the country and other parts of Upper India, in Bengal and in some parts of the Bombay Presidency such as Guzarat. For instance it is unknown in the Madras Presidency, where the High Court in *Ibrahim Sahib* v. *Muni Mir-udin Sahib* (3) have gone the length of holding that even in the case of Mahomedans the doctrine of pre-emption is not law in that Presidency. Similarly in such parts of the Bombay Presidency as have not been subject to Muhammadan influence, the right of pre-emption does not prevail, and where it is found to prevail it has been distinctly held to prevail, among the Hindus on no basis other than their acceptance of the

(1) 5 A. 110. (2) B.L.R. Sup. Vol. 35. (3) 6 M.H.C.R. 26.

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Muhammadan rule of pre-emption. For this the case of *Gordhandas Giodharbhai* v. *Prankor* (1) is a distinct authority. That was a case entirely between Hindus, and the learned Judges after stating that there had been many cases disposed of by the Sadar Diwani Adalat of that Presidency, went on to say.—"There is no doubt that the custom in Guzarat is the Muhammadan right of pre-emption, or *hak shufa*; and therefore that in deciding such a suit as the present, it is to the particulars of that law we must look for guidance."

If it were a correct proposition to maintain that the law of pre-emption as contained in the *wajib-ul-arz* is an offshoot of the Hindu law relating to joint undivided Hindu families, I should have expected that in other parts of the country also, such as Madras and Bombay, where that law has had uninterrupted and full opera- [267] tion, a similar doctrine of pre-emption might have been evolved by village communities and joint Hindu families. But there is no contention that any such evolutionary phenomenon has taken place, and its absence is all the more remarkable because so far as the joint Hindu family system is concerned, those parts of the country are governed by the Mitakshara school of Hindu law in common with this part of the country. Equally remarkable is the circumstance that in none of the numerous cases to be found in the printed reports has any attempt been made to engraft on to the right of pre-emption the analogies of the Hindu law relating to legal necessity for alienations and other similar doctrines as understood in that law. It is also a fact which must not pass unobserved that so far as the pre-emptive clauses in this part of the country are concerned, village communities, which have entered those clauses are as often mixed communities of Hindus and Muhammadans as they are unmixed Hindu or Muhammadan communities, and yet in the vast majority of cases of pre-emption which come before this Court the terms of the pre-emptive clause are similar, and this fact, upon the hypothesis of the majority of the Full Bench, leads to the conclusion either that a Hindu law of pre-emption which never existed or an evolutionized form of the Hindu law as to joint undivided families, was adopted by the Muhammadans in such cases, an evolution which has not been recognized even by Hindus themselves in respect of sales of joint immoveable property such as houses and other buildings.

I do not wish to pursue the subject any further beyond respectfully repeating that I find it impossible to accept the conclusions of the majority of the Court in the Full Bench case of *Chowdhree Brij Lall* v. *Rajah Goor Sahai* (2) so far as those conclusions attribute the origin of pre-emption in village communities to an evolution of the Hindu Law relating to the joint Hindu family system. I have however no doubt that that system may have and probably did, restricting as it does the free right of sale, operate as a pre-disposing cause facilitating and rendering congenial the adoption by [268] Hindus of notions of a pre-emptive right derived from and founded upon the doctrines of Muhammadan jurisprudence on that subject. Beyond what I have said as to the historical origin of pre-emption, I do not dissent from the conclusions arrived at by the learned Judges of the majority in the Full Bench case which I am considering. I agree with them in holding that a right of pre-emption when adopted by village communities as a custom or compact and entered in the *wajib-ul-arz* may in some of its incidents be different from the rules of the Muhammadan law of pre-emption, that in such cases the

(1) 6 B.H.C.R. 263. (2) N.W.P.H.C.R.F.B. Rul. (1866-67), p. 128.

Court should carefully interpret the terms of the pre-emptive clause of the *wajib-ul-arz* and give effect to them, even though they vary or modify the ordinary rule of the Muhammadan law of pre-emption in any respect, such as the indispensability of the immediate and confirmatory demands. This is the whole scope of the Full Bench ruling minus the theory as to the origin of pre-emption, and viewed in this light there is nothing in that ruling inconsistant with the principles laid down by Sir Barnes Peacock in the Full Bench case of *Faiker Rawot* v. *Skeikh Emambaksh* (1) to which I have so often referred, for that ruling clearly recognizes that where custom has varied the incidents of the Muhammadan law of pre-emption, the modification is to be respected by the Court, and this indeed was the *ratio decidendi* of the rule adopted by my brother Brodhurst and myself in *Zamir Husain* v. *Daulat Ram* (2). That case gave full effect to the Full Bench ruling of this Court, for there we dispensed with the preliminary demands of pre-emption in deference to the variations which were proved to have been made by the local custom. This leads me to the fifth point in this part of the case, namely, how is the Court to act in cases where the local custom or compact as entered in the *wajib-ul-arz* is totally silent as to any matter which by reason of the right of pre-emption being claimed becomes a necessary subject for adjudication, as indeed in this case. Upon this point the Full Bench ruling of the majority of this Court in *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (3) beyond laying down the broad rule that pre-emptive clauses of the *wajib-ul-arz* are [269] to be enforced without "alteration or addition" throws no clear light, whilst I have said enough to show that the Full Bench ruling of the Calcutta High Court in *Fakir Rawot* v. *Sheikh Emambaksh* (1) and the Division Bench ruling of the Bombay High Court in *Gordhandas Girdharbhai* v. *Prankor* (4) clearly lay down that the analogies of the Muhammadan law of pre-emption must be looked to for guidance.

But the exigencies of deciding questions not provided for by the pre-emptive clause of the *wajib-ul-arz* as indeed also of local custom where that custom is silent, do often arise in an infinite variety of cases, and the best way to illustrate them is to refer to some of the reported cases which had to be decided by this Court and I will before discussing them take them in their chronological order. Perhaps the first case which I should cite on this point is *Buldeo Pershad* v. *Mohan* (5) where Roberts and Turner, JJ., did not even doubt or hesitate to apply the rule of the Muhammadan law to a claim for profits during the interval between the pre-empted sale and the actual enforcement of pre-emption by possession of the pre-emptor. That case like the present arose out of pre-emption claimed under the *wajib-ul-arz*. So was the case of *Rajoo* v. *Lalman* (6) where a co-sharer in a village, who had under the *wajib-ul-arz* a right to the pre-mortgage of a share in such village and who in anticipation of enforcing his right mortgaged such share to a "stranger" (that is, a person who had not a preferential right to the mortgage) was held by my brother Brodhurst and myself to have forfeited his right. The *wajib-ul-arz* upon that point was silent, and my learned brother and I applied the doctrine of the Muhammadan Law of pre-emption, holding that such doctrine was in accordance with justice, equity and good conscience.

(1) B L.R. Sup. Vol. p. 35. (2) 5 A. 110.
(3) N.W.P.H.C.R. F.B. Rul (1866-67) p. 128.
(4) 6 B.H.C.R. 263. (6) 5 A. 180.
(5) N.W.P.H.C.R. Rev. App. p. 30.

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Such also was the case of *Bhawani Prasad* v. *Damru* (1) where a co-sharer in a village, who had under the *wajib-ul-arz* a right of pre-emption in respect of the sale of a share, and who had joined a "stranger" (that is, a person who had not such right) with himself in suing [270] to enforce such right, was held by my brother Tyrrell and myself to have forfeited his right of pre-emption, and we held this with especial reference to the analogies of the Muhammadan law of pre-emption, holding that such law on the subject was consistent with justice, equity, and good conscience, and should be enforced in the absence of any provision to the contrary in the pre-emptive clause of the *wajib-ul-arz* whereupon the suit was based.

Then comes the case of *Kashi Nath* v. *Mukhta Prasad* (2) in which Mr. Justice Duthoit and I concurred in adopting the analogies of the Mahomedan law of pre-emption even to the extent of regulating the form and scope of a pre-emptive suit under the *wajib-ul-arz*, and my learned colleague in that case concurred with me in holding that the provisions of s. 214 of Code of Civil Procedure, must not (in the absence of specific provision therein as to suits by rival pre-emptors, and in view of the vast power which Courts of equity possess in framing their decrees) be read regardless of the analogies furnished by the Muhammadan Law of pre-emption. Again upon the same principle my brother Brodhurst and I in *Durga Prasad* v. *Munsi* (3) by again introducing the analogies of the Mahammadan law of pre-emption in a case founded on the pre-emptive clause of the *wajib-ul-arz*, concurred in holding that every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption conveyed by one bargain of sale to one stranger ; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right. And my learned brother and I carried the rule further in a similar case of *wajib-ul-arz* pre-emption, in *Hulási* v. *Sheo Prasad* (4) where we held that the prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption, by suing for a portion only of the property sold. Again the analogies of the rules of the Muhammadan law of pre-emption were applied to a case of *wajib-ul-arz* pre-emption by my brethren [271] Straight and Brodhurst in *Harjas* v. *Kanhya* (5) where, approving the doctrine laid down in *Bhawani Parshad* v. *Damru* (1) which I have already referred to, my learned brethren concurred in holding that if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the *whole* of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.

These cases are sufficient to show that in connection with various difficulties arising out of the enforcement of the right of pre-emption even when claimed upon the pre-emptive clause of the *wajib-ul-arz* and in the absence of any specific provision in such clause upon any particular point, my brethren Straight, Brodhurst, Tyrrell and myself have followed the analogies of the Muhammadan law of pre-emption, and have laid down rules of law which by dint of those analogies have appeared to us consistent with justice, equity and good conscience. I do not wish to multiply instances of reported or unreported cases beyond those which show that the principle of adopting the analogies of the Muhammadan law of pre-

(1) 5 A. 197. (2) 6 A. 370. (3) 6 A. 423. (4) 6 A. 455.
(5) 5 A. 118.

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emption has also received the approval of the present Chief Justice of this Court.

In respect of this matter, the first case I refer to is *Ram Prasad* v. *Abdul Karim* (1) where I had the honour of being associated with the learned Chief Justice on the Bench. That was a case in which the *wajib-ul-arz* of the village in its pre-emptive clause consisted of the following laconic terms. "*The custom of pre-emption* prevails according to the usage of the country."

The pre-emptive suit in that case was based upon this clause of the *wajib-ul-arz.*, and it was a suit between a Hindu pre-emptor and a Muhammadan purchaser defendant. To add to the difficulties of the case, there was no evidence to show the exact nature or scope of the custom of pre-emption prevailing in the district, nor was it proved that the plaintiff had satisfied the requirements of the Muhammadan law of pre-emption as to immediate and confir-[272]matory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time before suit willing to pay the actual contract-price. In a case of this character the Full Bench ruling of the majority of the Court in *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (2) could furnish no help, and the learned Chief Justice dealt with it adequately (and entirely with my concurrence) at page 516 of the printed report. I remember that in the course of the hearing of that case, the theory of the law of pre-emption originating in an evolution of the Hindu law doctrine relating to alienations by members of a joint undivided Hindu family could not be driven far enough to cover the case then before us, and whilst fully concurring with the learned Chief Justice I pointed out that the use of the word *shufa*, a technical Arabic expression of the Muhammadan law, in the pre-emptive clause of the *wazib-ul-arz*, necessarily implied that it referred to custom as regulated by the Muhammadan law of pre-emption. The learned Chief Justice and myself concurred in holding that in the absence of evidence of any special custom different from or not co-extensive with the Muhammadan law of pre-emption, that law must be applied to the case, and that the suit was to be governed thereby. It is needless to add that the rule thus laid down by Sir John Edge, the present Chief Justice of this Court, is in full accord with the principle of the ruling of Sir Barnes Peacock, C.J., in the Full Bench case of *Fakir Rawot* v. *Skeikh Imambaksh* (3) to which I have already so often referred. I have referred to this case in particular at such length, because it explains and affirms the important doctrine to which it relates, and upon which the learned Chief Justice has acted in the more recent case. One of them is the case of *Arjun Singh* v. *Sarfaraz Singh* (4) which happened to be an appeal under s. 10 of the Letters Patent from my own judgment sitting as a single Judge for deciding what have been termed "petty cases." The case was one of pre-emption based upon the pre-emptive clause of the *wazib-ul-arz* and it related to rival suits by rival pre-emptors, and in that case the learned Chief Justice [273] and my brother Brodhurst concurred in holding, following the analogies of the Muhammadan law of pre-emption, which my judgment necessarily involved, that the pre-emptor's claim was inadmissible, since to allow it would have the effect of defeating the rule of that law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt. Now, it is important to remark that the

(1) 9 A. 531.
(2) N.W.P.H.C.R.F.B. Rul. (1866-67) p. 128.
(3) B.L.R. Sup. Vol. p. 35.
(4) 10 A. 182.

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analogical importation of the rule of the Muhammadan law of pre-emption was necessitated in that case, because the pre-emptive clause of the *wajib-ul-arz* on which pre-emption was claimed, was silent upon that subject. The only other case upon this part of the argument to which I wish to refer is the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) which was decided by the learned Chief Justice and my brother Tyrrell, and besides being the latest case, I wish to dwell upon it as the most important authority for applying the rule that the analogies of the Muhammadan law of pre-emption must necessarily be respected in pre-emption suits not only out of choice but *ex necessitate rei*, as the only way of escaping the anomalies which the legal history of the administration of justice and jurisprudential notions would join in repudiating. In that case under one and the same deed a share in a village and a piece of land in the city of Moradabad were sold; and the plaintiff was entitled to pre-emption in respect of both the parcels so conveyed. In respect of the share in the village his right of pre-emption rested on the pre-emptive clause of the *wajib-ul-arz*, and in respect of the piece of land in the city his right of pre-emption arose out of the rule of Muhammadan law.

The suit was framed so as to seek enforcement of pre-emption in respect of both the properties conveyed by the sale, and there can be no doubt that such a suit was maintainable. It was however found that in respect of the piece of land in the city, the essential preliminaries of the immediate and confirmatory demands required by the Muhammadan law of pre-emption had not been duly performed, and that therefore the suit to that extent would necessarily fail, but in respect of the share in the village his right of pre-emption was not affected under the terms of the *wajib-ul-arz*.

[274] In this state of things the learned Chief Justice applied the principle of the rule that a pre-emptor, when he is entitled to pre-emption in respect of the entire subject of the sale, cannot break up the bargain of sale, and following the ratio his Lordship laid down the rule that where a pre-emptor has disqualified himself under the Muhammadan law from claiming a portion of the property sold, he is prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz*, though he is willing to pay the full purchase-money and to leave in the vendee's hands the portion to which he was disqualified under the Muhammadan law.

Now this ruling and the ratio upon which it proceeds recognises no less than four important principles of the Muhammadan law of pre-emption, and applies those principles to pre-emption claimed under the *wajib-ul-arz*, the terms of that document being silent upon the points to which those principles were applied. The first is that a pre-emptor cannot break up a bargain of sale unless the sale includes property in respect of which he has no right of pre-emption, as was the case before my brethren Straight and Brodhurst in *Harjas* v. *Kanhya* (2). The *second* principle is that the scope of a pre-emptive suit must comprehend the entire property to which the plaintiff's pre-emption extends, included in the bargain of sale. The *third* is that where a part of the pre-emptive claim fails, the whole must fail, because a decree such as the Muhammadan law of pre-emption recognises cannot be framed. The *fourth* is that the rule against a breaking up of a bargain of sale is so fundamental that a defect in that

(1) 11 A. 108.

(2) 7 A. 118.

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respect is not cured even by the pre-emptor's willingness to pay the entire price and leaving a portion of the property in the hands of the vendee.

Now, if I am right in thinking that this is the effect of the ruling, I must necessarily be right also in holding that that case is a strong and most emphatic authority, consistent as it is with earlier rulings, for saying that this Court has uniformly applied the analogies of the rule of the Muhammdan law of pre-emption even to cases where pre-emption was claimed under the terms of the *wajib-*[275]*ul-arz.* And now I wish to make a few observations to show that the adoption of such a course is a matter *ex necessitate rei.*

In the case of *Zamir Husain* v. *Daulat Ram* (1) I made certain observations, which I am afraid were *obiter dicta* in that case, but which cannot be *obiter* in this judgment, and I will therefore incorporate them here. Referring to the judgment of Sir Barnes Peacock in *Fakir Rawot* v. *Sheik Emambakhsh* (2) I went on to say—"I entirely concur in these conclusions, which appear to me to be in perfect accord with the rule of justice, equity, and good conscience upon which Courts of justice in India are bound to act in such cases. It is clear that it does not lie within the province of equity to create rules of substantive law, and the maxim *æquilas sequitur legem* necessarily implies the existence of rules of law which equity has to follow With the exception of certain provisions of the local Acts applicable to certain provinces of India like the Punjab and Oudh, the Legislature, whilst recognizing the existence of the right of pre-emption in India, has hardly provided any rules in regard to that right ; and even where the statute book notices the right, the rules laid down therein relate more to matters belonging to the remedy, *ad litis ordinationem* than to subjects appertaining to the merits, *ad litis decisionem.* The Muhammadan law is the only system prevalent in India which provides substantive rules relating to the right of pre-emption in a systematic form At least in Upper India the origin of the right of pre-emption is not traceable to any source other than Muhammadan jurisprudence which the Musalmans brought with them to this country. It may therefore be safely laid down that in all cases in which the right of pre-emption is claimed, the Courts in administering equity will, by analogy, follow the rules of the Muhammadan law of pre-emption, even in cases where the right is not claimed under that law, but under local usage or custom. The rules of customary pre-emption no doubt depend upon the custom itself, but where such custom is silent upon any particular point, the rules of the Muhammadan [276] law of pre-emption upon that point must, by analogy, be taken to be the rule of decision."

I still adhere to these views and adhere to them so firmly that if I could find it possible to accept the hypothesis that the right of pre-emption in India owes its origin and practical prevalence to the rule of Hindu Law as to joint undivided Hindu families, I would, notwithstanding all I have said here and before now from the Bench, unhesitatingly resort to the Hindu law of pre-emption for obtaining analogies such as the administration of the rule of justice, equity and good conscience which cases such as the present necessarily require. But as I have already said, no such Hindu law of pre-emption exists, and it would be in vain to resort to any of the authoritative texts of that law for guidance as to how such cases should be decided. Now, returning to the facts of this particular case, the pre-emptive clause of the *waijb-ul-arz* whether

(1) 5 A. 110.

(2) B.L.R. Sup. Vol. 35.

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regarded as stating a custom or formulating the terms of a compact, must be interpreted according to the well-recognized rules of interpretation, and among them I take it that one of the most important rules is that when technical terms are employed they are to be understood in such technical sense. I have already quoted the pre-emptive clause of the *wajib-ul-arz*, and do not find in it any technical term of Hindu law; but on the contrary the right and possessor of that right are described in technical terms of the Muhammadan law of pre-emption. I hold therefore that even as a pure matter of interpretation the custom or contract which the clause indicates, necessarily implies that upon points in respect of which it makes no specific provision to the contrary, the analogies of the Muhammadan law of pre-emption were intended by the parties to be imported, and that therefore in this case the rule of that law should govern on decision.

I might have ended my judgment here; but since in the course of the argument much doubt and difficulty was raised over the contention that the pre-emptive clause of the *wajib-ul-arz* was to be regarded as a contract for sale creating an obligation annexed to ownership of land such as those contemplated by the second para-[277]graph of s. 40 of the Transfer of Property Act (IV of 1882) read with the *illustration* to that section, I do not wish to end my judgment without dealing with this part of the argument. It was argued that the pre-emptive clause of the *wajib-ul-arz* being a contract for sale, the defendant's pre-emptive suit which resulted in the decree of 8th September, 1883, must be regarded as a decree for specific performance of a contract for sale, and that since the rule of equity requires that that which should have been done may be taken to have been done at the time when it should have been done, therefore the sale of his share by Radha Ballab on 4th January 1883, to Sri Ram and Chet Ram, plaintiffs-respondents, instead of the defendant-appellant, must be taken to be the date on which the title of ownership of the pre-empted share vested in the defendant-appellant Deokinandan, entitling him by dint of such ownership to the profits of the vended share for the interval between the date of the sale, namely, 4th January 1883, and the actual enforcement of the defendant-appellant's pre-emptive decree by formal possession, namely, 1st December 1883, to which profits are the subject-matter of the present litigation. It was also suggested as an alternative argument that even if ownership did not vest in the pre-emptor Deokinandan, defendant, at the date of the sale to plaintiffs, he could claim the profits as the measure of the damages for the breach of the pre-emptive covenant in the *wajib-ul-arz* and recover such damages from the plaintiffs respondents, and therefore the present suit should have failed.

Now, in order to deal with this hypothesis, it is in the first place necessary to ascertain what a contract for sale is under our law, and in the next place to point out, for the sake of further clearness, that upon the hypothesis of this part of the argument the pre-emptive clause of the *wajib-ul-arz* is to be taken as a contract for sale by Radha Ballab in favour of the defendant Deokinandan, who may analogically be called the would-be purchaser, the sale of 4th January, 1883 by Radha Ballab to the plaintiffs- respondents Sri Ram and Chet Ram must be regarded as a breach of the contract for sale made by Radha Ballab with the defendant Deokinandan, and [278] it is far from being unimportant to bear in mind that the plaintiffs-respondents were no parties to the contract, though they may be taken to have purchased with notice of the custom or covenant contained in the pre-emptive clause of the *wajib-ul-arz*.

Viewing the case in this manner, the question arises, what is a

contract for sale as distinguished from an actual sale? The answer is well furnished by the excellent definitions contained in s. 54 of the Transfer of Property Act (IV of 1882), which definitions formulate what I understand to have always been the law of British India:—"Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised," a definition which clearly shows that the contract is an *executed* contract transvesting ownership the moment such contract is completed.

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"*A contract for the sale* of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties." A definition which clearly shows that the contract is *executory* as distinguished from sale, which is an executed contract. And this excellent definition is followed by the significant enunciation of the rule that such a contract "*does not of itself create any interest in or charge on such property.*"

In a recent case I pointed out that this distinction is well-founded in jurisprudence, and what I wish to do now is to show that even in the English Courts of equity, where peculiarly technical distinctions exist between what are known as *legal estates* as distinguished from *equitable estates*, a contract for sale does not *per se* and before the actual conveyance by sale invest the obligee of such contract, namely, the would-be purchaser, with ownership of the property in respect of which he has entered into the contract for sale. In the next place I wish that in India the doctrine of legal estate as distinguishable from equitable estate has never been recognized as relating to conveyances among Hindus and Muhammadans in the *mufassil.*

Now dealing first with the exact doctrine of the Courts of equity in England on this point, I do not think anything is to be gained by multiplying authorities, and I do not think I can do better than [279] quote a passage from the judgment of Sir Thomas Plumer, M.R., in *Wall* v. *Bright* (1) which was considered and approved by the House of Lords in *Shaw* v. *Foster* (2). Referring to the English doctrine of equity that the vendor of a contract for sale becomes a trustee for the vendee, the Master of the Rolls went on to say:—

"The vendor is therefore not a mere trustee; he is in progress towards it, and finally becomes such when the *money is paid*, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate. There are these essential distinctions between a mere trustee and one who is made a trustee constructively by having entered into a contract to sell, and it would, therefore, be going too far to say that they are alike in all respects. The principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate without affecting the legal."

This passage was cited by Sir R. Palmer in his argument for the respondent in *Shaw* v. *Foster* (2), and the report shows (p. 330) that the rule thus laid down was regarded by Lord Cairns as the same as that laid down by Lord Justice Turner in *Sherwin* v. *Shakspear* (3), and Lord Chancellor Hatherley in delivering his judgment in the House of Lords, referring to the passage which I have quoted from the judgment of Plumer, M. R., went on to say:—

(1) 1 Jac. and W. 494-503. (2) L.R. 5 H.L. 321. (3) 5 De. G.M. & G. 517.

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"What was meant to be said by him in that case, and by me in the present, is this, that you must always take that coupled with this remark; that as regards the contract itself, which by a fiction of equity, as Sir Thomas Plumer calls it (for the words are his, and not mine), is considered to be complete when it ought to be complete you must not so use the words as to do away with the true intent of that fiction of equity, which supposes the *money to be paid away with one hand and the estate to be conveyed away with* [280] *the other*. In other words, you must not use that doctrine as a means of impeding the completion of the purchase."

The dictum of Plumer, M.R., in *Wall* v. *Bright* (1), and the manner in which that dictum was dealt with by the House of Lords in *Shaw* v. *Foster* (2) was the subject of much instructive consideration and almost criticism by Jessel, M R., in *Lysaght* v. *Edwards* (3), but it would be lengthening this judgment unnecessarily if I said anything more than saying that the principles upon which the judgment of Jessel, M R., proceeded were essentially based upon the English doctrine of real property which draws a distinction between what are called legal estates as distinguishable from equitable estates, with reference to the period of the transvesting of ownership by a contract for sale as distinguished from an *actual* conveyance by sale. All I need add is that notwithstanding this distinction, which is unknown to the Indian law (beyond the enforceability of a contract for sale against an actual purchaser with notice of the antecedent contract for sale such as s. 40 of the Transfer of Property Act (IV of 1882) contemplates), Jessel, M. R., referring to the vendor in a contract for sale, went on to say:—

"He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser, and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, *and his right to rents till the day for completion*, he appears to me to have no other rights."

Now supposing for a moment that the English law as to equitable estates as distinguished from legal estates was to be applied to pre-emptive clauses of the *wajib-ul-arz* two things occur to me as a necessary consequence of such a supposition. The first is that the moment such a clause is duly entered in the *wajib-ul-arz* no co-[281]sharer of a village can fell his trees or do any other act of ownership derogatory to the estate under the hypothesis started in the course of the argument, because by doing so he might be reducing the value of the estate which he has already contracted to sell to him who may or may not claim pre-emption under the pre-emptive clause of the *wajib-ul-arz*. The next matter which I wish to point out is that even under the English law relating to equitable estates depending much upon the doctrines of specific performance of contracts for sale, Jessel, M.R., took care in the judgment from which I have quoted and in the words which I have emphasized to point out that among the exceptions to which even the fiction of the English Courts of equity as to equitable estates was subject, was the exception that until the conveyance of sale is actually completed the holder of an obligation to a contract for sale is not entitled to the rents, but the vendor who entered into such a contract for sale.

I think it is needless to multiply authorities to maintain the pro-

(1) 1 Jac. and W, 494. (2) L.R. 5 H. L. 321. (3) L.R. 2 Ch. D. 499.

position that even under the English law of specific performance of the contract for sale, and in the absence of specific covenants in the contract itself to the contrary, and before actual payment of the price, the Courts of equity in England will not enforce such a contract in such a manner as to deprive the vendor, namely the obligor of a contract for sale, of the rents and profits of the estate during the interval between the contract for sale, and the actual performance of that contract whether by actual conveyance by sale or by decree of Court which enforces such performance. Whatever the practice or rules of procedure may be in the English Courts of equity, one thing is certain, that the manner in which such decrees should be enforced here is clearly prescribed in s. 260 of the Code of Civil Procedure (Act XIV of 1882) which I find it impossible to read in any sense inconsistent with s. 214 of the same enactment, which deals with decrees passed in suits to enforce the right of pre-emption in particular.

Then comes another point in this part of the case, and in considering it, I have asked myself the question: Does the law of British India recognize any distinction between equitable estates **[282]** and legal estates as understood in the English law in cases of the contract for sale and the rules of specific performance of such contract, when in breach of such a contract a *third* party has acquired an interest in the property whether by mortgage or by actual sale? My answer to the question is an emphatic negative, subject of course to the rule of justice, equity and good conscience upon which the second paragraph of s. 40 of the Transfer of Property Act (IV of 1882) is founded. And even in respect of that clause I hold, and I believe consistently with the principles of the Specific Relief Act (I of 1877) that when a contract for sale is made, ownership of the property to which such contract relates is not transferred to the obligee of such a contract before the actual completion of the sale and more especially in cases where he has not already paid the price.

This would lead me to the citation of Indian authorities (including some of the rulings of the Lords of the Privy Council in appeals from British India); but before I do so I think it is as well to finish what I have been saying as to the doctrines of equity in Courts in England on the subject of the estate which the obligee of a contract for sale acquires under such a contract. I will quote from a text book of authority, Dart on Vendors and Purchasers, and the 5th edition of that work at page 246 contains the following:—

"It is sometimes stated, in general terms, that by the contract, the purchaser becomes, in equity, the owner of the property; but 'this rule applies only as between the *parties to the contract*, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a *stranger to the contract*, enforce equities attaching to the property' —*per* Lord Cottenham, in *Tasker* v. *Small*, 3 M. and C. 70; and see *Wall* v. *Bright*, 1 Jac. & W. 501—nor, *semble*, can he as against the vendor enforce such equities, without at the same time praying or offering specific performance of the contract itself.—*Fox* v. *Purssell*, 3 Sma. &. G. 242."

[283] Then as to the crops and profits pending the completion of the actual sale, the same authority lays down the following as the law and equity as administered in England, as to the rights and obligations arising out of the contract for sale:—

"Up to the time fixed for completion, the vendor is, *in the absence of special stipulation*, entitled to the crops, or other ordinary profits of the

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land. He would not however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time *fixed for completion*, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice or get in crops, but the net profits will belong to the purchaser. Where the contract was for the purchase of an estate, including the growing-crops, to be completed and possession given on the 24th June, and the time was extended by consent till the 29th September, and the vendor in the interval sold the crops, the purchaser was held entitled, in equity, only to the crops growing at the time of the *actual completion*, and was left to his remedy (if any) at law for the recovery of the produce of the crops."

Now, even if the pre-emptive clause of the *wajib-ul-arz*, of which I have quoted the *ipsissima verba* at the outset, were to be regarded as a contract for sale, and even if I could hold that it was governed by the doctrine of the English Courts of equity as to equitable estates, I could not hold that with reference to the terms of the pre-emptive clause itself, time was of the essence of the contract, or that it created any specific rights depending upon the fixation of the date of the transfer, in favour of the defendant-respondent Deokinandan, any more than in favour of any other existent or non-existent co-sharer of the village who under the general pre-emptive clause might in future be entitled to the right of pre-emption. And I take it that in such a state of things the Courts of equity in England, in view of the circumstance that neither the actual would-be purchaser (that is, a possible pre-emptor) was mentioned in the covenant contained in the pre-emptive clause of the *wajib-ul-arz*, nor the so-called contract for [284] sale specified any specific period when such contract was to be completed by actual sale, in view also of the circumstance that the so-called contract for sale might have been enforced not only by Deokinandan, defendant-respondent, but also by other co-sharers of the village, by rival pre-emptive suits, would never hold that even the equitable estate of ownership vested in the defendant Deokinandan (pre-emptor) at the time when the pre-emptive clause of the *wajib-ul-arz* was framed and duly entered in that document. Nor can I hold upon the same supposition, that those Courts would award profits of the estate to the defendant-respondent Deokinandan (pre-emptor), for the period intervening between the date of the covenant in the pre-emptive clause of the *wajib-ul-arz* (taking under the hypothesis such clause to be a contract for sale) and the date when he actually enforced the covenant by paying up the price and acquiring possession under his pre-emptive decree. I have dwelt upon this matter at such length because the rule of equity in such cases was seriously doubted in the course of the argument, and also because it would be an unsound proposition to lay down that covenants contained in the pre-emptive clause of a *wajib-ul-arz* in these Provinces are to be regarded as governed by the peculiarly technical notions of the English Courts of equity as to equitable estates, or that the rules of those Courts as to the specific performance of contracts for sale are to be applied in their integrity to pre-emptive clauses of the *wajib-ul-arz*. I have said already more than once that the British Indian law recognises no such distinctions as those between equitable estates as distinguished from legal estates in England, for here the Courts take the actual date of a completed sale as the date of the ownership of the property passing from the vendor and transvesting in the vendee, entitling the latter to all the rights of ownership, including of course, the right to receive profits.

Now, before citing the case-law upon the subject, I may call

attention to the principle upon which s. 85 of the Contract Act (IX of 1872) is based, because in my opinion that principle is identical with the one on which the definition of the contract for sale [285] of immoveable property in s. 54 of the Transfer of Property Act (IV of 1882) is founded. And in this connection I think the best case to cite is *Dhondiba Krishnaji Patel* v. *Ram Chandra Bhagwat* (1) where Westropp, C.J., dealing with the case before him, does not appear even to have doubted that under the Indian law the transvesting of ownership does not take place by the mere fact of a contract for sale, for that learned Judge after referring to s. 85 of the Indian Contract Act (IX of 1872) goes on to say :—

"In the mufassil of this Presidency, where there has been a contract for sale of immoveable property and a suit by the vendee for specific performance of it, the decree for the specific performance of the contract (coupled with the payment of the purchase-money) pass and have been treated, so long as we can recollect, as sufficiently passing, *i.e.*, transferring the ownership to the vendee, and entitle him to the possession of the property."

Now, as to this case, I do not think it is necessary for to me to say anything as to how far I am prepared to accept that ruling notwithstanding the provisions of ss. 260, 261 and 262 of the Code of Civil Procedure (Act XIV of 1882) which apparently did not govern the case before the learned Chief Justice of Bombay, and I think it is enough to say that the case is a good authority for showing that the execution of a contract for sale is not a transvestive fact by itself in the sense of passing ownership from the obligor to the obligee of such a contract for sale, until such contract has taken effect either by actual conveyance by sale or under a decree of Court to that effect. And I think I may say in passing, that this is consistent with the doctrine of the Muhammadan law of pre-emption as to the investiture of the ownership in the pre-emptor of the pre-empted property, and the period at which such investiture of ownership is to be deemed as to have actually taken place. And I think I may further point out that under both the views of the aspects of the case, it is important, as Westropp, C. J., pointed out, that the actual payment of purchase-money was a matter of no insignificance.

[286] But there are cases of higher authority to show that a contract for sale, that is an agreement to transfer by sale, any property to any person or persons, is a merely executory contract, and dose not operate as a sale *in praesenti*. The Lords of the Privy Council had to deal with this question in *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Singh*(2) and the connected case against Bahoo Budhoo Singh (*vide* p. 305) where, after stating that the Sadar Court had held that "a complete title to the lands passed to the Rajah by virtue of the bill of sale on its execution, and (by a supposed application of the doctrines of English Courts of equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money, and was to be held accountable as a mortgagee in possession for the rents and profits," their Lordships, after doubting whether such doctrines were applicable to a transaction of this nature between Hindus or between a Hindu or a Mussulman, went on to say (*vide* pp. 306-7), "It is not easy to see what principle of an English Court of equity, supposing such to be properly applicable to the case, would support the conclusions to which the

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(1) 5 B. 554.

(2) 12 M.I.A. 275.

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Judges of the Sadar Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract, and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable."

Now, the principle thus laid down by their Lordships was approved by them again in *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (1), where repeating their observations in the earlier case they said :—

"The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency, [287] of which the purchaser may claim specific performance if he comes into Court showing that he has himself done all that he was bound to do."

I regard the two Privy Council rulings which I have cited, as distinct authority for holding, that at least in India, if not also in England, a contract for sale such as the covenant contained in the pre-emptive clause of the *wajib-ul-arz* in this case may possibly be taken to be, the investiture of ownership with its necessary legal incident of the right to receive profit does *not* take place till an actual conveyance by sale is made, or the decree of Court has been obtained awarding specific performance of the contract for sale under the law governing such matters. Before going any further I think I may say that the interpretation which I have thus placed upon the Privy Council rulings is consistent with the interpretation placed upon those rulings by Couch, C.J., in *Tara Soonduree Chowdhrain* v. *The Court of Wards* (2) where it was held that an agreement to sell did not by itself operate as a *persent* transfer of the property, and that upon the ground of such a transfer no suit of the nature of an action in ejectment could be maintained by the obligee of such a contract for sale, as against a person in possession. Yet, in the course of the argument in this case, it was seriously suggested that because this covenant contained in the pre-emptive clause of the *wajib-ul-arz* must be taken as a contract for sale, therefore upon the date when such covenant was entered in the *wajib ul-arz* the defendant, Deokinandan along with some others, acquired the same rights as those which belong to the obligee of a contract for sale as understood in the English Courts of equity, thus conveying upon that hypothesis, to the defendant-appellant Deokinandan rights similar to those which belong to the obligee of a contract for sale under the peculiarly technical notions of the English Courts of equity as to equitable estates vesting in a transferee before the actual conveyance is completed.

I think I have said enough to show, that such cannot be the case, either under the English rules of Equity Courts or under our [288] law, as to the transvesting of the title of ownership, including of course the question as to the right to profits.

But, barring the matters of legal principles as to which I have expressed my opinion, perhaps the most important point is for us to see what actually occurred in this case with reference to the enforcement of the right of pre-emption under the pre-emptive clause of the *wajib-ul-arz*. I have already pointed out that that clause used *technical terms* of the Muham-

(1) 11 B.L.R. 36. (2) 20 W.R. 446.

madan law of pre-emption for creating or recognizing the right which that clause intended to provide for. I have also said enough to show that in my opinion that clause must not be read obliviously of the terms of the Muhammadan law of pre-emption which it employs; and I now proceed to show that the defendant Deokinandan himself understood the clause in that sense when he instituted his suit against the plaintiffs-respondents resulting in the decree of 8th September 1883, under which he obtained formal possession as pre-emptor on the 1st December, 1883.

The suit which so terminated was not a suit framed so as to render it a suit for specific performance of a contract for sale as understood either in the English Courts of equity or understood by our own Courts. Nor, therefore, would the rules for specific performance of contracts for sale, whether as recognized in the Courts of equity in England or as recognized by our law in ss. 260, 261 and 262 of the Civil Procedure Code, apply to such a case except by careful analogy. The suit as framed and as understood all along by both the parties was an ordinary suit for pre-emption, and it was so dealt with by the Court which decided it by its decree of 8th September 1883. That decree imports nothing from the technical notions of the English equity Courts as to the specific performance of contract for sale, or as to the vesting of equitable estates, but is a decree simply framed, as it should have been, under s. 214 of the Code of Civil Procedure. The decree is to the effect that the plaintiff pre-emptor, (namely the defendant-appellant Deokinandan) was to obtain possession of the pre-emptive property on payment of a certain sum of money into Court and that on his failure, [289] his suit for pre-emption would stand dismissed with costs The decree, in keeping with the terms of the pre-emptive clause in the *wajib-ul-arz*, was totally silent as to the profits of the estate conveyed by Radha Ballab to Sri Ram and Chet Ram, plaintiffs-respondents, on the 10th January 1883, for the period intervening between the date of the sale and the actual enforcement of pre-emption by any pre-emptor, including the defendant-appellant Deokinandan, under a decree of Court. The decree said nothing as to such profits being regarded as *damages* recoverable by the pre-emptor for breach of the covenant contained in the pre-emptive clause of the *wajib-ul-arz*, nor did it say that in any case such a decree could ever be made in a pre-emptive suit such as the one which terminated in favour of Deokinandan defendant-appellant by the decree of 8th of September 1883.

Now, I hold that in determining the questions which arise in this case, even if we avoided the real points of importance which arise out of the argument before the Full Bench, we are bound in this case to abide by the terms of the decree of 8th September 1883, in favour of Deokinandan, defendant-appellant. No matter whether the decree such as that which might or might not upon terms of the pre-emptive clause of the *wajib-ul-arz* have been made, an order that the profits of the pre-empted estate between the date of the sale by Radha Ballab to the plaintiffs-respondents (*i.e.*, 4th January, 1883) and the date when the defendant-appellant obtained possession under his pre-emptive decree of 8th September, 1883, is absent, as it should have been. The decree whether rightly or wrongly dealt with that litigation *not* as a suit for specific performance of a contract to sell, but as a pre-emptive suit, and the decree is in my opinion final for purposes of determining the rights of the parties to this litigation, for that decree was a civil Court's decree and dealt with the rights of the parties as to the sale of 4th January 1883, in respect

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of which the pre-emptive right was claimed by the defendant-appellant Deokinandan.

I hold that that decree did not award the profits of the estate sold so as to enable the pre-emptor Deokinandan defendant-appellant [290] to claim them as his own for the period between the sale to the plaintiffs-respondents and the defendants enforcement of his pre-emptive decree by payment of the price and obtaining possession, which did not take place till the 1st of December 1883. For these reasons, which I am sorry have taken up so much time to explain, I hold that to this case the principles enunciated by me in *Deodat* v. *Ramautar* (1) apply, and that the rule of decision should be the same as that adopted by Roberts and Turner, JJ., in *Buldeo Pershad* v. *Mohun* (2) to which I have already referred as a case on all fours with the present case. It follows as a natural corollary that, with much respect, I am unable to accept the rule laid down by my brethren Straight and Tyrrell in the case of *Ajudhia* v. *Baldeo Singh* (3), which has indeed been the cause of this case being referred to the Full Bench.

Since the effect of the learned Chief Justice's order of the 3rd January 1888 is to refer the whole case to the Full Bench, my opinion is, that the order of the learned Judge of the lower appellate Court should be upheld, and that this appeal be dismissed; the costs to abide the result.

Appeal dismissed.

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12 A. 290 (P.C.)=17 I.A. 73=5 Sar. P.C.J. 521.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

HAYAT-UN-NISSA AND OTHERS (*Plaintiffs*) *v.* MUHAMMAD ALI KHAN (*Defendant*). [22nd, 23rd and 24th January and 8th February, 1890.]

Inheritance by Muhammadan law—Sunni and Shia rules of descent—Evidence as to deceased having been a Sunni.

A Muhammadan widow, who by birth was a Sunni, but whose deceased husband had been a Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

[291] The evidence relating to the period after her husband's death led to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia.

[R., 12 A. 229 (231).]

APPEAL from a decree (27th November, 1884) of the High Court, reversing a decree (4th December, 1882) of the Subordinate Judge of Moradabad.

The suit out of which this appeal arose was brought by the appellants against the respondent to obtain a declaratory decree that they were entitled, by the Imamia, or Shia, law to the estate of Wazir-un-nissa, who died in 1881. It was not disputed by the defendant that the plaintiffs were

(1) 8 A. 502. (2) N.W.P.H.C.R. 1866, Rev. Ap. p. 30. (3) 7 A. 674.

related to the deceased in the degree alleged by them and that, had Wazir-un-nissa been a Shia at her death, they would have been her next heirs, the Imamia, or Shia, law ordaining a succession different from that which prevailed among Sunnis.

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The High Court, reversing the finding of the first Court, decided that Wazir-un-nissa, when she died, was a Sunni. And the principal question on this appeal was whether the deceased at the time of her death was a Shia or a Sunni, points as to the admissibility of evidence being also involved. No question now remained as to a will, alleged by the plaint to have been made by the deceased, the first Court having found that it was not a genuine document, and that finding not having been appealed.

Karamat Ali, the common ancestor of the parties, had two sons, the younger of whom was the grandfather of Saiyid Muhammad Ali Khan, the defendant in this suit, who had obtained possession of the estate of Wazir-un-nissa, the granddaughter of the elder of Karamat's two sons. The right of Muhammad Ali to the inheritance, clear enough by Sunni law, was disputed by the daughters of the maternal uncle of Wazir-un-nissa, on the ground that the latter having belonged to the Shia sect, the Imamia law, which gave it to them, as nearer of kin to the deceased, was applicable.

The plaint alleged :—"Wazir-un-nissa, the parties and their families, have always professed the Shia religion, and therefore, according [292] to the Muhammadan law, the plaintiffs alone are entitled to the whole estate."

This was denied by the defendant, Muhammad Ali Khan, who alleged that in her family "the estate of a deceased member has, since old times, been divided according to the law prevailing among Sunnis ; and all the questions relating to the partition of the estate are settled according to the tenets of the latter."

The Subordinate Judge of Moradabad found that Wazir-un-nissa was a Shia ; that the plaintiffs were the daughters of her maternal uncle ; and that the whole estate was their inheritance, to no share of which was the defendant entitled.

On the defendant's appeal to the High Court, a Division Bench (PETHERAM, C.J., and MAHMOOD, J.) reversed that decision. They held that the law to be applied here was that of the widow at the time of her death ; that law was the Sunni law, and therefore the defendant was entitled to succeed.

In reference to an argument in favour of the plaintiffs, attempted to be made out of the use of the word "parties" in section 24 of the Bengal Civil Courts Acs (VI of 1871), the Chief Justice said—"This argument, against the devolution of property in favour of defendant, is based on the section of the Act which provides that the law of the 'parties' is to be administered by the Court. But if this were held to mean the parties to the suit, and one were a Shia and the other a Sunni, it would follow that two laws would have to be administered. To my mind the meaning of the section is clearly that the devolution of the property is to be in accordance with the law of the person leaving the property, without distinction being made between a case of intestacy and one in which a will may be in dispute."

Mr. *J.D. Mayne*, for the appellants, argued that the Shia law should be applied, because, upon the whole evidence, the High Court should have found as a fact that Wazir-un-nissa died a Shia. The High Court has been wrong in holding that the litigation carried on in 1805 indicated the application of Sunni law to the [293] parties, as distinguished from Shia

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law. And that Court had failed to give proper effect to admissions made in 1864, which should have led to the belief that all the parties to the proceedings in that year, as well as Farzand, the common ancestor, were Shias. The High Court had also erred in admitting certain documentary evidence, which, however, if admissible, had not shown that the family property devolved in any manner opposed to Shia law. Wazir-un-nissa's pilgrimage to Ajmir was commented on, and it was contended that neither this act, nor her having consulted a pir, were inconsistent with her having been a Shia, the evidence in another part showing that she had maintained Shia ceremonies.

Mr. *R. V. Doyne* and Mr. *R. C. Saunders*, for the respondent, argued that the judgment of the High Court had correctly maintained the devolution of the property of the deceased in accordance with Sunni law, on the evidence, the deceased was a member of the Sunni sect at the time of her death.

Mr. *J.D. Mayne* replied.

The following authorities and cases were referred to on both sides:—

Hamilton's Hedaya, Prelim. Discourse, Bailie's Digest of Muhammadan Law, Book VII, of faraiz, or inheritance. *Raja Didar Hosein* v. *Rani Zahuran Nissa* (1), *Mirza Kasim Ali* v. *Mirza Muhammad Hosein* (2).

Their Lordships' judgment was delivered by LORD WATSON :—

JUDGMENT.

LORD WATSON.—This suit relates to the immoveable estate of Wazir-un-nissa, a Muhammadan lady, who died childless and intestate on the 26th October 1881. Her father, Ghulam Ali, died without male issue in the year 1838, leaving three widows, two of whom were childless. Besides the deceased, whose succession is now in dispute, Ghulam Ali had another daughter, Kulsum, married to Iradat Ali, there being one son of their marriage, who died in minority; and eventually Iradat Ali became entitled, as heir of his minor son, to his wife's share of her father's estate. After the [294] death of Kulsum, Iradat Ali became the husband of Asmat-un-nissa one of the parties to this appeal.

The appellants, plaintiffs in the suit, are the female descendants of Basawan Ali, the maternal uncle of the deceased Wazir-un-nissa. The defendant in the suit, and respondent in this appeal, is Muhammad Ali Khan, a collateral relative of the deceased in the ascendant line. The common ancestor of the parties was Karamat Said, whose younger son was father of Daud Ali, the father of the respondent. The elder son of Karamat had two sons, Kasim, the father of Ghulam Ali already mentioned, and Farzand, who died without issue. The appellants are Muhammadans, and so were Karamat and all his descendants, and the case must be decided according to the principles of Muhammadan law. But the rules of that law applicable respectively to Shia and Sunni succession are different, and, therefore, the true heirs of Wazir-un-nissa can only be discovered by first ascertaining to which of these rival sects the deceased belonged at the time of her death. The appellants allege that she was a Shia, the respondent that she was a Sunni. It is admitted, that according to the Shia rule, the appellants are her legal heirs ; and it is also matter of admission that, according to the Sunni rule, the respondent, being a paternal ascendant tracing his connection with the deceased through an

(1) S.D.A., Sel. Ca. (1830), p. 29=2 M.I.A. 441.
(2) S.D.A., 5 Sel. Ca. (1832), p. 213.

unbroken line of males, is entitled to take her estate to the exclusion of the appellants, whose relation to her is through a female. Whether the deceased was, in point of fact, a Shia or a Sunni, is the single issue presented for decision.

Wazir-un-nissa was for many years the wife of Saiyid Hadji, a staunch member of the Shia sect, who died in the beginning of the year 1865. The case made by the appellants in their pleadings and evidence is to the effect that Karamat and all his descendants were Shias; that Wazir-un-nissa was the daughther of a Shia, and brought up as a Shia; that she married a husband of her own sect, and ever after his death continued to adhere to the faith and to practice the ceremonies of that sect. On the other hand, the case presented in the respondent's evidence is that Ghulam Ali and his **[295]** daughter Wazir-un-nissa were Sunnis; that she was under the necessity of suppressing her true faith during the subsistence of her marriage, and of conforming outwardly to that of her husband and that on his decease, she resumed observance of the rites peculiar to the Sunnisect, and lived and died a member of it.

Upon all points material to the issue thus raised, with one or two exceptions, the oral evidence adduced by the parties is in direct conflict. There is evidence of a more reliable character, which may be used to test the value of the oral testimony, but even that evidence is not wholly consistent. The *onus* of proving that the deceased was a Shia rests in the first instance with the appellants, because they are seeking to eject the respondent, who is in possession and has been duly registered as owner in the books of the revenue authorities. The Subordinate Judge gave decree for the appellants in terms of their plaint, but his decision was reversed on appeal by the High Court, consisting of Chief Justice Petheram and Mr. Justice Mahmood, who dismissed the suit with costs. In his elaborate opinion the Subordinate Judge rests his judgment mainly on the evidence of the appellants' witnesses. He refers by name to two of these, whom he describes as respectable and literate men, *viz.*, Mirza Abid Ali Beg, the Subordinate Judge of Mainpuri, and Maulvi Tafazzul Husain, the Pesh Imaum of the Shias, by whom prayers are read to the congregation. There can be no reason to doubt that the learned Judge rightly describes the character of these witnesses, but the first of them does not state to which sect Wazir-un-nissa belonged; and the second, although he was acquainted with her husband, did not know Wazir-un nissa, and his belief that she was a Shia was derived from "women of his brotherhood." On the other hand, the learned Judges of the High Court placed little reliance upon the statements of witnesses to the effect that the deceased was a Shia or a Sunni, being of opinion that certain facts, as to which there is no conflict of testimony, were sufficient, when taken in connection with the written evidence, to indicate that Wazir-un-nissa, although she appeared to be a Shia during her married life, was in reality a Sunni.

[296] The oral evidence is not only contradictory but vague, and it is obvious that the bulk of the witnesses speak with little knowledge or from hearsay. But one part of it which is not open to that observation, is unquestionably favourable to the respondent's case. It shows that, after her husband's death, Wazir-un-nissa made a journey to Ajmere, in order to visit a Sunni shrine, in the company of a 'pir,' or spiritual guide of the Sunni sect, whose office and its functions are unknown among the Shias. It also shows that on her way to Ajmere the deceased partook of the holy meals, which are intended for Sunnis, in the house of the *pir*.

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These facts were hardly disputed in the argument addressed to us for the appellants; but the Subordinate Judge, who is conversant with the religious customs of both sects, disposes of them by the observation that "thousands of Hindus and Muhammadans, both Shias and Sunnis, especially women who are not acquainted with their religion, visit the shrine without changing their creed." The learned Judge makes no reference to the length of the pilgrimage, or to the companionship in which it was made. Mr. Justice Mahmood, who has no less knowledge of Muhammadan sects, says that the fact of the deceased having availed herself of the pious services of a *pir* implies a state of things which has no existence among the Shias, and that "it may safely be asserted that, if Wazir-un-nissa had been a Shia, she would have never gone to Ajmere as she did." The opinions thus expressed by the learned Judges are not necessarily inconsistent. According to that of the Subordinate Judge, the deceased, being a Shia, might very well have visited the Ajmere shrine if she was a woman unacquainted with the distinctive tenets of her sect; but he does not go so far as to say that she would, even in that case, have resorted to the ministrations of a Sunni *pir*. In any aspect of them, the facts create an inference adverse to the appellants. The most favourable inference of which they are susceptible is, that Wazir-un-nissa, after her husband's death, did that which would naturally be expected of a devout Sunni; but that she might possibly have acted as she did, if she was an ignorant professor of Shia principles. On the other hand, if the opinion [297] of Mr. Justice Mahmood be taken as correct upon this point (and there is nothing in the opinion of the Subordinate Judge which necessarily controverts it), these facts show that at the time of her pilgrimage Wazir-un-nissa professed her adherence to the Sunni faith. There is also oral evidence, not so clear or reliable as that which relates to the Ajmere pilgrimage, but tending in the same direction, to the effect that the deceased, during her widowhood, regularly observed the eleventh day of each month, and held Maulud Sharif meetings in her house, these being admittedly Sunni rites.

The facts proved, with respect to the religious observances of the deceased Wazir-un-nissa after her husband's death, all support the conclusion that she was a Sunni at the time of her own decease. It is, however, possible that these circumstances might be explained away, and, at all events, the evidence in support of some of them, which is not without contradiction, would be materially weakened if it were established that her father was a Shia, in which case there would be a very strong presumption that she was educated in his faith and continued in it until her marriage. That fact, if proved, might cast upon the respondent the onus of showing that on the dissolution of her marriage, she left the Shia and joined the Sunni sect. It is therefore necessary to refer to the period antecedent to her widowhood, and to the evidence which bears upon it. The oral testimony as to the sect of her father, Ghulam Ali, is vague and directly conflicting; and the written evidence, which is not free from conflict, becomes the only reliable test of the truth of the statements made by witnesses on the one side or the other.

Their Lordships do not attach much weight to the litigations in 1805 and 1810 between Kasim, the paternal grandfather of Wazir-un-nissa, and his brother, Farzand, with respect to the succession to their father. In the first of them Kasim founded on a deed of gift from his father, which Farzand alleged to be invalid; and the question of its validity was referred by the Sadar Judge to the kazi and the muftis of his Court, who returned an

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opinion that the gift was bad. The judgment of the Court went in favour of Kasim, upon grounds which did not involve any question as to the validity [298] of the deed. In the second of them, which raised the same controversy, the Court merely repeated its former judgment. It is admitted that the opinion of the kazi and muftis was founded upon a principle peculiar to Sunni law, which denies effect to a gift of lands in which the shares of the donees are not specially defined. The respondent relies upon the terms of that opinion as evidencing the agreement of the parties to the suit that their father, Shah Ali, was a Sunni. But it must be kept in view that, at the date of these proceedings, the only course of succession recognised by the Native Courts was that of the Sunnis, which had been the general law of the country from the time when it first came under Muhammadan rule; and it is by no means certain that the Sadar Court, or litigants before it, always paid regard to, or understood their rights under the Shia law.

The observation just made does not applyto the state of the law in 1838, when the estate of Ghulam Ali was divided. Long before that time the supremacy of Sunni law had disappeared, and it must have been generally known that the Shia rule governed the succession of Shias, and the Sunni rule that of Sunnis. If Ghulam Ali was a Shia, his two childless widows had no right of inheritance, and were only entitled to maintenance from his estate. If he was a Sunni, then these widows were proper heirs, entitled to a share of his estate along with his other representatives, who were the same according to the rule of either sect. That Ghulam Ali's succession was treated by all parties interested as that of a Sunni, and that his childless widows received the shares which the Sunni law allots to them, appears to be established by the evidence. There is in process an attested copy of the official report made to the Collector of Revenue on the occasion of Ghulam Ali's death, in which it is stated that these two widows, along with the two daughters of the deceased, Kulsum and Wazir-un-nissa, and their mother, were his heirs-at-law. Vilayat Husain, a witness for the appellants, states that "Husaini Begam, wife of Ghulam Ali Khan, also received a twenty-fourth share out of her husband's property; other wives also received shares in the same proportion." Now it[299]is significant that Husaini was one of the childless wives, and that one twenty-fourth is the exact proportion to which each of the three widows was entitled in terms of Sunni law. That each of the widows got that share of her husband's estate is not contradicted, but two of the appellants' witnesses allege that they did not inherit it, and that it was given them in compromise of their claim of dower under the Shia law. On the face of it the statement is improbable, and it is disproved by the written evidence. There is a sale-deed, dated the 11th July 1877, by Kulsum, one of the childless widows, by which she made over to Shaikh Imam-ud-din her interest in property "held conjointly with Saiyid Iradat Ali, Abid Ali and Musammat Wazir-un-nissa, muafi holders, of which the 24th share belongs to me, as inherited from my husband, and up to this moment I am in possession thereof." That was followed in September 1877 by a pre-emption suit, at the instance of Iradat Ali, which he was entitled to bring, as in right of his minor son, on the ground that the interest sold by Kulsum came to her by inheritance from her husband, Ghulam Ali. There would have been no pretext for such a claim, if Kulsum had acquired her share by purchase, and not by inheritance. An ingenious argument was addressed to us by the appellant's Counsel for the purpose of showing that the deed of sale and the

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copy of plaint were not duly filed, and were not proved to be genuine; but both documents have been transmitted as part of the record in this appeal and were founded on, in the judgment of the High Court. Besides, the fact that such a suit was brought is elicited by the appellants themselves on cross-examination. In these circumstances it is impossible to reject the documents *quantum valeant* and it is obvious that, if the appellants meant to discredit them, Iradat Ali, who is husband of one of them ought to have been called as a witness.

The fact that Ghulam Ali's succession was, immediately after his decease, treated as that of a Sunni by all parties interested, who were also those most nearly connected with him by ties of blood or affinity, would be well nigh conclusive, if it stood alone, as to the sect of which he was a member; and, in the absence of other evidence, [300] would naturally lead to the conclusion that, before her marriage, Wazir-un-nissa was also a Sunni. But the appellants rely upon a judicial statement made on behalf of Wazir-un-nissa herself, in 1864, as evidencing the contrary. In the beginning of that year Daud Ali, the respondent's father, brought a suit for redemption of a mortgage granted by Farzand, his own cousin and paternal uncle of Ghulam Ali. In that suit Iradat Ali and the deceased Wazir-un-nissa intervened and claimed the right of reversion, on the ground that they, and not Daud Ali, were the legal heirs of the mortgagor, under the rules of the Imamia, which is the Shia sect. The rights of the parties claiming the reversion did not depend upon their own religion, but upon that of Farzand, the mortgagor; but in the written statement lodged for them it was broadly averred that not only Farzand, but all the parties to the suit, belonged to the Imamia sect. In answer to that averment Daud Ali stated that "although the parties belong to the Imamia sect, yet in the family of the parties the distribution of inheritance takes place according to the rules of the Sunni sect, and the same are still acted upon."

Had Daud Ali contented himself with the admission that Farzand was a Shia, his statement would have been sufficient for the purposes of the suit. But he does not dispute the allegation that the parties to the suit, including Wazir-un-nissa, were Shias. If the assertion made by the interveners had been deliberately sanctioned by Wazir-un-nissa, it would prove her to be a Shia at the time when it was made, and might also suggest the inference that she had been brought up as a member of the Shia sect. But there is no evidence to show that Wazir-un-nissa personally authorized the statement which was made on her behalf. The probability is that it was made by Iradat Ali, either at his own hand and for his own purposes, or with authority of her husband. The latter was alive at the time, and she was, outwardly at least, conforming to his religion, which was undoubtedly that of a Shia. It has already been noticed that Iradat Ali must be taken to have admitted, in 1838, against the interest of his family, which was virtually his own [301] interest, that Ghulam Ali was a Sunni and that begets a presumption that his daughter was also a Sunni until the time of her marriage. In the absence of any explanation from Iradat Ali, it cannot be assumed that the statement made in 1864 was meant to contradict that inference, or to go beyond the assertion that at the time when it was made Wazir-un-nissa was a Shia.

In these circumstances, their Lordships have come to the conclusion that the evinence applicable to the period preceding the death of her husband tends, though not strongly, to the inference that, from her birth until her marriage, Wazir-un-nissa was a Sunni. It is not matter of

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dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that, throughout her widowhood, she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife. They will accordingly humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellants must bear the costs of this appeal. *Appeal dismissed.*

Solicitors for the appellants : Messrs. *Robinson* aud *Turnbull.*
Solicitors for the respondent : Messrs. *Bird* and *Moore.*

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

MUHAMMAD INAYAT HUSAIN (*Plaintiff*) *v.* MUHAMMAD KARAMATULLAH (*Defendant*). [13th November, 1889.]

Lambardar and co-sharer—Suit by recorded co-sharer for profits—Claim for profits not collected in consequence of defendant's negligence or misconduct—Jamabandi—Evidence—Burden of proof—Act XII of 1881 (*N.W.P. Rent Act*), ss. 93 (*h*). 209—*Act I of* 1872 (*Evidence Act*), s. 106.

In a suit under s. 93 (*h*) of the N.W.P. Rent Act (XII of 1881), by a recorded co-sharer against a lambardar for his recorded share of the profits of a mahal, in [302] which the plaintiff seeks to make the defendant liable under s. 209 not only for the profits which the latter has actually collected, but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the quantum of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. S. 106 of the Evidence Act (I of 1872) does not apply to such a case.

So *held* by the Full Bench, Mahmood, J., dissenting.

Held by MAHMOOD, J., *contra*, that the production of the *jamabandi* by the plaintiff in a case where he claims his share of the profits according to the *jamabandi* and the lambardar-defendant pleads that the actual collections fell short of the *jamabandi*, established a *prima facie* presumption in favour of the plaintiff so as to throw upon the defendant, with reference to s. 106 of the Evidence Act, the necessity of proving circumstances which rendered it impossible for him to collect the profits according to the *jamabandi*.

[R., 4 O.C. 1.]

THE parties to this suit were co-sharers, and the defendant was the lambardar collecting the rents of the patti. The plaintiff as the owner of an one-third share of the patti, instituted this suit under s. 93 (*h*) of the N.W.P. Rent Act (XII of 1881), for the recovery of Rs. 457-7-0 not as his share of the profits for the years 1282 to 1291 Fasli.

The defendant pleaded (*inter alia*) that the plaintiff's share of the profits for the years in question amounted to Rs. 48-6-6.

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The Court of the first instance (Deputy Collector of Budaun) held that the plaintiff's share must be calculated according to the recorded rent-roll; that the defendant had failed to prove the arrears of rent; and that "no attempt was made by the defendant to recover the arrears." The Court further found that the plaintiff's share of the profits amounted to Rs. 418 6-10, and to that extent decreed the claim.

On appeal by the defendant, the lower appellate Court (District Judge of Shahjahanpur) held that "the actual recoveries and not the gross rental of the state must be made the basis of calculation of profits in view of the fact that the plaintiff has not discharged himself of the burden of proving that there was negligence or [303] dishonesty." The Court, applying this principle, held that the plaintiff was entitled only to a sum of Rs. 197-11-4, and modified the decree of the Court of first instance accordingly.

The plaintiff appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

BRODHURST and MAHMOOD, JJ.—Mr. *Abdul Majid*, on behalf of the appellant, contends that the lower appellate Court has wrongly cast the burden of proof as to the amount of rent on the plaintiff-appellant; that it did not lie on the plaintiff to prove the gross negligence or misconduct of the lambardar in collecting rents; and that in the present case, the lambardar having failed to explain why a portion of the rental was not realized, the decree of the first Court should have been allowed to stand. On the other hand, Pandit *Bihambhar Nath*, on behalf of the respondent, relies on a ruling of this Court in *Dhanak Singh* v. *Chain Sukh* (1) in which it was held that where a co-sharer claims a dividend on the full rental of the mahal, and the lambardar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar, in the sense of s. 209 of the N.W.P. Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. There can be no doubt that this ruling supports the respondent's case, but it is not altogether in accord with the principle of two other rulings of this Court—*Sees Ram* v. *Chait Ram* (2) and *Inaiya Hassain* v. *Ghulam Ali* (3), and the question is of sufficient importance to require consideration by a Full Bench. The question which we would refer to the Full Bench is :—

In a suit under s. 93 (*h*) of the Rent Act, in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardar pleads that the actual collections fell short of the rent-roll, on which party does the burden of proof lie in respect [304] of gross negligence or misconduct within the meaning of s. 209 of the Rent Act?

With these observations we direct that the case be submitted to the learned Chief Justice for orders as to our referring this question to the whole Court.

The point was accordingly referred to the Full Bench.

The parties were represented as before.

JUDGMENTS.

MAHMOOD, J.—The facts of the case are stated in the order of reference, dated 24th October 1887, passed by my brother Brodhurst

(1) 8 A. 61. (2) N.W.P.H.C.R. 1867, p. 266. (3) N.W.P.H.C.R. 1867, p. 276.

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and myself, whereby the case was referred to the learned Chief Justice for orders as to whether it was or was not to be considered by the whole Court. The learned Chief Justice by his order of the 28th October 1887, directed that the case was to be heard by the whole Court, and it is in consequence of that order that the question which the order of reference involves has to be considered by this Bench.

Now in making the order of reference, dated the 24th October 1887, my brother Brodhurst and I formulated the question in the following terms:—

"In a suit under 93 (*h*) of the Rent Act, in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardar pleads that the actual collections fell short of the rent-roll, on which party does the burden of proof lie in respect of gross negligence or misconduct within the meaning of s. 209 of the Rent Act?"

Now I understand this is the solitary question which has been referred to the Full Bench, and that it is not the whole case but this solitary question. In the referring order, reference is made to certain previous rulings of this Court which necessitated the reference, and because the rulings as contained in the order do still in my mind create a doubt, I think I should state the exact reasons why the question was sufficiently important to be considered by the Full Bench. There is no difference of opinion that in connection with such cases the rules of the statute law as contained in the Rent [305] Act are to be borne in mind and that such rules must in great measure affect the question of the *onus probandi* which the question referred to the Full Bench involves. In my opinion a system under which such powers as the lambardar possesses in the part of Her Majesty's territories called the North-Western Provinces, is governed not only by Act XII of 1881 but also by the Revenue Act (XIX of 1873), and it is on this account that I would read Act XII of 1881 as replacing Act XVIII of 1873, in conjunction with the provisions of Act XIX of 1873 which defines the revenue law applicable to these Provinces.

I regard both these statutes to be *in pari materia*, and they must therefore be read together for the purposes of ascertaining the exact difficulty which arises over the matter of procedure such as that contained in the exact question which my brother Brodhurst and myself referred in the order of 24th October 1887.

It would be taking up the time of the Bench for me to say more than this, that in India there are only four recognised systems under which the collection of revenue is made by Government, which keeps the peace for the revenue which it collects, and that as a part and parcel of the revenue system, the most important in the Presidency of Fort William in Bengal is the system of zemindari tenure which has been well recognized ever since the attainment of sovereign authority by the East India Company, as a system best calculated for the purpose of the collection of rent, the rent which is recovered from the tenant being utilized by him who collects it to pay the Government revenue which is due to the sovereign authority. This being so, the difficulty rests with the question, what is the position of a person such as the defendant in this case, Muhammad Karamatullah, in suits of such a character as that which is now before us for consideration?

I am of opinion that the authority of the lambardar, as it stands under the statute law in these Provinces, is so supreme that it might be almost partially to lower it to say that he is the agent for other

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co-sharers of the village. The lambardar is one of the co-sharers of a village in which more zemindars than himself exists, and as such he [306] is not a person appointed as agent by his co-sharers, but a person who has been appointed by dint of the statute law itself and by dint of the authority exercised by the revenue officers who have appointed the lambardar as a person having authority practically to oust all exercise of minute details of the rights of ownership which might otherwise be exercised by any co-sharer of the village. When I use the word "village" I mean the revenue unit or mahal, because under the ordinary zemindari system every mahal has a lambardar. There is enough in the Rent Act, especially in the sections which prevent a co-sharer from trying either to give a lease for any field or trying to recover any rent for any particular field from a tenant or even adopting any method for recovery of rent, to show that the lambardar is a creation of the statute, and as such holds powers which otherwise a corporation, such as an ordinary mahal or village consisting of more than one sharer, might practically have for the purpose of deciding whether such authority was or was not to be conferred upon any particular individual.

Now this being so, the exact question before us is what my brother Brodhurst and I meant by the use of the word "rent-roll." We meant the *jamabandi*, and it is in this sense that the question was to be understood. In these cases when difficulties arise between co-sharers such as the lambardar, because he is one, and other co-sharers who are ousted from exercising some powers of ownership, it is for us, in dealing with the question of the amount of profits, to consider upon whom would rest the burden of proof. The ruling which mainly gave rise to this reference is *Dhanak Singh* v. *Chain Sukh* (1) and, so far as I am concerned in making the reference, I would only say that the rule therein laid down would have been accepted by me *in toto* if it did not go further than what I am going to adopt.

Taking the matter now, the question stands thus : a co-sharer who is not the lambardar comes into Court with an allegation that according to the rent-roll of the village, namely, the *jamabandi*, in the preparation of which the defendant-lambardar has the greatest [307] share, the share of profits to which the plaintiff was entitled was, as in this case, much larger than what the lambardar-defendant with the power as to the collection of rent and as to the adopting of the process of law, in fact realized. Neither in the present case nor in any other case of this character should I lay down a rule that the rent-roll is to be accepted as a piece of conclusive evidence in the sense of its not being capable of being controverted, or any rule which would attach to it a value greater than that which it would deserve as an official paper prepared under the rules of the zemindari law to which I have referred.

In cases of this character it does, indeed, lie upon the plaintiff to show a *prima facie* case for the purpose of recovering more than what the lambardar as a recoginized or authorized agent has collected from the tenants. The question referred to us is, whether such *prima facie* evidence is or is not sufficient when the rent-roll, of which, I repeat again, the lambardar has the greatest share in preparation, has been produced. I am of opinion that the production of the rent-roll coupled with the allegation such as that made in this case, is sufficient in itself to furnish *prima facie* evidence to put it upon the defendant-lambardar to prove that the rent-roll could not be collected, because of certain circumstances

(1) 8 A. 61.

which he may allege. There may even be cases in which the profits are even greater than those included in the rent-roll, namely, the *jamabandi*.

I have been speaking of the *jamabandi* more than once as the rent-roll, and I will therefore only refer to the exact explanation of the term as contained at page 739 of the appendix to Field's notes on the Law of Evidence (4th edition).

That being so, the question stands, how under the present state of the Rent law the question of *onus probandi* has to be decided. One thing is perfectly clear from what I understand of the revenue system in these Provinces, namely, the zemindari system, and it is that there should be a lambardar; that the lambardar is not necessarily appointed by the unanimous concurrence of the co-sharers; that he is appointed by the revenue officer who is in charge of collecting Government revenue and who is in charge of seeing that [308] every co-sharer must receive his due share of the profits; and also that irrespective of the desire of the co-sharers, the lambardar must be appointed by dint of the authority which requires the collection of Government revenue. It is because the lambardar does possess this as the basis of his authority that he has statutory functions to discharge, and it is because of these functions that he is a person most capable of giving information as to what lay fallow; whether or not any particular tenant died or absconded; whether there were any special reasons why a canal or watercourse ceased to give water so as to induce the tenant to abscond; or whether there had been any draught; and other matters concerned with the non-collection of the amount due under the rent-roll. I am of opinion that this is the state of things which the zemindari law has necessitated, and that it is therefore necessary to refer to s. 106 of the Evidence Act (I of 1872) which says " when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

There is no doubt that in connection with matters such as those which have arisen in this case, the burden of proving that there were reasons for not collecting the rent-roll, that those reasons did not involve the possibility of being regarded as gross neglect or misconduct, and that therefore the rent-roll was not sufficiently collected to the proper amount mentioned therein, rests on him who has the best means of proving what he had to do. The case is very like the case of a plaintiff suing for redemption of mortgage upon the allegation that enough money had been realized from the mortgaged property for the purpose of paying off the mortgage by the defendant-mortgagee in possession. Upon whom is it to prove whether such money has been realized? I think I am within the case-law when I say that the Privy Council have ruled that in such a case the burden of proof lies upon the mortgagee to furnish accounts, and that in the absence of accounts the presumption is against the mortgagee for resisting the redemption. Now I wish to formulate the exact proposition which I lay down in this case, and it is best expressed in the following words :—

[309] In a suit under clause s. 93 (*h*) of the Rent Act (XII of 1881) in which a co-sharer claims his share of the profits according to the rent-roll, and the defendant-lambardar pleads that the actual collections fell short of the rent-roll, and states the reasons for such non-collection, the plaintiff proving the rent-roll has produced enough evidence to furnish a *prima facie* presumption in favour of the plaintiff, so as to throw upon the defendant the necessity of proving circumstances which rendered it impossible for him to collect the rents from the tenants according to the rent-roll.

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This statement of the rule which I lay down only modifies the rule in *Dhanak Singh* v. *Chain Sukh* (1), but is not in full discord with it. With these observations I would return the case to the Bench which made the reference.

STRAIGHT, J.—From the course the argument of this reference took at the hearing, it becomes unnecessary to discuss the question of with which party rests the burden of proof in a suit of the kind mentioned in the referring order, for Mr. *Abdul Majid*, the learned Counsel for the appellant-plaintiff, did not controvert the position that the onus was on his client in the first instance. The contention, however, was that the production and giving in evidence by his client of the *jamabandi* or recorded rent-roll was sufficient to throw upon the defendant-lambardar the obligation of showing that in respect of so much of the recorded rental as he had not collected he had not been guilty of "gross negligence or misconduct" within the meaning of s. 209 of the Rent Act. In support of this argument Mr. *Abdul Majid* maintained that the facts connected with the collections were specially within the knowledge of the defendant-lambardar, and he should therefore be required to give evidence of them. On the other side, Pandit *Bishambhar Nath* urged that according to all ordinary and well-recognised rules of evidence, a plaintiff who seeks to recover not only "his share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits which, through gross negligence or misconduct the lambardar has omitted to collect," [310] must give some proof of the gross negligence or misconduct beyond the mere production of the *jamabandi*, and he relied on a ruling of this Court in I. L. R., 8 All. 61.

I have no doubt Mr. *Abdul Majid* rightly conceded that the burden of proof rested in the first instance with his client, and the question that has now opened up, namely, what is enough *prima facie* evidence in cases of the kind mentioned in the referring order, which, stricly speaking, is not the point referred, is one upon which it is impossible to lay down any rule that will be applicable to all cases, other than in the general terms that where a co-sharer in a suit in the Revenue Court under s. 93 (*h*) of the Rent Act not only seeks to recover his share of the profits returned as collected from his lambardar, but the difference between that amount and the full recoded rental or any portion of such less deductions which he asserts has not been collected by reason of the gross neglience or misconduct of the lambardar-defendant, he must give evidence of the negligence or misconduct set up by him, the nature and *quantum* of which must depend upon the special circumstances of each case. It would be obviously impossible for me to sketch out for the guidance of the lower Courts the sort of proof for which they should look before fixing gross negligence or miconduct on a lambardar, but we may go so far as to say that the mere production by a plaintiff of the *jamabandi* or recorded rent-roll is not enough. Some remarks have been made by my brother Mahmood in the course of his judgment with regard to the application of s. 106 of the Evidence Act. He has suggested that under the principle enunciated in that section the lambardar has special means of knowledge, and he is the only person who has such means of knowledge, and that other co-sharers have no such opportunity. As far as I have been able to ascertain or am aware, every co-sharer has just as good opportunities of getting his information from the patwari of the village,

(1) 8 A. 61.

with whom really rests the knowledge of the matters that would go to establish such a case as would entitle a co-sharer to a decree under the Rent Act against the lambardar owing to gross negligence and misconduct. With this expression of opinion, I would return the case to the Division Bench for disposal.

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[311] EDGE, C.J.—I agree with my brother Straight that in a case in which it is sought to charge the lambardar with liability in respect of rents which have not been collected, the mere production and proof of the *jamabandi* is not sufficient *prima facie* evidence to shift on to the shoulders of the lambardar the *onus* of proof. I also agree with my brother Straight that it is impossible for us sitting here and dealing with the question in the abstract to lay down any fixed rules as to the quantum of evidence which must be given by a plaintiff in such a case in order to shift the burden of proof on to the shoulders of the lambardar. If the mere production of the *jamabandi* was sufficient evidence to cast the burden of proving that there was no neligence or misconduct of the lambardar on him, we would have to assume that in all cases it was possible to collect the *jamabandi* rent. From my experience of cases in this Court I know that frequently it is impossible to collect the *jamabandi* rent from many causes other than the misconduct and negligence of the lambardar in not collecting it. If the evidence suggested by my brother Mahmood is sufficient, I should like to know why the Court should presume that if the difference arises, it arises through the gross negligence or misconduct of the lambardar and not through the result of the season, the happening of any calamity, or any of the other many causes which might make it impossible to a lambardar, no matter how diligent he might be, to collect the full *jamabandi* rent. To read s. 209 of the Rent Act as my brother Mahmood reads it, would, it appears to me, be to act at variance with all the rules of evidence in cases in which liability is sought to be fixed upon a party on all alleged charge of gross negligence and misconduct of such party. If it was the intention of the Legislature in passing s. 209 of the Rent Act that a lambardar should be made liable on such proof only as that suggested by my brother. Mahmood, I should have expected that they would have expressed that intention in language such as this. They might have said that in a suit brought by a co-sharer against the lambardar for his share of the profits, the Court should presume that the lambardar could have collected all the rent shown in the *jamabandi*, and should pass a decree for the plaintiff's share against the lambardar, [312] unless the lambardar proved that, notwithstanding due diligence on his part, he was unable to collect the rent or some portion of it. But it is not this language or anything like this language that is used in s. 209. The lambardar no doubt in some cases may know or probably does know more accurately the reason why the rent has not been collected than a particular co-sharer does. But it would appear to me that if we were to apply s. 106 of the Evidence Act to this case, we would be applying the section in a way in which it was never intended. There are many cases which happen every day in which it might be said that the defendant knows better how to disprove negligence or misconduct than the plaintiff knows how to establish those charges as against him. But I never heard it suggested that in cases of this kind we should apply s. 106. It might be said that if you charge a man with fraud, the fact whether he committed the fraud or not is more within his knowledge than within that of the plaintiff. It might be said that if one employs a veterinary surgeon to attend a sick horse, and the horse died, and

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owner of the horse charged such veterinary surgeon with negligence in causing the death of the horse, it was more specially within the knowledge of the veterinary surgeon what the horse died of than it was within the knowledge of the plaintiff. In either of these cases s. 106 of the Evidence Act does not apply. I think it would be introducing a very dangerous principle by attempting to read s. 106 of the Evidence Act into s. 209 of the Rent Act where we find words in the Rent Act clear and specific, and we find that the Legislature does not use in s. 209 the language which would throw the whole burden upon the lambardar. When the Rent Act of 1881 was passed, and indeed when the Act of 1873, in which I think a clause similar to s. 209 of Act XII of 1881 occurred, was in force, there had already been a decision of this Court as to the liability of the lambardar. The effect of the decision was to hold that a lambardar is not liable for the rent which he without any wilful default on his part has never received, if he shows that he has done his duty in endeavouring to collect the same : *Inayat Husain* v. *Ghulam Ali* (1). I make this reference [313] because we must assume that when s. 209 as it appears in Act XII of 1881 was drafted, the framers of the section would have looked at that authority of this Court with regard to the liability of the lambardar, and could, if it was desired that that authority should be followed, have drafted s. 209 on the basis of the judgment in that case. For these reasons I am of opinion that the mere proof of the *Jamabandi* is not sufficient evidence to warrant a decree against the lambardar for the uncollected rents on the ground of misconduct or gross negligence.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur with the learned Chief Justice and my brother Straight.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

SETH CHAND MAL AND ANOTHER (*Decree-holders*) *v.* DURGA DEI AND OTHERS (*Judgment-debtors*). [12th December, 1889.]

Execution of decree—Question for Court executing decree—Appeal—Separate suit—Legal representative—Claim by legal representative to property as his own independently of deceased judgment-debtor—Jus tertii—Civil Procedure Code, ss. 234, 244 (c), 248, 278.

Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under s. 244 (c) of the Civil Procedure Code must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after the decree. Under the last paragraph of s. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment-debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale ; and the Court's order is subject to appeal but not to a separate suit under s. 283.

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(1) N.W.P.H.C.R. (1867), 276.

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Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, [314] although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit.

So *held* by the Full Bench, TYRRELL, J., dissenting.

Held by TYRRELL, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under s. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings.

Observations by STRAIGHT, J., as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable, in accordance with the same procedure as that adopted in regular suits.

Rajrup Singh v. *Ramgolam Roy* (1) approved. *Abdul Rahman* v. *Muhammad Yar* (2), *Awadh Kuari* v. *Raklu Tiwari* (3) overruled. *Bahori Lal* v. *Gauri Sahai* (4) distinguished.

[F., 21 A. 323 = 19 A.W.N. 104; 23 A. 263 = 21 A.W.N. 75; 28 A. 51 = A.W.N. (1905), 180; 23 M. 195 (200) (F.B.); A.W.N. (1906) 157 = 3 A.L.J. 370; 6 C.P.L.R. 4; R., 13 A. 290 = 11 A.W.N. 94; 16 A. 449 (458); 19 A. 543 = 17 A.W.N. 153; 28 A. 644 = A.W.N. (1906) 158 = 3 A.L.J. 565; 20 B. 385; 28 B. 125; 34 C. 642 (F.B.) = 11 C.W.N. 593 = 5 C.L.J. 491 = 2 M.L.T. 207; 17 M. 399; 1 O.C. Suppl. 11; 1 O.C. Suppl. 60; 16 C.P.L.R. 19; Disappr., 23 B. 237; D., 19 A. 480 = 17 A.W.N. 115; 21 A. 277 = 19 A.W.N. 64.]

THE facts of this reference to the Full Bench are stated in the judgment of Straight, J.

Mr. *G. E. A. Ross* and Pandit *Sundar Lal*, for the appellants.

The Hon. Pandit *Ajudhia Nath*, for the respondents.

JUDGMENTS.

STRAIGHT, J.—These two execution first appeals involve very important questions of procedure which have been the subject of many conflicting decisions, and upon which it is most desirable that there should be uniformity of authority for the guidance of the Courts below and for the information of those whose business it is to advise litigants within our jurisdiction. I therefore am constrained at some little length to enter into, *first*, the facts out of which these two appeals from orders before us have arisen, and *secondly* the authorities of which I have spoken, which, at any rate so far as this Court is concerned, are in conflict.

It appears that a decree was obtained against a person of the name of Ajudhia Prasad. It was a simple money decree, and, before [315] it could be executed, he died. In execution of the decree certain properties were attached and notice was issued to the respondent Musammat Durga Dei, in her own person and as guardian of her minor sons, to appear in the execution proceedings and show cause why the decree should not be executed against them in that character. For the purposes of the case, it may be taken that there were six properties attached. As to three of these properties, a particular title was set up by way of objection on the part of Musammat Durga Dei and her minor sons, and as to three of them, it was alleged that those properties had been acquired by her out of her own funds, wholly independent and apart from any inheritance from

(1) 16 C. 1. (2) 4 A. 190. (3) 6 A. 109. (4) 8 A. 626.

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her husband. In other words, the assertion of the objectors was :—These properties which you have attached are not the properties of the deceased judgment-debtor, but are our properties. In the course of these proceedings Musammat Durga Dei took no objection that she had been improperly brought into them as the representative of the deceased judgment-debtor nor was it suggested that her minor sons for whom she appeared as guardian had also been improperly cited. The matter went on. Inquiry, such as it was, was made and in the result the Subordinate Judge found that, as to three properties, the objection was a good one and should be sustained, and that they should be exempted from attachment; and as to the three other properties he held that the objections were not sustained, and that the attachment as to them should be maintained. It will thus be seen that there were two grounds of complaint in the order of the Subordinate Judge, one at the instance of the decree-holders, the other at the instance of the objectors, and this is the way in which we have before us two appeals. Appeal No. 93 of 1887 is the appeal by the decree-holders against the allowance of the objectors' objections. Appeal No. 140 of 1887 is the appeal by the objectors against the portions of their objections which were disallowed. The first appeal, No. 93 of 1887, when it was called on to be heard, was met by a preliminary objection on the part of Pandit *Audhia Nath*, an objection that, we are told, would have been repeated in the other appeal had it been called on, to the effect that the proceeding between the parties in the matter of objections [316] was one which must be regarded as an objection of a person other than the representative of a deceased judgment-debtor; that the order passed upon it must be regarded as an order passed in favour of, or against a person who has objected on his own account to the attachment of certain property in execution of a decree against the judgment-debtor; and the argument of the learned pleader in first appeal No. 93 of 1887, for the respondents was, that under the circumstances the order of the Subordinate Judge was a final order; that no appeal could be preferred from that order to this Court; and that the remedy of the decree-holders, if they had any, was a separate suit, for the purpose of having it declared that they were entitled to bring to sale those properties, in respect of which the objections of the respondents had succeeded. The same objection applies to the other appeal, and therefore we must deal with the two cases together, and dispose of them by a single judgment.

We have had the great advantage of hearing the matter most fully discussed by a very learned pleader, who has placed before us all the materials that will enable us, I hope, to come to what will be a unanimous decision upon this extremely vexed and difficult point. The question resolves itself into this :—Where a judgment-debtor dies after a decree passed against him, and his legal representatives are brought into execution proceedings to represent him in respect of the decree, are questions which they raise, as to property which they say does not belong to his assets in their hands and as such capable of being taken in execution of decree, questions in execution, which must be determined in the execution department under s. 244 of the Code of Civil Procedure between the decree-holder and them as representatives of the deceased judgment-debtor? Now, no doubt the principal authority to which reference has been made in dealing with the case is that of their Lordships of the Privy Council, to be found in *Chowdry Wahid Ali* v. *Musammat Jumaee* (1). It has, however

(1) 11 B.L.R. 149 = 18 W.R. 185.

rightly been said, I think, by Pandit *Ajudhia Nath*, for the respondents, that this ruling must not be carried beyond the scope of the precise question that was before their Lordships, namely, whether under Act XXIII of 1861, s. 2 [317] the word "*parties*" included their legal representatives, as to which their Lordships for the purpose of construing the section held that the term "*parties*" did include "legal representatives." But it must be remembered that this decision was antecedent to the passing of Act X of 1877, and long before the introduction in s. 244 of the Civil Procedure Code of the words "*their representatives*." A distinction has been attempted to be drawn between cases in which persons are made parties to a suit as representatives of the deceased defendant, and where they are brought in subsequent to decree, as legal representatives of the deceased judgment-debtor, and in the course of the argument much stress has been laid upon this circumstance. But upon most careful consideration I have come to the conclusion that no distinction can be drawn in this respect, having regard to the specific language of the Civil Procedure Code. No doubt the ruling of the learned Chief Justice and my brother Brodhurst in *Mulmantri* v. *Ashfak Ahmad* (1) and the ruling of my brother Mahmood and Mr. Justice Oldfield in *Ram Ghulam* v. *Hazar Kuar* (2) might be distinguished from the present case upon this ground. But I do not think that any such distinction can be properly drawn, and that, whether rightly or wrongly, those who framed the Civil Procedure Code must be taken to have intended to place a legal representative after the decree, upon the same footing as a legal representative before the decree, and that there is no distinction between their positions. As to the position of the legal representative before the decree, it could not be contended that in execution of decree all questions arising between him and the decree-holder could not be and must not be determined. It is not my business to say whether it is a good or right thing that representatives brought in after the decree should be treated upon the same footing, but in my opinion the law contemplates this, looking to the terms of the section. While referring to the rulings of this Court, I think it right to say that this opinion necessarily conflicts with that expressed by me in *Abdul Rahman* v. *Muhammad Yar* (3) and with that expressed by me in [318] conjunction with my brother Tyrrell in *Awadh Kuari* v. *Raktu Tiwari* (4).

Even if I had not been coerced to the opinion I have now arrived at by a consideration of all the later rulings, I should have thought it right, as the majority of this Court is in favour of the present view, to dissent from it in order to procure uniformity of decision upon the point. I think I have referred to all the rulings of this Court, with the exception of one to which I shall presently refer, and I now turn to the latest ruling of the Calcutta Court which may be said to contain a citation of all the authorities that are to be found upon the question. This is the case of *Rajrup Singh* v. *Ramgolam Roy* (5), and it is a decision by a learned Judge for whose opinion I entertain the highest respect, namely, Mr. Justice Wilson, and in the argument of the case before him and Mr. Justice Macpherson, those learned Judges had all the authorities, including the authorities of this Court. There a decree-holder had in execution of his decree made an application to bring to sale certain property. In the execution proceedings the sons of the deceased judgment-debtor, who had been brought in as legal representatives, objected that they

(1) 9 A. 605. (2) 7 A. 547. (3) 4 A. 190. (4) 6 A. 109. (5) 16 C. 1.

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had obtained the estate from their uncle, Mewa Lal, and not from their father, the judgment-debtor, and the Court dealing with the matter in a proceeding in execution of the decree, held that the disputed property should be exempted from sale. Subsequently the decree-holder assigned his interest to persons who were the plaintiffs in the suit, and they prayed in the suit for a declaration that the property in question was liable in the defendant's hands to be attached and sold to satisfy that decree. The Subordinate Judge held that s. 244 of the Civil Procedure Code was a bar to the suit, and he dismissed it. The District Judge reversed his decision and remanded the case for trial. There was an appeal to the High Court at Calcutta upon the ground that the order of the District Judge was wrong, and after fully considering all the rulings upon the point, Mr. Justice Wilson came to the conclusion that the order in the execution department, exempting the property from sale by auction, made between the decree-holder **[319]** on the one side and the legal representative of the judgment-debtor on the other, who said that it was their property obtained from some one other than the judgment-debtor, was made under s. 244 of the Civil Procedure Code, and consequently barred a separate suit, and that the latter suit could not be maintained.

Now it is obvious that is a direct authority in the present case. In the course of his judgment there Mr. Justice Wilson referred to the case of *Bahori Lal* v. *Gauri Sahai* (1). It is a ruling by my brother Mahmood and myself, and I have taken occasion to refresh my memory as to the circumstances of that case and also as to the discussion which took place between my brother Mahmood and myself before we delivered it. In the case of *Mungeshur Kuar* v. *Jamoona Prashad* (2) Mr. Justice Tottenham in his judgment has pointed out correctly the distinction that is to be drawn between that case, with which my brother Mahmood and I were concerned, and other cases on the subject. The facts of that case were very peculiar, and there was a technical distinction to be drawn in it, and the other cases. I have stated what appear to me to be the important and material rulings upon the question, and if I had to declare in explicit terms the reasoning by which my judgment has been arrived at, I should repeat *verbatim* the language used by Mr. Justice Wilson in *Rajrup Singh* v. *Ramgolam Roy* (3).

Now it seems to me as I said before, that we have got to look to ss. 234, 244 and 248 of the Civil Procedure Code. Under s. 244 what is it that the statute declares? It says:—"The following questions shall be determined by order of the Court executing a decree and not by separate suit." Now it could never be contended for a moment that if any one of the "following questions" does arise between the parties mentioned in the section and is determined, it is not a positive prohibition to the maintenance of a separate suit. Let us then see what is mentioned in the latter portion of the section, particularly clause (*c*). It runs thus:— "Any other questions arising between the parties to the suit in which the decree was **[320]** passed, or their representatives, and in relating to the execution, discharge or satisfaction of the decree."

Now although questions may have arisen as to the extent to which the term "*representative*" in clause (*c*) was extended, I can have no doubt that it contemplates and provides for cases arising in execution between either the representatives of the deceased defendant who become judgment-debtors themselves, or the representatives of the deaceased jugdment-debtors

(1) 8 A. 626. (2) 4 C. 603. (3) 16 C. 1.

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who have been brought into the execution proceedings subsequent to the decree and subsequent to his death before execution has been taken up. Therefore we have it that the Court executing the decree must determine questions in execution between the decree-holder on the one side and the representatives of the deceased judgment-debtor on the other.

If we look to s. 234 of the Code we shall ascertain what is the scope of the proceedings that may be taken as between the decree-holder on the one side and the representatives of the deceased judgment-debtor on the other. It says :—" The holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased," and as the learned Chief Justice pointed out, under s. 248 of the Civil Procedure Code, when he desires to take these steps he may apply for notice to issue to such person unless he has been cited in former proceedings, and when such notice is issued such person may appear, and if no cause is shown the decree shall be executed. If he does appear and show good cause, he will be entitled to the consideration of the questions provided in the last paragraph of s. 234. The representative of the deceased judgment-debtor may say, " I have no assets." The Court will then proceed to try whether he has any assets. Again taking a case in which attachment has been issued against property and the representative of the deceased judgment-debtor is brought in the execution proceedings and the representative says :—" The property attached is my property and not the property of the deceased judgment-debtor." Now under the last paragraph of s. 234 a Court may in my opinion proceed to try and determine, aye or no, is the property attached in the part of the estate of the deceased judg-[321]ment-debtor which has come to his hands. The learned Pandit has urged upon us that is only *pro tanto* to decide the question, and that it is not a question within s. 244 such as would be a final determination to bar a subsequent suit. I think the Legislature can never have intended this. I think it intended that the task of finding out whether there was property in the hands of the representative of the deceased judgment-debtor was to be left to the Court executing the decree, and that it meant that the Court executing the decree was to find this fact for the purpose of execution for bringing the property to sale and giving the-auction-purchaser a good title under the sale ; and it could not have been intended, so far as the auction-purchaser was concerned, to leave him open to a subsequent suit at the instance of the representative of the deceased judgment-debtor to have it decided that what in execution had been found to be part of the estate of the deceased judgment-debtor was not a part, and that what was brought to sale had been improperly brought to save. I have already said that s. 244 gives power to determine questions arising between the decree-holder and the representative of the deceased judgment-debtor, and I think I have pointed out that under the terms of s. 234 arises the very question as to whether a property which had come to the hands of the representative of the deceased judgment-debtor was of the assets of the deceased judgment-debtor or not. It is also to be noticed that the Court has to make the inquiry to ascertain to what extent the assets that have come to the hands of the representative have not been disposed of.

Unless it has full power in the matter to make such inquiry under s. 244 as between the decree-holder and the representative of the deceased judgment-debtor which should have force and binding effect, it seems to me that s. 244 would be shorn of much of its usefulness. My view, therefore, after serious consideration, is that the present is a case in which

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there could have been in the execution proceeding which was before the Court below a proper determination of the question arising between the decree-holder on the one side and the representative of the deceased judgment-debtor on the [322] other, of the rights of the one party and the other; that is to say, of the right of the decree-holder to bring the property to sale and the right of the representative of the deceased judgment-debtor to hold on to the property, as his own property.

I do not think, when the representative of the deceased judgment-debtor says, in regard to the property which he contends is not the property of the deceased judgment-debtor but is his property, that it can rightly be said that he thereby sets up a *jus tertii*. I think he can only do that as trustee or as representing some character wholly separate from his personal and individual character.

I have only one more word to add. I have always felt and do feel the hardship to which persons may be subjected by this view of the section. But this hardship is principally due to the mode in which execution proceedings are carried out. We are well aware of the fact that they are not conducted by the Courts below with the same care and the same attention to the taking of evidence and in many other respects as is pursued in the trial of regular suits. The law, however, does not contemplate that it should be so. The Courts below would do well to understand that, in these execution proceedings, and more particularly in proceedings such as these which involve the determination of the rights of parties as they arise in proceedings where the legal representative of the deceased judgment-debtor has been brought in, greater care, attention and time should be devoted to them. I wish emphatically to say, having taken this view of the sections of the Code and the authorities I have, that in all these matters the Courts executing decrees and having to try such important questions should do so with the greatest care and with regard to the procedure, so far as it is applicable, that is adopted in deciding questions arising between parties in original suits.

The learned Chief Justice has been good enough to allow me to deliver my judgment in the case first, because the point is one I have felt much anxiety about and interest in for a considerable time, I have long felt much reason to doubt the correctness of [323] the rulings in *Abdul Rahman* v. *Muhammad Yar* (1) and *Awadh Kuari* v. *Raktu Tiwari* (2), and I have now come to the conclusion that they were wrong. With these remarks I would direct that the appeals be returned to the Division Bench for disposal.

EDGE, C. J.—It appears to me that the intention of the Legislature as regards the question before us may be gathered from ss. 234 and 248 of the Code of Civil Procedure. S. 234 provides that when the judgment-debtor dies before the decree has been fully executed, the decree-holder may apply to the Court which passed it to execute it against the legal representative of the deceased, and that "such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit." It is obvious to my mind that the meaning of the section is that the Court executing the decree would have to decide in such a case whether or not any and what

(1) 4 A. 190. (2) 6 A. 109.

property which was of the deceased judgment-debtor in his lifetime came to the hands of the representative, and further, if any such property came to his hands and was disposed of by him, whether or not it had been duly disposed of.

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In order to decide those questions the Court executing the decree would necessarily have to ascertain and decide whether any and what portion of the property against which execution is sought or in respect of the dealings with which by the representative is sought to be made liable in execution, was property which was of the judgment-debtor in his lifetime or was property which was exclusively the property of the representative and had not come to him from the judgment-debtor. I wish to say further, although I am repeating what my brother Straight has already said, that in cases of this kind, I have now no doubt, although I have had doubts upon the question, that we cannot regard a case in which the representative merely asserts that the property against which [324] execution is desired or in respect of his dealings with which it is sought to make him liable in execution is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as the representative of the deceased judgment-debtor, as a case in which he is setting up *justertii*. Where, however, the representative of the judgment-debtor opposes execution against any particular property on the ground that although such property is vested in him, it is vested in him not beneficially by reason of his being the representative of the deceased judgment-debtor but as trustee or as executor of some one else, then that is a case in which a *jus tertii* is set up, and either party in such a case may have that question of *jus tertii* determined in a separate suit. I have considered the section of the Code and the cases to which my brother Straight has referred, and I have come to the same conclusion as that arrived at by him.

BRODHURST, J.—I concur.

TYRRELL, J.—I regret that I cannot concur. It seems to me that I should distinguish between the case, on the one hand, of a legal representative of a deceased party to a decree, who contests a question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, and the case, on the other hand, of the same person, when he appears not in his capacity of legal representative, but in his personal character, independent of the suit and decree, and prefers a claim under s. 278 of the Code of Civil Procedure. It is true that this latter claim "is to be heared in all respects as if the claimant or objector was a party to the suit," and in this respect the procedure for the decision of a question raised under s. 244 and under s. 278 of the Code is identical. In both alike the person resisting execution is to be treated by the Court "as if he was a party to the suit." But in the former case—I mean that of a legal representative—the question at issue is radically different from the question to be tried under s. 278. Under s. 244 the legal representative can only, I suppose, raise such objections as would be heard from the mouth of the party he represents; as for example, an [325] objection that the decree should not be executed in some particular way against the estate of the deceased judgment-debtor. In the other case the objection is that the decree has no operation against certain property purporting to be attached in execution of the decree, for reasons personal to the objector and having no reference to or relevance in connection with the party whom the objector represents in the execution case.

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In other words, the objection of s. 278 is in no way made for or in representation of any of the parties to the suit in which the decree was passed or on behalf of the estate of a deceased party. On the contrary, it is raised in an interest antagonistic to all the parties and to their representatives as such. It is made in defence of the objector's own estate against claims enforcible only against the estate which he happens to be representing. In this view I cannot see why a person who would unquestionably be entitled to the reliefs and remedies of s. 278 and the connected sections if he were a stranger to the suit, should be debarred from them by the mere accident that he is a legal representative in the execution stage of a suit. It is of course for the public interest that there should be "*finis litium*," but I do not think that this object is happily secured by trying C's title to X in the execution proceedings of a suit between A and B about Y, more especially when it is remembered that the decision binds no one but the person least concerned, that is to say, the decree-holder, the field of strife about the matter in issue being otherwise left open to all the world beside.

I would therefore reply that the order before us was made unde s. 280 of the Code of Civil Procedure, and is unappealable.

MAHMOOD, J.—I have arrived at the same conclusions as the learned Chief Justice and my brothers Straight and Bordhurst, because I understand the solitary question before the Bench is whether or not an appeal lies in this case. I understand also, with reference to the order by which the case is before us in the Full Bench, that we are not seized of the whole case. Limiting my judgment thus, all I wish to say will be directed to the question put by the order of reference. I agree in so much of what has [326] fallen from my brother Straight in the case that it would be unnecessary to go further and add anything to what has been said as to the peculiar and special circumstances of the case of *Behari Lal* v. *Gauri Sahai* (1) in which I had the honour of being associated with my learned brother and in which I gave concurrence to his judgment after expressing doubts, as my judgment in the case shows, but which doubts I did not allow to go the length of my dissenting from him, because of the peculiar circumstances of the case. In delivering my judgment in the case, however, I pointed out what at that time was the state of the case-law upon the subject, namely, regarding the proposition which was then before us, as a matter of much doubt, and to those cases may be added the recent rulings of the Calcutta High Court in *Roop Lal Das* v. *Bekani Meah* (2), *Rajrup Singh* v. *Ramgolam Roy* (3), and *Mungeshur Kuar* v. *Jamoona Prashad* (4).

In view of all these rulings, and considering the question that is now before us, I am desirous not to enter into a detailed consideration of the various rulings which have been cited, but I am desirous to lay down what I think is wholly consistent with the judgment delivered by my brother Straight and adopted by the learned Chief Justice and my brother Brodhurst; namely, that the turning point of the question whether or not an appeal lies in this case is the interpretation of s. 244 of the Civil Procedure Code, and the exact answer to be given with reference to the terms of the first part of the section. Now this, again, of course, takes us back to the provisions of s. 234 of the Civil Procedure Code, and to the provisions of s. 248 of the Code, namely, how far the representative of the deceased judgment-debtor, whether such decease took place before or after the decree, is to be taken as representing the estate for the purpose of

(1) 8 A. 626. (2) 15 C. 437. (3) 16 C. 1. (4) 4 C. 603.

executing the decree, irrespective of any further questions, being raised in a regular suit. In the case of *Nath Mal Das* v. *Tajammul Husain* (1) I gave expression to the view that where a person was impleaded as a defendant and the decree actually passed **[327]** against him, which decree was actually sought to be executed against him, then the judgment-debtor could come in with the plea that the rights which could possibly be affected by the decree or be brought to sale under such decree were the rights which did not extend to his, the judgment-debtor's capacity of being the holder of an independent *wakf* of trust estate; in other words, I held that a distinction was to be drawn between the capacity of the judgment-debtor as representing his own interest and his capacity as representing an interest which did not vest in him, and which I call a legal *jus tertii*. The ruling, however, will not help the present objection, because here there is no such plea. The plea that is taken is that the judgment-debtor, as a party to the suit, might by dint of a personal objection raise the question that the right to any particular property which is sought to be brought under the operation of the decree of Court, has devolved or come otherwise to the judgment-debtor by a title irrespective of that which belonged to him as judgment-debtor, and therefore, the judgment-debtor is entitled in this bifurcated capacity to raise the objection such as might be raised and dealt with under s. 278 of the Code. I think this contention, to use an ordinary colloquial phrase of the English language, would involve the achievement of second innings, namely, that whilst the objections might be raised if the legal representative of the deceased judgment-debtor acted under s. 244 and dealt with under s. 244, similar matters might be re-agitated thereafter in a regular suit.

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Now I hold that as a sound principle of adjudication the law does not intend that litigation should be prolonged or that there should be no end to litigation. It seems to me that as soon as a person is impleaded in a suit and he objects against the execution of the decree, he is bound so long as he claims in respect of the property, against which execution is sought, a right no other than that which vests in him in his own person, to raise those objections in the execution of decree, and that therefore the matter would be governed by s. 244 and would, as in this case, give a right of appeal, because such questions could not be agitated by a regular suit. I only wish to add that this view is wholly consistent with the **[328]** judgment of the learned Chief Justice and my brother Brodhurst in *Mulamantri* v. *Ashfak Ahmad* (2), and that judgment therefore has my concurrence.

(1) 7 A. 36.

(2) 9 A. 605.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

TULSHI RAM AND ANOTHER (*Defendants*) *v.* BEHARI LAL AND ANOTHER (*Plaintiffs*). [12th December, 1889].

Hindu Law—Benares school—Mitakshara—Adoption—Power of Hindu widow to adopt—Necessity of express authority of deceased husband—Maxim, quod fieri non debuit, factum valet.

Held by the Full Bench that, according to the Benares school of Hindu law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void and that the maxim, *quod fieri non debuit, factum valet*, is inapplicable to such an adoption.

[F., 1 O.C. 30; R., 14 A. 67 (F.B.); 17 A. 294=15 A.W.N. 167.]

THE relative positions of the parties in this case are indicated in the following genealogical table:—

Mohan Lal.

Bihari, plaintiff. — Shankar. — Jhamman. — Bhagwan.

Shankar: Musammat Lareti, widow, defendant.

Jhamman: Chatarbhuj.

Bhagwan: Ramsarup, plaintiff.

Chatarbhuj: Tulsi, defendant. — Narain Das, dead.

It was admitted that the property in suit belonged to Mohan Lal, upon whose death sometime in 1879, the property was inherited by his surviving sons and his grandson Ramsarup (plaintiff) as representing his father Bhagwan, who had predeceased Mohan Lal. Subsequently Shankar died without issue, leaving a widow, Musammat Lareti (defendant), whose name was recorded in respect of her husband's share.

On the 16th of January, 1886, the widow, Musammat Lareti (defendant), executed a deed purporting to adopt Tulsi (defendant) [329] the grandson of Jhamman; and the latter on the same day executed an *ikrarnama*, agreeing to pay Rs. 100 annually from this estate to one Ram Sahai, who was the son of the widow's brother. The deed of adoption was registered on the 10th of February, 1886, and the present suit was instituted on the 15th of March, 1886, by Bihari Lal and Ramsarup with the object of setting aside the adoption of Tulsi by Musammat Lareti, both of whom were impleaded as defendants in the cause, as also the abovementioned Jhamman.

The allegations in the plaint were that the deed of adoption of Tulsi, executed by Musammat Lareti (defendant) on the 16th of January, 1886, was the result of fraud and collusion between her and Tulsi's grandfather, Jhamman; that the ceremonies of adoption had not been gone through; that Shankar, the husband of Musammat Lareti, had neither adopted Tulsi nor had he given any permission to the widow to adopt anyone; and that even if he had done so the adoption was invalid, as Tulsi was the only son of his natural parents at the time of the adoption.

The suit was resisted upon the ground that Musammat Lareti's husband was separate from his brothers: that she was therefore in

separate possession of that share as his widow; that by a testament she had been authorised by her husband to make an adoption "if a second son be born to Chatarbhuj Sahai, and to pay Rs. 100 annually to Ram Sahai; that Chatarbhuj Sahai's son named Narain Das died, and when the other son named Tulsi was born by another wife, the defendant adopted him, and that as the *wajib-ul-arz* gives the females of this family the power to adopt, the adoption is valid."

It was admitted that the parties were governed by the Benares or Mitakhshara school of Hindu law.

The Court of first instance (Subordinate Judge of Mainpuri) held that the property was undivided as understood in the Hindu law; that "there is no proof of the fact that the husband gave permission to adopt;" that the transactions of 16th January, 1888 were the result of collusion between the widow, Musammat Lareti, and Jhamman; the adopted son "Tulsi Ram is the only son of his [330] father, and it is false that there was any other son who is now dead; that it is not fully proved that all the adoption ceremonies were gone through;" that the entry in the *wajib-ul-arz* could not abrogate the Hindu law; and that even in the case of *Sudras* the permission of the husband was an essential condition precedent to the validity of adoption by the widow after his death. Upon these grounds the first Court decreed the claim, setting aside the adoption.

Upon appeal the lower appellate Court (District Judge of Mainpuri) agreeing with the first Court, held (without deciding whether the property was joint or divided) that no permission was ever given by Shankar to his widow, Musammat Lareti, to make a posthumous adoption; that such permission was absolutely necessary to validate such an adoption as that of Tulsi; that the entry in the *wajib-ul-arz*, "as it does not state expressly that the widows can adopt *without permission*, should be construed in accordance with the ordinary rule of Hindu law by supplying the words *if authorised by the husband*."

Upon these grounds, the learned Judge, without considering the question of collusion and fraud, dismissed the appeal. The defendants appealed to the High Court on the following grounds:—

"1. That the permission of the husband was not necessary to make the adoption sought to be set aside.

"2. That a good and valid authority to adopt a son has been established.

"3 That in any case the adoption cannot be absolutely void, and the plaintiffs have got no cause of action to maintain the present suit."

The appeal came for hearing before Straight and Mahmood, JJ., who made the following order of reference to the Full Bench:—

STRAIGHT, J.—There can be no doubt that the two questions raised in this appeal are of very grave importance, and their decision involves very considerable difficulty. These two questions are:—

[331] *Firstly*,—Whether an essential condition precedent to the making of a valid adoption by a Hindu widow is an authority from her deceased husband to make it?

Secondly,—Whether a valid adoption can be made of an only son of another?

The Hindu law bearing upon these two points is not altogether clear, and it is difficult to reconcile some of the decisions with the original texts, to which we have been referred by Mr. *Sundar Lal* on behalf of the defendants appellants. In the case of *Chowdhry Padam Singh* v. *Koer Udaya*

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Singh (1) which was a decision of their Lordships of the Privy Council on an appeal from a decree of the Sadar Diwani Adalat of these Provinces, Sir James Colvile in the course of his judgment remarks:—"In order, therefore, to establish the validity of the adoption in this case, it was necessary for the appellant to prove first the authority given by Hem Singh to his wife to make the adoption, and second the actual adoption."

On the other hand, the commentary of the *Viramitrodaya*, at page 115, quoted by Mr. *Sundar Lal*, reciting the passage from Vasishta, which is said to embody the Hindu law on the question, the criticisms of Mr. Mandlik, in his well-known work at pages 462-465, the paragraph of the *Vyavastha Chandrika*, Vol. II, pages 19 and 38, and the summary of Dr. Jolly in his book upon the Hindu Law of Partition, Inheritance and Adoption, page 304, all give much colour to the contention set up by the defendants, namely, that a valid adoption may be made by a Hindu widow to her deceased husband without any authority from him. We are informed by Pandit *Ajudhia Nath*, that in S.A. No. 35 of 1888 (*Beni Prasad* v. *Hardai Bibi*), which is pending in this Court, this same question is involved, and it seems to us to be one of such importance that it should be considered and determined by the Full Bench.

As to the second point involved, *viz.*, as to whether an only son can be the subject of an adoption, there is no doubt that a Full Bench of this Court in the case reported in I.L.R., 2 All. 164, has held in the affirmative. I confess with the most profound respect [332] for the majority of the Judges who so decided, that I have always, since I came to have any acquaintance with Hindu law, entertained serious doubts as to that judgment being in accordance with that law, and as it is not a unanimous judgment of the whole Court and as my doubts about its accuracy are shared by my brother Mahmood, I think it would be well if the Full Bench should at least have an opportunity of determining whether it is prepared to reconsider the question so determined by the former Full Bench, and if so, it can then determine it.

Under these circumstances, and with these observations, I refer the second appeal No. 2067 of 1886, to the Full Bench.

MAHMOOD, J.—I agree entirely.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants, cited the following authorities:—*Vasistha Smriti*, chap. XV, verse 5, at p. 75 of Dr. G. Buhler's translation (Sacred Books of the East, edited by Prof. Max Muller, vol. xiv, p. 75); *Viramitrodaya*, translated by Golap Chandro Sarkar Shastri, pp. 115 and 116 (ed. 1879); Mandlik's Hindu law, pp. 462—466; Stokes' Hindu Law Books, p. 415; *Dattaka Mimansa*, sec. I, paras 15, 16, 17, 18 (Stokes, p. 534); *Dattaka Mimansa*, sec. IV., para. 12 (to show that Nanda Pandit was inconsistent in holding that a childless Hindu widow had an implied authority to give away in adoption, but not to adopt): *Dattaka Chandrika*, sec. I, paras, 31 and 32 (Stokes, p. 636); *The Collector of Mádura* v. *Mootoo Ramlinga Sethupathy* (2); *Ganga Sahai* v. *Lekhraj Singh* (3); *Ramji* v. *Ghaman*(4); *Giriowa* v. *Bhimaji Raghunath* (5); *Giridhari Lall Roy* v. *The Government of Bengal* (6); *Muni Ram Khota* v. *Kerij Kolitany* (7); *Hanuman Tiwari* v. *Chirai* (8); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (9).

(1) 12 M.I.A. 350. (2) 12 M.I.A. 397. (3) 9 A. 253. (4) 6 B. 498.
(5) 9 B. 58. (6) 12 M.I.A. 448. (7) 7 I.A. 115 at p. 153.
(8) 2 A. 164. (9) 5 I.A. 40.

Pandit *Bishambhar Nath* and Munshi *Kashi Prasad*, for the respondents cited the following authorites :—Mayne's Hindu Law (ed. 1878), para. 99, pp. 91, 92; West and Buhler's Hindu [333] Law (ed. 1884), pp. 958, 959; Macnaghten's Hindu Law, pp. 90, 100, 155, 182; Colebrooke, vol. iii, p. 322, para. 3, Strange's Hindu Law (ed. 1864) pp. 78, 79; Tagore Law Lectures, 1883, by Dr. Jolly (ed. 1885), chapter iii, pp. 303, 304; Norton's Leading Cases on the Hindu Law of Inheritance, part I, pp. 84, 85; Preface to *Dattaka Mimansa* by J. C. Sutherland (ed. 1834), para. pp. 3, 4; Stokes' Hindu Law Books. p. 664; *Vyavsatha Chandrika* (Shama Charan Sirkar) vol. ii, p. 38; J. S. Siromani's Commentary on Hindu Law (ed. 1885); pp, 117, 118; *Vyavastha Darpan* (Shama Charan Sirkar) ed. 1859, vol. i, pp. 868 (para. 508), 870; *Dattaka Mimansa* (J. C. Sutherland), ed. 1834, p. 4; Colebrooke's Digest of Hindu Law (ed. 1865), vol. ii, p. 388; *Raja Shumshere Mal* v. *Rani Dilraj Konwar* (1); *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (2); *Jairam Dhani* v. *Musan Dhani* (3); *Chowdhry Padam Singh* v. *Koer Udaya Singh* (4); *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy* (5); *Thakoor Oomrao Singh* v, *Thakoranee Mahtab Koonwer* (6); *Gournath Chowdhree* v. *Arnopoorna Chowdhrain* (7); *Narayan Babaji* v. *Nana Manohar* (8); *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (9); *Bawani Sankara Pandit* v. *Ambabay Ammal* (10).

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The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants, in reply, cited *Vyavastha Chandrika*, vol. i, preface, p. xxii, vol. ii pp. 40, 55 (*note*), Tagore Law Lectures, 1883, p. 305; Elberling's Hindu Law, p. 16, para. 30: Morley's Digest, vol. I (a), Introduction, p. 205; Norton's Leading Cases on Hindu Law, vol. I, p. 86.

JUDGMENTS.

MAHMOOD, J.—The main points in the case are stated in my learned brother's order of reference to be the following:—

(1) Whether an essential condition precedent to the making of a valid adoption by a Hindu widow is an authority from her deceased husband to make it?

[334] (2) Whether a valid adoption can be made of an only son of another?

It is to these two questions that I shall presently address myself. But before doing so I wish to premise that notwithstanding the ruling of a Division Bench of the Calcutta High Court in *Raj Coomar Lal* v. *Bissessur Dyal* (11) I entertain considerable doubts as to the soundness of the view which seems to have been adopted by both the Courts below, that the literary caste of *Kayesths* in this part of the country, to which the parties belong, falls under the category of *Sudras*, as understood in the division of mankind in the Institutes of Manu, or elsewhere in authoritative texts of the Hindu law. The question is one of considerable difficulty, not only ethnologically, but also from a legal point of view, so far as the administration of the Hindu law to this important section of

(1) Calc. S. D. A. vol. ii (1812-1819), p. 169.
(2) Knapp, 203; Suth. P. C. Judgments, vol. i, p. 4.
(3) Calc. S.D.A., 1830, p. 3.
(4) 12 M.I.A. 350, at pp. 356, 357.
(5) 12 M.I.A., 397, at pp 436, 437.
(6) N W P.H.C.R. 1868, 403 *a*, at pp. 103 *k*, 103 *l*.
(7) Calc. S D.A., 1852, vol. viii, part. I. p. 332, at pp. 333, 334.
(8) 7 B.H C.R. 153, at p. 176.
(9) 4 I.A. 1, at p. 10.
(10) 1 M.H.C.R. 363.
(11) 10 C. 688.

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the population is concerned. I do not take the question to be settled by any adjudication of the Lords of the Privy Council, either in *Sri Narayan Mitter* v. *Sree Mutty Kishen Soondoory Dassee* (1) or in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (2), in both of which the cases referred to adoption by *Kayesths* of Lower Bengal, who may be distinguishable from the *twelve* castes of *Kayesths* in Upper India, such as the North-Western Provinces and Oudh. Nor do I think that the unreported decision of the learned Chief Justice and my brother Tyrrell in *Chaudhri Hazari Lal* v. *Bishun Dial* (First Appeal No. 113 of 1886, decided on the 15th of June 1887), which was also an adoption case, settles the question. But I need not pursue the subject any further since, both in the Division Bench and in the argument addressed to the Full Bench on either side, I fully understood it to be conceded that this case was governed by the ordinary rules of the Hindu law of adoption, and that the nationality or caste of the parties did not affect the two main questions which my brother Straight enunciated in his order of reference which I have quoted. In this manner I shall deal with the case, and, I think, I may conveniently say here in passing that I agree with the [335] learned Judge of the lower appellate Court in holding that whatever importance may be attached to entries as to custom in the *wajib-ul-arz* as evidence of such custom, they are not conclusive proof, and that in any case express words are necessary to prove any such special custom as would modify the general law, and that in this case the absence of such words in the *wajib-ul-arz* points to the conclusion that the general Hindu law of adoption was not intended to be interfered with as to the widow's power of adoption—an interpretation fully consistent with the manner in which the Lords of the Privy Council treated the *wajib ul-arz* in *Rani Lekhraj Kuar* v. *Babu Mahpal Singh* (3), and in *Uman Parshad* v. *Gandharb Singh* (4).

Now the parties to this litigation are residents of the district of Mainpuri, in which the property in dispute is situate, and it is admitted that they are governed by the Benares school of Hindu law, which is sometimes denominated as the Mitakshara school, though of course the authority of the Mitakshara is also recognized in other parts of India. I have considered it necessary to state this at the outset, because in dealing with the difficulties of law which the facts of this case have produced, constant references will have to be made to schools of Hindu law other than the Benares school.

Viewing the case thus, by far the most important question of fact upon which both the Courts below have concurred is that the deceased Shankar had never authorised his widow, Musammat Lareti to make a posthumous adoption, and I hold that this finding of fact cannot be disturbed in second appeal. And because this is so, the first question enunciated by my brother Straight in his referring order becomes the turning point of decision in this case, namely, whether in the absence of authority by the husband, the widow of a childless Hindu, acting on her own behalf, can make a valid adoption. This very question of law arose in the case of *Ganga Sahai* v. *Lekhraj Singh* (5) in which I had the honour of being associated with my brother Straight, who approved of my [336] judgment in that case. The question was not then decided because my learned brother and I were agreed that upon the evidence in that case the *factum*

(1) I.A. Sup. Vol. 149. (2) 7 I.A. 250. (3) 7 I.A. 63.
(4) 14 I.A. 127. (5) 9 A. 253, see p. 274.

of the adoption was not proved, and if I mention the case now, it is principally with a view to avoid repetition of what I said in that case upon points, or rather steps of reasoning, which are common to this case and the case which I have mentioned. 1889 DEC. 12. FULL BENCH. 12 A, 328 (F.B.).

The exigencies of this case, however, as I have already stated, require the decision of the question; and in deciding it, so far as I am concerned, it will be most convenient for me to make constant references to the printed report of my judgment in *Ganga Sahai* v. *Lekhraj Singh* (1) to furnish the steps of reasoning which have led me to the conclusion at which I have arrived in this case.

Perhaps the first point which I should dispose of is that pressed on behalf of the appellants to support the adoption of Tulsi by Musammat Lareti in the argument that, even if the adoption was made without permission of the widow's husband, and even in the absence of the permission or consent of the *sapindas* of the deceased husband, the fact that an actual adoption has been made by the widow is sufficient to validate such adoption by reason of the doctrine of *factum valet* as understood in the Hindu law of adoption. This was one of the questions which I had to deal with in *Ganga Sahai* v. *Lekhraj Singh* (2), and in summing up my conclusions I said at page 297 of the report:—

"Having so far explained how I understand the general scope of the doctrine of *factum valet.* I proceed to define upon what points of Hindu adoption I would hold it to be inapplicable. Adoption under the Hindu law being in the nature of gift, three main matters constitute its elements, apart from questions of form. The capacity to give, the capacity to take and the capacity to be the subject of adoption, seem to me to be matters essential to the validity of the transaction, and, at such, beyond the province of the doctrine of *factum valet.* And I may at once say that if any of [337] these three capacities is wanting in this case, I shall hold the plaintiff's adoption to be altogether invalid."

I still adhere to the views which I thus expressed, and because of such adherence it might have become with me in this case a matter of considerable difficuity to decide how far I could make it possible for me to accept the ruling of the majority of a Full Bench of this Court in *Hanuman Tiwari* v. *Chirai* (3) where it was laid down that the doctrine of *factum valet* applied even to the adoption of an only son under the Hindu law. I say this because in the case now before me it is admitted that at the time of the adoption of Tulsi by Musammat Lareti, he was the only son of his natural parents, and this circumstance alone might have precluded not only the capacity of his parents to give in adoption, but also the capacity of Musammat Lareti, and even of her husband, were he alive, to receive the child in adoption.

I am, however, relieved of the necessity of considering this question, not only because there is still existing the ruling of the majority of a Full Bench of this Court in *Hanuman Tiwari* v. *Chirai* (3) as to the validity of the adoption of an only son, but also because, according to the view which I have taken in this case, I have arrived at the conclusion that the express permission of the husband is absolutely necessary as a condition precedent to the validity of any adoption by the widow subsequent to the death of her husband.

Now, the fundamental reasons upon which the Hindu system of jurisprudence recognizes adoption or affiliation to the extent that it does,

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(1) 9 A. 253, see p. 274. (2) See 9 A. pp. 292—297. (3) 2 A. 164.

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were stated by me in *Ganga Sahai* v. *Lekhraj Singh* (1), and at page 300 of the report I stated two texts which form the foundation of the right of adoption itself. I said that one of the two texts was from Manu (chapter IX, section 168):—

"He whom his father or mother, *with her husband's consent*, gives to another as his son, provided that the donee has no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water." [338] The other text is from Vasistha (3 Dig., page 242), which is fuller than the preceding one:—

"A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause. Both parents have power to sell or to desert him. But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. *Nor let a woman give or accept a son unless with the assent of her lord.*"

The supreme authority of both these texts is universally acknowledged in the Hindu law of adoption, and I should have thought that the words "*with her husband's consent*" in the text of Manu, and the clearer words "*nor let a woman give or accept a son unless with the assent of her lord*," which occur in the text of Vasistha, would leave no room for doubt that the consent or permission of the husband was an indispensable condition to the validity of an adoption by a wife or a widow. But such does not seem to be the case, as is apparent from a note to verse 9, chapter I, section II on the Mitakshara by the celebarated Colebrooke (*Stokes' Hindu Law Books*, page 415). The note says:—

"In regard to a widow's power of adopting a son, there is much diversity of opinions. Vachespati Misra, who is followed by the Mithila school, maintains that neither a woman nor a Sudra can adopt a dattaka or given son, because the prescribed ceremony includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony, and accordingly adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. Nanda Pandita, however, in his treatise on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Ballambhatta contends that a woman's right of adopting, as well as of giving a son, is common to the widow and to the wife. This likewise is the opinion of the author of the *Vyavahara-mayukha*; but while he admits that a widow may adopt a son without her husband's [339] previous authority, he requires that she should have the *express* sanction of his kindred. Writers of the Gaura school, on the contrary, insist on a formal permission from the husband declared in his lifetime."

Such being the divergencies of opinion among the text-writers of the Hindu law themelves, I shall, before referring to the case-law upon the subject, deal first with the Hindu law texts themselves, and in doing so I will, except for purposes of analogy, confine myself to the exact question which arises in this case, namely, the capacity of the widow to *take* in adoption (as distinguished from her capacity to *give* in adoption), for here there is no question that the natural parents of the adopted Tulsi had capacity to *give* him, barring such objections as might arise in consequence of his being an only son—an objection which I have already disposed of with

(1) 9 A. at pp. 299-302.

reference to the Full Bench ruling of this Court in *Hanuman Tiwari* v. *Chirai* (1). 1889 DEC. 12. — FULL BENCH. — 12 A. 328 (F.B.).

The question being thus limited to the capacity of the widow to *take* in adoption without the permission of her husband, the most important authority relied upon by the learned Pandit *Adjudhia Nath* is the *Viramitradaya* of Mitra Misra—a commentary on the *Mitakshara*, undertaken apparently with a deliberate intention to uphold the authority of the *Mitakshara* by answering the objections which were raised and enunciated by the conflicting school of inheritance as represented by the *Dayabaghaga*. The author referring to the text of Vasistha, "*let not a woman give or accept a son unless with the assent of her husbnnd,*" which I have already quoted, goes on to say in a somewhat polemical spirit.

"Some say that the adoption of a son by a woman without the assent of her husband being prohibited in this text, the son taken by a widow whose husband died without giving authority, does not become an adopted son. This is not tenable, since a sonless person has no access to heaven, and the procreation of a son is ordained to be necessary. Therefore the permission which he was bound under the Shastras to give is not to be considered as wanting [340] in such a case. Nor can it be said that thus the portion, namely, '*unless with the assent of her husband*' would be useless, inasmuch as there is no case to be excluded, and as the authority which a person is bound under the Shastras to give is in all cases necessary (and so assumed as given). Because the prohibition is levelled against a woman who wishes to adopt a son for her own sake when her husband, who is desirous of having *maksha* or freedom from the necessity of repeated deaths and births, or who as a son by another wife, cannot possibly give an authority to adopt.................. But when the husband is dead the assent of those only is necessary on whom she is dependent. In this view the object of the prohibition becomes reasonable. *Therefore, although the husband be deceased without giving permission to adopt, still an adoption by the widow is not invalid.*" (Gopal Chundra Sarkar's translation of the *Viramitradaya*, pp. 115-16).

Beyond verbal difference the same is substantially the effect of the translation of the passage made by Mr. Mandlik in his commentary on the *Mayukha* (at pp. 463-64) in his work on Hindu law. I have cited this passage first, as it covers the whole ground of the argument addressed to us by Pandit *Ajudhia Nath* on behalf of the appellant, and also because the *Viramitradaya* is relied upon by the learned Pandit as possessing quite as high an authority, if not greater than the *Dattaka Mimansa* of Nanda Pandit (Stokes' Hindu Law Books, page 531), in the Benares school of Hindu Law. There can be no doubt that the passage cited is in direct conflict with the rule laid down by Nanda Pandit in his *Dattaka Mimansa*, to which I shall refer later on; but meanwhile it is more than interesting to ascertain the exact authority of the *Viramitradaya*, on which so much emphasis has been laid on behalf of the appellants. The origin of the book is well described by Shama Charan Sirkar in his *Viyavastha Chandrika*, Vol. I, p. 17 of his preface, in a foot-note. The learned author says:—

"The *Viramitradaya* was composed by Mitra Misra the direction of Raja Vira-Sinha, whence the book is styled *Viramitradaya*. The age of this work appears to be less than four hundred years [341] as Raghunandana, the author of the *Smriti-tattwa*, who flourished

(1) 2 A. 164.

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in Nudea about four hundred years ago, has been cited therein. The object of Mitra Misra's writing this work appears to have been with a view to re-establish or confirm the doctrines of the *Mitakshara* or of the Benaras school, many of which were refuted by *Jimuta-Vahana*, who was supported by Raghunandana and the other writers of the Bengal school'; but Mitra Misra, reasoning on the arguments of *Jimuta-Vahana* and the rest with great accuracy, has generally refuted their doctrines and confirmed those of his master, *Vijvaneshwara*. *Viramitradaya* is the work of a great logician, and may be regarded as a complete Digest of the *Dharmashastra* of the Benares school, in which the author has generally expounded the doubtful passages, and supplied the deficiencies of the *Mitakshara*, and expressed what was left therein to implication.".

That the *Viramitradaya* is an authority in the Benares school cannot be doubted. In *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1), their Lordships of the Privy Council refer to the work (*vide* p. 438) as "a treatise of special authority at Benares," and in *Giridhari Lal Roy* v. *The Bengal Government* (2), they more specifically say that "their Lordships have no doubt that the *Viramitradaya*, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the *Mi takshara*, and declaratory of the law of the Benares school,"—*a dictum* in keeping with the importance which their Lordships attached to the book in *Muni Ram Kohta* v. *Kerrij Kolitany* (3).

The *Viramitradaya* must therefore be regarded as a work of high authority in the Benares school of Hindu law, but it is equally certain that the *Dattaka Mimansa* of Nanda Pandit is also a very high authority in that school, especially upon questions of adoption, which it treats more comprehensively than any other work of that school of law. The authoritativeness of the book, so far as the Benares school is concerned, was fully recognized by the [342] Lords of the Privy Council in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1), and I dwelt at some length on the subject in *Ganga Sahai* v. *Lekhraj Singh* (4).

The observations which I then made with reference to the exact authoritativeness of the book have been relied upon on behalf of the appellant in this case for the contention that the work is not one of high authority; but I think it is enough to say that there is nothing in my judgment in that case to shake the authority of the work as a book of reference on the Hindu law of adoption, and that if I declined to accept the intertpretation of Nanda Pandit in his *Dattaka Mimansa*, on the particular point then before me, it was mainly because I held that the passage of the *Kalikapurana*, upon which his view of the law was based as to the limit of age for adoption, was in itself not shown to be a genuine text. I may have to refer to this subject again; but meanwhile, as a counterpoise to the text of the *Viramitradaya* which I have quoted, it will be convenient to quote the *Dattaka Mimansa* of Nanda Pandit (section I, verses 15, 18), *Stokes' Hindu Law Books*, pp. 534-35, where referring to the text that adoption may be made "by *a man destitute of son*," the author's commentary is—

"From the masculine gender being here used, it follows that a woman is incompetent (to adopt). Accordingly *Vasistha* ordains: let not a woman either give or receive a son in adoption unless with the assent

(1) 12 M.I.A. 397.
(2) 12 M.I.A. 448.
(3) 7 I.A. 115 at p. 153.
(4) 9 A. at pp. 322-324.

of her husband. From this the incompetency of the widow is deduced, since the assent of her husband is impossible. Nor should it be argued that the assent of the husband is requisite for a woman whose husband is living because she is subject to control, but not so the widow, for mention being made of women in general, dependency on control is not the cause and (were it) her subjection to the control of kinsmen exists as shown in the following text—' *On default of these the kinsmen, &c.*" If it is contended, then, that she may adopt a son with the assent of the kinsmen even, it is wrong, for the term ' husband' would become indefinite, and the purpose would not be attained. Now the purpose of [343] the husband's sanction is that the filiation as son of the husband may be complete, even by means of an adoption made by the wife."

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There can be no doubt that the effect of this passage is to show that, according to the *Dattaka Mimansa*, a widow, without the previous assent of her husband, has no authority to adopt a son to him—a rule which, as I have already said, is directly opposed to the doctrine of the *Viramitradaya.*

But these are not only original authorities which have been cited on either side, and much reliance has been placed upon words belonging to other sub-divisions of the *Mitakshara* law, and there can be no doubt that they may be resorted to for help in determining doubtful questions arising out of the doctrines of the *Mitakshara* itself.

In dealing with this class of authorities, perhaps the best course will be to take those which were cited on behalf of the appellant, and then to cite those relied upon on behalf of the respondent, before considering what resulting effect they may have upon this case.

Pandit *Ajudhia Nath*, on behalf of the appellant, introduces these texts by reading a passage from Mr. Mandlik's Hindu Law, pages 463-65, where that learned author has quoted the original texts and translated them. He says :—

" What the wife may not do, the widow can do ; for from the very necessity of the case, after the husband's death, the widow requires no such power from her husband. A text of *Vasistha,*—a female should not give or receive a son except by permission of the husband, which apparently lends colour to the opposite view,—has been so construed by *Gonda* writers that according to their interpretation a widow can under no circumstances make an adoption except with the express *anumati* (permission) of her husband. This, however, is not correct. The text applies to the wife, and not to the widow ; and so it has been construed by the *Nibandhakaras* and other writers who are followed on this side of India. Thus *Kamalakara* in the *Nirnayasindhu*, after quoting the above text of [344] *Vasistha* observes :—This (text applies) where the husband is living, otherwise there will be a contradiction (between this text and) the text of *Vatsa* and *Vyasa* (to the effect that) he is to be known as a given son who is given by his mother or father. *Gift* here is *illustrative* of *acceptance.*"

Mr. Mandlik then cites the passage from the *Viramitradaya* which I have already quoted, and he then, referring to that passage as to the widow's power of adoption without her husband's permission, goes on to say :—

Anantadeva in the *Samskara-kausluvha* goes still further. He says :— " In reality this precept (*viz.*, the text of *Vasistha*, which says tha t a woman cannot give or receive a son without the command of her husband), should be understood by the intelligent not as a prohibition, but as

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intended to require a command (of some one) for adoption in the case of a woman who has had no permission from her husband; inasmuch as there can be no prohibition of what has been commanded (as the adoption of a son is), owing to the failure to adopt being declared sinful by the text, there is no higher world for a sonless man, &c., and inasmuch again as (treating the precept) as a *paryudisa* (a negative proposition) would imply a *lakshna* (metaphorical interpretation.") (Mandlik, page 465).

The other text on which Pandit *Ajudhja Nath* relies is a passage from the *Dattakadarpana*, which doctor Jolly has translated at pages 304-5 of his *Tagore Law Lectures* for 1883. The extract is the following:—

"The adoption of a substitute for a son should be undertaken by females as well as by males. If it be objected that the incapacity of women to give or receive a son in adoption is shown by the text of *Vasistha*—'Let a woman neither give nor receive a son' (the reply is)—No. The incapacity of women to give or receive a son might be twofold—owing to their incapacity to recite the *mantras* customary on the gift or acceptance of an adoptive son, or owing to the want of the husband's consent. The first reason is not to the purpose [345] because a woman, after having merely declared her intention to adopt, might cause the *homa* and all the other ceremonies to be performed by a spiritual guide. Where the person to be adopted is a closely related *sapinda* or *sagotra*, there is no impropriety of any sort, because it is ruled that the *homa* and the other ceremonies may be dispensed with in that case......Nor is the second reason correct, because *Vasistha* recognises a right to adopt in women as well (as in men) as he say—'without the husband's permission.' For *Vaistha* does not speak of that incapacity of a woman which is caused by her incapacity to recite *mantras*, but of that incapacity only which is connected with the want of the husband's consent. ...... In accordance with the text 'the father protects her during infancy; the husband protects her when she is grown up; the son protects her in her old age; woman is never fit to be independent;' women whose husbands are living have power to give or take a son in adoption, not independently, however, but with the sanction of their husbands only. Widows, on the other hand, who are destitute of the three, beginning with the son (*i.e.*, son, husband, father), possess an entirely uncontrolled and independent power of giving and taking (in adoption). Only the widow's right of adoption must be held to be confined to the widow of one divided in estate (from his brothers or other co-parceners)."

These texts are in accord with the doctrine of the *Mayukha* (chapter IV, section 5, verse 17, *Stokes Hindu Law Books*, p. 63), where it says:—

"Therefore, if there must be an order from the husband, it is for a married woman only, as above shown; but for a *widow*, even without it (adoption) may be made with the permission of her father, or, on failure of him, of the relations *nyati* under this precept: 'Let a female be taken care of by her father while a child; by her husband when married; and by her sons in her old age. If none of these exist, let her other relations (*nyati*) take care of her. A woman is never fit for independence.' This has been declared by *Yajnavalkya* only with reference to difference of [346] age and the circumstances of woman being under the power of her husband. In case of his being dead, or (unable) from old age or other (disqualification), or from helplessness, than (she is) indeed under the power of her sons or other relatives."

There is no doubt that these texts support the contention on behalf of the appellant, especially as they all bear upon the point of distinction

between the *adoptive* powers of a *widow* as distinguished from the wife, that is to say, the powers of a woman whose husband is living. 1889 DEC. 12.

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On the other hand, Pandit *Bishambhar Nath* on behalf of the respondent in supporting the authority of the *Dattaka Mimansa* of Nanda Pandit in the Benares school as to the indispensability of the husband's permission for the validity of a posthumous adoption by his widow, cites two texts which have been translated by Dr. Jolly in his work on Hindu law (*Tagore Law Lectures* for 1883, p. 303). The first of these texts is from the *Dattaka Nirnaya* :—

"Giving or taking a son in adoption is illegal in a woman unless her husband gives his consent to it."

The other text is from the *Dattaka Tilaka* :—

"By 'one sonless,' *i.e.*, by a male destitute of the likeness of a son. Not by a woman, because it may neither give nor receive (a son in adoption, as stated by *Vasistha* : "Man formed of virile seed and uterine blood proceeds from his mother and his father (as an effect from its cause). (Therefore) both parents have power to give, to sell, and to abandon him. Let him not give or (receive in adoption) an only son. For (he must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband's permission.' The right of a woman to adopt with her husband's permission is secondary only ;......and it must not be said : The mother also has full power to give or receive a son, on failure of the father, because the text 'both parents have power' contains the *dvandva* (copulative) compound (*mata pitavan*, 'both parents'), and because it is said 'whom his mother or father give,' &c., (*Manu*, IX, 168), and because each of the two component [347] parts of a *dvanda* compound is significant by itself. This objection cannot be maintained in the face of the rule that the husband's permission is required. Again, if it be said that here also the equality of rights between both parents is established, the prohibitive rule, 'Let a women neither give nor receive a son, 'would be unmeaning, the female sex being in every way dependent on the male sex, because they must never be independent. And thus says *Harita*,—'In regard to a wife, in regard to wealth, and especially in regard to the sacred law, a woman does not deserve independence, neither in taking nor in abandoning.' *Narada* :— Transactions made by woman are null and void, except during distress, especially if they relate to the gift, mortgaging or sale of a house or field. Such transactions acquire validity in that case only if the husband approves of them, or, on failure of the husband, the son, or on failure of both husband and son, the king.' The term 'during distress' is used (in the text of *Narada*) in order to indicate that a gift or other transaction made by a woman for the purpose of obviating distress, is valid. Therefore a woman even may give in adoption and completely relinquish her dominion over a son in times of *distress*. But she may not receive (in adoption) because the *dvandva* compound, &c., is used with reference to the gift only of a son. Therefore both parents have power to *give*, sell, or abandon from passion or some other motive their son, who is formed of virile seed and uterine blood, and has proceeded from them as an effect from its cause. But they are not (invested with equal power) as regards the *acceptance* (of a son). Although, therefore, a son owes his existence to his mother, she cannot be permitted to adopt a son independently (of her husband), because she is not allowed to give a son in adoption during the lifetime of her husband. Therefore, supposing even a man were

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anxious to give in adoption his only son, the representative of his race, a woman is not allowed to receive him in adoption."

That these various texts of the Hindu Law or in much conflict with each other as to the necessity of the husband's permission for the validity of an adoption by a woman, whether as the wife of a [348] living husband or as a widow, cannot be doubted; and the difficulties created by this conflict are considerably enhanced by the circumstance that all the texts quoted belong to the *Mitakshara* school of Hindu law, though their comparative authority is received with varying weight in various sub-divisions of the *Mitakshara* school of the Hindu law itself.

Their Lordships of Privy Council had to deal with a similar difficulty in the case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) where, after stating that "the remoter sources of the Hindu law are common to all the different schools," and describing the process whereby these various schools adopted divergent opinions, went on to say:—

"This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of *Vasishta*, which says:—'Nor let a woman give or accept a son unless with the assent of her lord.' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption; and therefore, that a widow cannot receive a son in adoption according to the *Dattaka* form at all. The *Bengal* school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death, whilst the *Mayukha* and *Koustribha* treatises which govern the *Mahratta* school explain the text away by saying that it applies only to an adoption made in the husband's lifetime and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. *Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husbnad.*"

Their Lordships then go on to say:—

"The duty therefore of a European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, [349] as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

It is in the light of these observations of their Lordships that I shall deal with the exact question now before us, *viz.*, whether a widow can validly adopt without the previous permission of her husband who is no longer alive. I shall consider the question in accordance with the Benares school of Hindu law, which admittedly governs this case, but before doing so I wish to repeat what I have already said, that in the present case there is no question as to widow's power of *giving* in adoption, but the question is limited to her power of *taking or receiving* in adoption.

This being so, the authority of *Manu*, which is supreme in the Benares school, is the first to be referred to. I have already quoted verse 168 of chapter IX of that holy Sage's institutes of law as conferring authority upon the parents to *give* a son in adoption, and in that verse the name of

(1) 12 M.I.A. 397.

the mother of the given boy is expressly mentioned, though even there the consent of the husband is indicated, giving rise to those divergencies of opinion to which reference has already been made by me. So much as to the authority *to give* in that sacred institute, but as to the authority to *receive*, the important verse is the next, namely, verse No. 169, which runs as follows :— 1889 DEC. 12. — FULL BENCH. — 12 A. 328 (F.B.).

"He is considered as a son made *or adopted* whom a *man* takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with *the* merit *of performing obsequies to his adopter*, and with *the* sin *of omitting them.*"

Now, comparing this passage with the preceding verse, it is remarkable that whilst as to the power of *giving* the mother of the boy *given* is mentioned, in the later verse the wife of the *taker*, in adoption is not mentioned, and the text shows that the taking in adoption is entirely dependent upon the wish of the man, *i.e.*, the adoptive father.

[350] I have no desire to apply to the interpretation of such ancient texts as verses 168 and 169, chapter IX of Manu's Institutes the comparatively modern rule of interpretation *expressio unius exclusio alterius*; but at the same time I cannot help feeling it to be very significant that whilst in dealing with the power to *give* the name of the mother of the boy to be given in adoption is mentioned, the text of the following section, which deals with the power of taking a boy in adoption, is totally silent as to the wife of the *man* who adopts. The significance of such silence is all the more increased by the fact that the *Mitakshara* itself seems apparently to draw the distinction between *giving* and *receiving* so far as the part of the wife is concerned, and is equally silent as to the power of a woman in receiving a child in adoption as distinguished from the part which she may have to take in the transaction of *giving* her son in adoption. Section XI, chapter I, verse 1 of the *Mitakshara*, in describing the twelve kinds of sons recognised by the Hindu law, goes on to say :—

"He whom his father or his mother gives for adoption, shall be considered as a son *given*. A son bought is one who was sold by his father and mother. A son made is one adopted by *man* himself."

Now, in this passage again, which really contains definitions of the various kinds of sons, the wife of the *giver* is mentioned, but not the wife of the *taker* in adoption ; and the silence is as significant as that in the text of Manu which I have cited. Superadding to the significance of such silence both in Manu and in the *Mitakshara* as to the power or authority of the adoptive mother, is the text of *Vasistha*, which is a *smriti*, and as such of the highest authority in the Benares school, as also in the other schools of the Hindu law. I have already quoted the text more than once, but I think its importance deserves repetition for the purposes of this case, for it lays down in clear language :—

"*Let a woman neither give nor receive a son except with her husband's permission.*" (*Sacred Books of the East*, edited by Max Muller, vol. XIV, p. 75)

[351] This is the translation by Dr. G. Buhler, but since Pandit *Ajudhia Nath* for the appellant, advocated the greater accuracy of Mr. Mandlik's translation of the original Sanskrit, I will quote that also. It is to be found in a foot-note at page 463 of Mr. Mandlik's work on Hindu law, and runs as follows :—

"*A female should not give or receive a son except by permission of the husband.*"

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I confess I do not see any substantial difference between the two translations; but Pandit *Ajudia Nath*, for the appellant, insisted upon Mr. Mandlik's translation being preferred for the sake of the contention that the injunction was only directory, and as such capable of being covered by the doctrine of *factum valet*, so far as any want of power in a widow to adopt without her husband's permission might give rise to objection.

Now, if I were to adopt the ordinary rules of interpretation as understood by us in their application to modern law, I should have been inclined to hold that the presence of negative words in either of these two translations of the texts of *Vasistha* amount to a specific prohibition rendering that illegal which is done in contravention of such prohibition.

But since the texts belong to an ancient system of law, it is necessary to refer to the authoritative texts of that law itself to interpret the exact meaning of those prohibitions, and in this connection perhaps the best way would be to enunciate as steps of reasoning the following points for consideration :—

(1) Whether, during the lifetime of the husband and the wife, their powers of adoption stand on an equal footing.

(2) Whether, after the death of the wife, the widower can adopt a son irrespective of any permission of his deceased wife.

(3) Whether, after the death of the husband, the widow can *take* in adoption without the previous consent of her hubsand.

Now, the consideration of these questions will lead me to the consideration of some of the doctrines of the Hindu law; but in [352] doing so, I shall confine myself to the method of decision prescribed by the Lords of the Privy Council in the passage which I have already quoted from their judgment in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) at p. 436 of the report.

And upon the *first* of these points, I cannot do better than adopt the language of Mr. Mayne's *Hindu Law*, in section 99 of his work, where he says :—

" As an adoption is made solely to the husband and for his benefit, he is competent to effect it without his wife's assent, and notwithstanding her *dissent* [*Dattaka Mimansa*, i.s. 22; *Rungama* v. *Atchama* (2)]. For the same reason she can adopt to no one but her husband. An adoption made to herself, except where the *Kritrima* form is allowed, would be wholly invalid : [*Chaudhri Pudum* v. *Koer Oodey* (3)]. Adoptions by women of the dancing girl caste rest on a different footing (see *post*, s. 108). Nor can she ever adopt to her husband during his lifetime, except with his assent (*Dattaka mimansa*, i. s. 27)."

Upon the *second* of these points also, I think the state of the law is well put by Mr. Mayne is section 96 of his work on *Hindu Law*, and I adopt his views when he says :—

" It has been suggested that an adoption by a bachelor, or a widower, would be invalid, either on the ground that such a person was not in the order of *grihastha* (householder or married man) or that the right of adoption was only allowed where the ligitimate mode of procreation had failed. *But it may now be taken as settled that an adopton in either of the above cases would be valid* (Suth. Syn. 664, 671 ; 3 Dig. 252 ; 1 W. McN. 66 ; 2 W. McN, 175 ; *Gunnappa v. Sankappa*, Bom. Sel. Rep. 202 ; *Nagappa*

(1) 12 M. I. A. 397. (2) 4 M. I, A. 1, 7 Suth. (P. C.) 57.
(3) 12 M. I.A. 356, 12 Suth. (P.C.; 1, 2 B.L.R. P. C.) 101.

v. Subba Sastry, 2 Mad. H. C. 367 ; *Chandrasekharudu* v. *Bramhanna*, 4 Mad. H. C. 270)."

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The reasons for the conclusion at which Mr. Mayne has arrived or stated in the rest of the section of the work from which I [353] have quoted, and they leave no doubt in my mind that the existence or non-existence of the *wife*, whether in the case of a bachelor or a widower, is wholly unimportant for the validity of Hindu adoption by a man. And it would be prolonging the discussion of this matter if I were to enter upon proving the proposition that in no case, except perhaps that of dancing girls (*vide* s. 180, Mayne's *Hindu Law*) could an adoption be validly made by an unmarried woman. There is indeed no contention that such a thing could be done ; and if I have mentioned it, it is with the object of bringing forth a somewhat epigrammatic form of the undoubted proposition of the Hindu law, that whilst in the case of a *man* the fact of his having never married or never intending to marry is no bar to his power of adoption, in the case of an unmarried *woman* the simple fact of her being without a lawful husband debars her absolutely from exercising any such right as that of adoption. The power of adopting as I would say, if I were referring to modern law, is a pure creation of "*the Statute*," like the power to appeal from a judgment ; but it is not from this method of interpretation that I have any desire to form my opinion upon the question now before me. Yet, apart from any proclivities which I may have as an English lawyer in favour of the recognised rules of interpretation, I cannot help feeling in connection with matters relating to the Hindu law (any more than in matters relating to the Muhammadan law) that the difference between the powers of adoption in the case of a *man* and that of a *woman* is most significant : that this is so, is amply apparent from the authorities which I have already cited ; and by analogy of reasoning it becomes all the more significant when it is borne in mind that the adoption of a *female* is not recognised by the Hindu law, and that in one essential at least of the validity of adoption, namely, the proper subject for the exercise of the right, there is no contention that the adopted child must be a *male* and not a *female*.

I have degressed into this analogical reasoning in order to deal with the views expressed by Mr. Mandlik in his work on *Hindu Law*, at pages 466 and 467. The learned author somewhat severally [354] criticises the recognized European authorities on Hindu law by saying :—

"It appears to me that some confusion has been created by very loose and indefinite writing regarding the duties of a son and the performance of *Sraddhas*, &c., by the adopted son. Sir T. Strange says :—"The better reason therefore perhaps is that the necessity of a son to celebrate the funeral rite regards the man, rather than the woman, who depends less for redemption upon such reasons ; so that whatever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not her own. (*Elements of Hindu Law*, vol. I, p. 79, 3rd ed.) Mr. Justice Strange goes further and says :—'Unmarried males of whatsoever age, and females, whether unmarried or married, are not in danger of *put*. No adoption on their account is hence necessary, neither would such adoption be valid, (*Manual of Hindu Law*, 2nd ed. p. 18)."

The learned author then goes on to state that the views expressed by Sir. T. Strange and Mr. Justice Strange, and commented on by Messrs. Ellis and Sutherland, were equally unsupported by authority, and that (to use the learned author's own words), "all this is a very unsatisfactory mode of stating the *Dharmashastra*," and he ends a whole paragraph by

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saying :—" This confusion of the mother's position and her necessity as to *Sraddha* has, it appears to me, led to a complete misunderstanding of the whole subject of adoption by females."

The learned author, in thus criticising the conclusions of eminent English Hindu lawyers, states the names of certain rituals prescribed by the Hindu law as to obsequies of the deceased, but he cites no authorities for his propositions on that head, so far as they tend to show that either the necessity or the power of adoption stands upon an equal footing in the case of a *man* and a *woman*. Nor is there any attempt made by the learned author (and I say this with great respect) to explain why throughout the whole Hindu jurisprudence, whether with reference to personal liberty or personal rights, whether with reference to inheritance or succession, whether with reference to powers of alienation of property or other rights which [355] need not be detailed, the legal powers of the females are not on the same footing as those of the males. There are of course explanations to be found in the sacred texts of the Hindu law itself, which have been carefully investigated by eminent European investigators of the Hindu law to account for the line of thought that under that system a very marked distinction is drawn between the legal rights of a *man* and those of a *woman* ; and also that that distinction cannot be lost sight of in the case of the right of adoption which would not exist but for express authority of the Hindu texts themselves in that behalf. Any attempt made by modern writers to remove or diminish the efficacy or force of that distinction must necessarily require disturbance or, at any rate, mitigation of the rigour of the Hindu law ; and I do not think, as a Judge sitting in this Court, it is within my province to do so.

I will therefore quote a passage from Mr. Mandlik himself, not only because it goes the whole length of supporting the appellants' argument as to the adoptive powers of a woman under the Hindu law, but also because it will be introductory to my dealing with the last but most important question in this case.

Mr. Mandlik, after criticising the English authorities on Hindu law as I have stated, goes on to say :—

"To sum up : a *Sraddha* produces equal benefit to both the father and the mother. When there is a son, he must perform it for both, and does so perform it, as all the *Sraddha* works and our current practice show. If there be no son, a man can follow several ways to get his own salvation, or may adopt a son both for getting his *Sraddha* performed, and for the perpetuation of his name. The same is the case with the man's wife. During his lifetime her identity is sunk in her husband's. After his death she may follow the several ways above indicated for her salvation as well as his, or both follow those ways and also adopt a son who will be her own as well as her husband's son."

These, then, are the views of Mr. Mandlik, and they deserve respectful consideration. The original Hindu authorities upon which those views rest have already been quoted or referred to by [356] me in this judgment ; and I may say that the authority of Mr. Mandlik himself as a Hindu lawyer would have been of much greater weight and effect with me, so far as this point is concerned, had I found it possible for me to escape the suspicion that, in desiring to raise the adoptive powers of a woman and her spiritual benefits by dint of such adoption, the learned author was more or less influenced by the modern enlightenment of Europe as to the relative 'position of manhood and womanhood.' But I am here to administer not what the Hindu law might be or ought to be, but what

the law is, on the old maxim which I hold to be binding upon me even in this class of cases.

What then are the behests of the Hindu law as to the relative position of man and woman in regard to the exercise of legal rights, be they of a temporal or spiritual character? So far as her position in this world, as distinguished from the spiritual world in the future, is concerned, the sacred text of Manu in verse 148, chapter V, is conclusive, and Sir William Jones has thus translated it :—

"In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her son; *if she have no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign*: a woman must never seek independence."

I have quoted this text *in extenso*, not only because it leaves no doubt that Hindu jurisprudence recognises no equality between man and woman for temporal benefits, but also because the text itself is in no small measure referred to in the authoritative passages which I have quoted, and relied upon as an authority for the proposition that even for such spiritual benefits as may arise out of adoption, the position of woman is far below that of a man, and in no case is it independent of the consent of males.

Perhaps the best way in which I can explain what I have just said is to state the questions which I have put to myself in considering this case, and I will state them in an interrogative form, because I have been unable to find any anwser to them in Mr. [357] Mandlik's well-known work on Hindu law, or in any other authoritative treatise on the subject.

First.—It being admitted on all hands that the solitary foundation of the Hindu right of adoption is the spiritual benefit of the adoptor, why is that right available to a bachelor and not to a maid, that is, to an unmarried man and not to an unmarried woman?

Secondly.—In the case of a married couple, why is adoption available to the husband even against the wishes of his living wife, whilst the living wife (even according to Mr. Mandlik) cannot adopt to her husband or even to herself against his wishes?

Thirdly.—Why is a widower entitled to adopt without any reference to the wishes of his deceased wife?

The answer to these questions is of course to be found in the general principles upon which the whole system of Hindu jurisprudence proceeds with reference to the temporal and spiritual position and benefits accorded by that ancient system to womanhood: and I think I may safely affirm that that system nowhere contemplates the spiritual salvation of a woman irrespective of her being married; that is to say, irrespective of the man to whom she is married, and who is throughout, the sacred text denominated, as her lord and master, furnishing foundation even for such extreme rites as those of *suttee*. "Reprehensible is the father who gives not his daughter in marriage at the proper time." *Manu*, Chap. IX, verse 4. "If a damsel, yet unmarried, arrive at puberty in the house of her father, he is guilty of infanticide by detaining her at a time when she might have been a mother, and the damsel is held *degraded to the servile class*." (Text of *Katyayana*, *Colebrook's Digest of Hindu Law*, 3rd *edition*, *vol. II*, *Page* 297). "The *nuptial ceremony* is considered as the *complete institution* of woman, ordained for them in the *Veda*, together with reverence to their husband, dwelling first in their father's family, the business of the house, and attention to sacred fire." (*Manu*, chap. II, verse 67). "When the husband has performed the nuptial rites with texts from the *Veda*, he gives bliss

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continually to his wife here below, both in season and out of season; and he will give her happiness [358] in the next world," (*Manu*, chap. V, verse 153). "No sacrifice is allowed to women apart from their husbands, no religious rite, no fasting, as far only as a wife honours her lord, so far she is exalted in heaven." (*Manu*, chap. V, verse 155.)

The last of these texts is of especial importance for the purposes of this case, because adoption is not a temporal transaction but a sacrament or religious rite under the Hindu law, which cannot be performed by a woman irrespective of a husband, for without him she has no spiritual benefits to expect.

The broad outcome of what I have said may be thus summarized:—

(1) A *maid* cannot adopt because she has no husband; but a *bachelor* may adopt though he has no wife.

(2) A *husband* may adopt though his wife does not consent; but a wife cannot adopt if her husband does not give his permission.

(3) A *widower* may adopt without permission from his deceased wife.

So far there is no controversy as to the doctrines of Hindu law of adoption in this part of the country, and the question then remains:—Why should not the same difference between the adoptive powers of a man and those of a woman be maintained in the case of a widow?

The argument of Pandit *Ajudhia Nath* aims at placing the *widow* on the same footing as the *widower*. The learned pleader, in supporting his case on this point, bifurcated his arguments by contending, in the *first* place, that if a *widower* can validly adopt without the permission of his deceased wife, there is no reason why the *widow* should not make a valid adoption without the permission of her deceased husband. In the *second* place, the learned pleader argued that even if the deceased husband's permission is necessary, it must be taken to be necessarily implied, because an adoption by the widow would be conducive to his spiritual benefits.

Now, so far as the first part of this argument is concerned, I think I have already quoted enough original texts to show the [359] enormous conflict that exists upon the subject of the widow's power of adoption: but since the learned Pandit on behalf of the appellant has asked us to regard the question as *res integra* and to employ our own judicial reasoning for deducing our conclusions from the principles of the Hindu law of adoption in general, I desire, at the risk of prolixity, to emphasize the extent and complications of such conflict of authority in the various schools of the Hindu law. In doing so I cannot do better than quote a passage from Mr. Mayne's work on Hindu law. The learned author says:—

"Her capacity to adopt to him after his death, whether with or without his assent, is a point which has given rise to four different opinions, each of which is settled to be law in the province where it prevails. All the schools accept as authoritative the text of *Vasistha*, which says:—'*Nor let a woman give or accept a son unless with the assent of her lord.*' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the *Duttaka* form, at all—(*Duttaka Mimansa*, 1, s. 16; *Vivada Chintamani*, 74; 1 W. McN. 95, 100; *Jai Ram* v. *Musan Dhami*, 5 S.D. 3). The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death (1 W. McN. 91, 100; 2 W. McN.175, 182, 183; *Janki Dibeh* v. *Suda Sheo*, 1 S. D. 197 (262); *Mt. Tara Munee* v. *Dev Narayun*, 3 S. D. 387

(516); whilst the *Mayukha Koustubha* and other treatises which govern the *Mahratta* school explain the test away by saying 'that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husbands soul." (*Per curiam, Collector of Madura* v. *Moottoo Ramalinga*, 12 Moo. I.A. 435; S.C. 1 B.L.R. (P.C.) 1; S.C. 10 Suth. (P.C.) 17; V.N. Mandlik, 463). A fourth and intermediate view was established by the Judicial Committee in the case from which this quotation is taken, *viz.*, that in Southern India the want of the husband's assent may be supplied by that of the *sapindas*. The doctrine of the Benares **[360]** school, as it prevails in Northern India, appears to be the same as that of Bengal, as to the necessity for the husband's assent; though upon this point a greater difference of opinion has prevailed from the circumstance that the *Viramitrodaya*, which allows the assent of the kinsmen to be sufficient, is an authority in that province (*Viramit*, ii. 2 S. 8); W.McN. 91, 100; 2 W. McN. 189; *Shumshere* v. *Dilraj*, 2 S.D. 169 (216); *Himan* v. *Koomar*, Kn. 203: *per curiam, Collector of Madura* v. *Moottoo Ramalinga*, 12 Moo. I. A. 440; S.C. in the Court below, 2 Mad. H.C. 216; 2 Stra. H.L. 92). The result is, that in the case of an adoption by a widow, in *Mithila*, no consent is sufficient; in Western India no consent is required; in Bengal and Benares the husband's assent is required; in Southern India the consent either of the husbands or of the *sapindas* is sufficient." (*Mayne's Hindu Law*, s. 99, 3rd ed., pages 99, 100).

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Such being the state of the law, I think it is open to us to adopt the view which seems to us most conformable to the spirit of Hindu jurisprudence, interpreting that spirit with due regard to maintining consistency between the various precepts which, as I have already explained, draw a marked distinction between the sexes as to temporal rights and spiritual benefits, and place the woman far below the man. This cannot be doubted; and if this is so, it seems to me that in interpreting a doubtful proposition of law, the duty of the Judge is to interpret it so as to obviate the disturbance of harmony between the various doctrines of the same system. In this light, which I think is consistent with juridical principles, I would, even if I were limited to mere ratiocination, hold that it stands to reason that the disability or restrictions which the Hindu law imposes upon woman should apply to her in all the *three* stages of her existence, namely, *maidenhood*, *wedlock* or coverture, and *widowhood*. I would hold thus because the texts of the Hindu law do not expressly state the reasons why any distinction between the two sexes as to the acquisition of spiritual benefits by adoption has been prescribed in the first two stages, and why the same analogy should not be carried on into the third stage, namely, widowhood. It is **[361]** not, however, upon mere analogical or abstract reasoning that I would decide such a question; but I do thus decide it because to my mind it furnishes ample reason for preferring the doctrine of the *Dattaka Mimansa* of Nanda Pandit to the doctrine of the *Viramitrodaya* of Mitra Misra, these two being the most important authorities in conflict with each other, so far as the Benares school of Hindu Law is concerned. I am all the more fortified in this view because, so far as the indispensability of the husband's permission to enable a valid adoption by a widow is concerned, the doctrine of the *Dattaka Mimansa* is consistent, though not wholly coincident, with *Mithila* and Bengal schools of Hindu law, and even with that of the *Dravida* or Madras school, where the only distinction made is that the consent of the *sapindas* is taken as a substitute

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for the consent of the husband. The only sub-division of the *Mitakshara* school which dispenses with the necessity of the husband's permission is the *Maharastra* school, which shows preference to the doctrines of the *Mayukha*, and prevailing as it does in the Bombay Presidency, in no small decree accounts for the partiality which Mr. Mandlik, himself a Mahratta Brahmin, and eminent lawyer of Bombay, has naturally shown to those doctrines. That the majority of the schools of Hindu law recognize the indispensability of the husband's permission in some form or other has already been shown by me, and it seems to me that I should be doing nothing more or less than introducing into this part of the country the doctrines of *Mayukha*, that is, the *Maharstra* school, if I were to adopt the whole length of Pandit *Ajudhia Nath's* argument on behalf of the appellant by holding that, for the validity of an adoption in the Benares school, the previous permission of the husband is not an essential condition. I will also later on show that such course would also disturb the uniform continuity of decision in cases governed by the Benares school.

But before entering into the consideration and effect of modern authorites on Hindu law and reported cases, I wish to deal with the second part of the argument of the learned Pandit on behalf of the appellant, namely, that even if the husband's permission be [362] indispensable, it must be taken to be *necessarily implied* because an adoption by the widow would be conducive to his spiritual welfare. In supporting this part of his argument, the learned Pleader laid much stress upon analogical reasoning to be derived from the powers of a Hindu widow to alienate the property of her husband for his spiritual benefits under circumstances falling under the category of *legal necessity* as understood in the modern phraseology of Hindu law.

Now, in the first place, this argument, so far as it relies upon the consideration of spiritual benefits to the deceased husband by the widow's act of adoption, seems to me to amount to nothing more than begging the whole question; because if adoption by a widow without her husband's permission is invalid in law, no spiritual benefits can accrue by such adoption to the soul of the deceased husband any more than an alienation invalidly made by a widow can confer any such benefit. The argument therefore does not carry the matter further than where it stood in connection with the first part of the argument which I have already disposed of. An invalid adoption does not affiliate a boy to the adoptive father, and therefore the adopted child can confer no spiritual benefits upon his adoptive father even if the latter had invalidly made the adoption himself, much less when such invalid adoption is made by his widow without his permission.

I do not, however, wish to leave the matter here, because I wish, out of respect for the learned arguments addressed to us on behalf of the parties by the learned Pandits on either side, to state what I consider to be a radical distinction between the powers of a Hindu widow in possession of her husband's estate to alienate his property under legal necessity and her power to make an adoption after his death. It seems to me that the conditions under which alienation, whether by sale, mortgage or otherwise, may be made, form rules of property appertaining to transfer, whilst adoption is not a rule of property under the Hindu Law, but a rule of personal *status*. And I may affirm at once that even that ancient system—perhaps the most ancient in the world—does not ignore the broad distinction [363] between the rules of property and the rules governing personal *status*. And when I say this I must not be understood to be oblivious of the

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complications which this statement of the Hindu law, if understood unreservedly, might create if it is not borne in mind that under that system slavery was allowed, and also *patria potestas* much in the same manner as among the ancient Romans.

The broad distinction, however, remains that whilst in the case of alienations by a widow the personal *status* of no one is altered; in the case of adoption the personal *status* of a human being, namely, the adopted son, is undoubtedly altered. There can be no analogy between adoption and *legal necessity* justifying a widow to alienate her husband's estate, because adoption may be made without the existence of any property to be inherited by the adopted son, whilst *ex necessitate rei* the existence of the husband's property is a condition precedent to the exercise of the power of alienation by a Hindu widow.

The learned Pandit for the appellant, beyond suggesting a remote analogy, has not cited a single authoritative text to warrant the view that adoption stands upon the same footing as *legal necessity* which would justify a Hindu widow to alienate her husband's estate. If he had pointed out such a text I should have been anxious to call upon the learned Pandit also to point out some text which would maintain the suggested analogy and meet the difficulty of a case in which a husband never intended to adopt, and before death positively *prohibited* his wife from adopting anyone, as is often done in the case of property which a dying husband in leaving to his wife prescribes should not be alienated by her.

I have endeavoured in vain to find any authoritative texts which would meet the difficulties which the observations which I have just made suggest: and I cannot therefore help holding that the analogy is unsound. If the argument of the learned Pandit for the appellant were to be carried to its logical extent, a widow may *give* a son in adoption without the permission of her deceased husband, and so may a widow *take* a son in adoption without the permission [364] of her deceased husband. So that if the argument is right, two widows, one by *giving* and the other by *taking*, might bring about a valid adoption irrespective of the consent of their respective husbands or even of their *sapindas*. In other words, two widowed ladies might by mutual consent alter the personal *status* of a male human being, involving, as such alteration does, the result that not only in point of the pecuniary benefits of inheritance which the adopted son might have had from his natural father, but also in spiritual respects, he ceases to be the son of his own father, and becomes the son of a man who is no longer alive, who never intended to adopt him, and who never gave any permission to his widow to make any such adoption.

I hold that such a result wholly militates against the fundamental principles of Hindu jurisprudence, because such result would assign to womanhood a temporal and spiritual position enabling the female sex to govern the personal status of a male, both in his temporal and spiritual interests. And I say this with some emphasis, because upon all questions of importance I have long held that the *Smriti* of Manu, which would abhor the spirit of such a notion, is the best guide.

But the learned Pandit goes on to argue that in matters of adoption by the widow there is a necessary implication of her husband's permission, and he contends that the power to *take* in adoption must rest upon the same theory and principle as the power to *give* in adoption. With this hypothesis the learned Pandit has called our attention to the following texts of the *Dattaka Chandrika* (Sec. I, paras. 31 and 32):—

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"But by a woman the *gift may be made* with her husband's sanction if he be alive; or even without it if he be dead, have emigrated or entered a religious order. Accordingly *Vasistha* says:—'Let not a woman either *give* or *receive* a son unless with the assent of her husband.' Now, if there be no prohibition even there is assent: On account of the maxim:—'The intention of another, not prohibited, is sanctioned.' *Yagnavalkya* suggests the independency of the woman:—'He whom his father or mother, *gives* is a son *given*.

[365] Also in another place: "deserted by his father and mother, or either of them." (*Stokes' Hindu Law Books*, p. 636.)

These texts no doubt support the contention as to *implied* authority; but they are opposed to the doctrine of the *Dattaka Mimansa* (section IV, paras. 9, 10 and 11):—

"*By a man having several sons.*' Since the masculine gender is here used, the *gift* of a son, by a woman, is prohibited. Accordingly *Vasistha* says:—Let not a woman either *give or accept* a son; and (her) independency is not ordained. With the husband's assent, a woman also is competent. Accordingly *Vasistha* adds: 'unless with the assent of her husband.' *Whom his mother or his father gives* (*dadyat*): 'his mother or father give (*dadayat*'). As for what is contained in these passages, as intimating the equality of the father and mother, that is merely with reference to the assent of the husband."

The *Dattaka Mimansa* repudiates the whole doctrine of implied authority as much in the case of *giving* as in the case of *taking* in adoption by a widow; but the learned pleader for the appellant quotes the following paragraph of the same work to show that Nanda Pandit, the author of the *Dattaka Mimansa*, is inconsistent with himself when he lays down (section IV, para. 12):—

"It must not be argued that thus the gift of her son by a widow, though during a season of calamity, could not take place on account of the impossibility of the assent of her husband, analogous (to her incapacity) to adopt. For by referring to the instance recorded of *Galava*, such gift may be inferred as legal, and the singular number, indicating independence of another, is used." (*Stokes Hindu Law Books*, p. 573.)

Now, whilst I admit that so far as the doctrine of the husband's implied authority is concerned there is conflict between the *Dattaka Chandrika* and the *Dattaka Mimansa*, I confess I can see no inconsistency between the various parts of the rules laid down by Nanda Pandit. He uniformly upholds the indispensability of the huband's permission to validate an adoption by a widow, and he applies it [366] equally to the act of the widow in *giving* and her act in *taking* in adoption. The only exception which he mentions is the case of *calamity* or *distress*, when the husband has deserted his child or is dead, and where his permission to *give* his son in adoption is unprocurable.

Now, I have no hesitation in preferring the doctrine of the *Dattaka Mimansa* upon this point also, because it seems to me to be more consonant with the general spirit and fundamental principles of Hindu jurisprudence than the doctrine of the *Dattaka Chandrika* as to the husband's implied authority. Such implication of permission by the husband is based solely upon the theory that adoption by the widow would benefit the soul of the deceased husband. This point has already been disposed of by me as unsound under the Benares school of Hindu law; but even assuming, for the sake of argument, that such permission may be implied in the case of a widow *taking* in adoption, I fail to see how the doctrine of the

Dattaka Chandrika can be sound when it applies the doctrine equally to the case of a widow *giving* her son in adoption. I am unaware of any authority in the Hindu law which would justify the view that the act of *giving* away a son in adoption is conducive to the spiritual welfare of his father, be he dead or alive. It is thus clear that if this hypothesis of spiritual welfare to the deceased husband applies to the case of a widow *taking* in adoption, it certainly cannot apply to the case of a widow *giving* in adoption, for she might thus be possibly depriving her husband and herself of such spiritual benefits as the Hindu law contemplates by the existence of a son after the death of the parents—that is, the doctrine which is the solitary foundation of the right of adoption under that system.

It is thus that it is not the *Dattaka Mimansa* which is inconsistent with itself but the *Dattaka Chandrika* in so far as it may be understood to place implied authority of the husband on the same footing in the case of *giving* as in the case of *taking*. The *Dattaka Mimansa*, of course, in para 12, section IV, permits the *giving* of a son by a widow during a season of calamity or distress without [367] her husband's permission, but this exception is expressly limited to seasons of calamity or distress, and is consistent is with what is enunciated in the texts cited by the author in paras. 19 and 20 of the same part of the work, showing that according to *Katyayana* and *Manu*, seasons of distress and calamity stand upon a special footing of their own with reference to the power of *giving* away a son in adoption. This, indeed, is in full accord with the humane element which pervades the whole of Hindu jurisprudence, even where it lays down strict and rigid principles, and in the case of a son being *given* away during a calamity or distress, such as famine, that humanity is shown in the interests of the son and relieves the natural parents of what would otherwise be a sin in them. This is clearly brought out in the *Dattaka Mimansa*(section IV, paras. 19 and 20):—

"Hence the meaning is this: a gift of a son is to be made in a time of calamity only; not otherwise. Thus *Katyayana* says:—'But during a season of distress the gift or sale even may be made; otherwise he must not attempt the same. This is the injunction of the holy institutes.' From the context 'of sons and wives,' is understood. *Manu* also:—'Whom his mother or father *gives* during distress, confirming the gift with water.' *During distress*:—In a famine, and so forth: should the gift be made, no distress existing, the giver commits a sin on account of the prohibition, 'otherwise he must not attempt the same." ' (*Stokes' Hindu Law Books*, page, 575).

These texts then clearly show the reason of the distinction which Nanda Pandit in his *Dattaka Mimansa* makes between the power of a widow to *give* in adoption (in a time of distress) without her husband's permission and her power to *take* in adoption without such permission. The differentiating circumstance is of course the distress and calamity, and who would maintain that a widow is driven to *take* in adoption because of such distress or calamity? The whole argument therefore which has been addressed on behalf of the appellant, so far as it proceeds upon the assumption of inconsistency of Nanda Pandit's rule in the *Dattaka Mimansa*, is fallacious,

[368] But the learned Pandit on behalf of the appellant pursued the argument further by calling our attention to the text of the *Mitakshara* itself (chap. I, sec. XI, para 9) and Colebrook's Note thereon:—

"'*Whom his father or mother gives.*' *Medhatithi* reads and interprets

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'whom his father or mother *give*:' (inserting the conjunctive particle *cha* instead of the disjunctive *va*). *Balambhatta* condemns that reading; and infers from the disjunctive particle and dual number in the text that three cases are intended, *viz.*, 1*st.*—The mother may *give* her son for adoption with her husband's consent if he be absent or incapable; and without it, if he be dead or the distress be urgent. 2*nd.*—The father may *give* away his son without his wife's consent, if she be dead or insane, or otherwise incapable; but, with her consent, if she reside in her own father's house, 3*rd.*—The father and mother may conjointly *give* away their son if they be living together" (*Stokes' Hindu Law Books*, page 415).

Upon the authority of the views of *Balambhatta* thus expressed, the learned Pandit for the appellant has argued that the conclusions which are to be drawn from the *Dattaka Mimansa*, as I have stated them, are to be overridden. This argument has had my consideration, but I cannot adopt it because, in my opinion, the authority of *Balambhatta* cannot override the ratiocinative conclusions based upon the general spirit and principles of the Hindu law of adoption as represented by the doctrines of the *Dattaka Mimansa* of Nanda Pandit. I should not have said so unless I felt that the authority of *Balambhatta* is not so high as to override such conclusions. At page 17 of their work on Hindu law (3rd edn.), Mr. Justice West and Dr. Buhler state that *Balambhatta* is the *nom de plume* of a lady of the name of Lakshmidevi, who "gives a full and continuous verbal interpretation of the *Mitakshara* accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of *Yajnavalkya*.........Her opinions are held in comparatively small esteem, and are hardly ever brought forward by the *Sastris*, if unsupported by other authorities."

[369] To these views I cannot help adding the surmise that upon the particular question as to the woman's power to *give* or *take* in adoption *Balambhatta's* latitudinarian interpretation of the *Mitakshara* would naturally tend to favour her sex, and I would therefore regard her views of the law on such questions with great caution. When I say this I must not be understood to contradict what Mr. Shyama Charan Sarkar says at page xvii of his preface to vol. I of his *Vyvastha Chandrika*, to the effect that the work of *Balambhatta*, known as the *Balambhatta-tika*, is an authority in the Benares school, and may be referred to. All that I hold in this case is that I do not regard her authority upon the point now under consideration as higher than that of Nanda Pandit's ratiocinative enunciation of the law in the *Dattaka Mimansa*, to the effect that "the connection of lineage to the father is the filiation as his son and such filiation proceeds from the sanction only of the father, not from the act of adoption; for the agent of that in this instance is the wife." (*Dattaka Mimansa*, sec. I, para. 19). The exact effect of the preferable doctrine of the Benares school is perhaps best expressed by Mr. Sutherland in the last pragraph of *Head first* of his Synopsis of the Hindu law of adoption (*Stokes' Hindu Law Books*, page 664):—

"The same reason which imposes the necessity of adoption on a man not equally applying to a woman, the latter—(at least such seems the more accurate and prevailing doctrine)—is incapable in her own right of adoption, though it is admitted that by his sanction she may affiliate on the part of her husband a son who would necessarily be filially related to himself. Nanda Pandit denies generally the authority of the widow to adopt, assigning a reason by no means satisfactory, that the assent of her husband is impossible: but it is reasonable to admit, consistent with

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practice and the opinion of other authors, the validity of an adoption made by a widow under the sanction of her husband, written or formally expressed during his lifetime, and perhaps in some places under that of kinsmen."

Having so far dealt with the original texts and the reasoning which by analogy or ratiocination might be deduced from them, I [370] proceed to deal with the reported rulings of the Courts, as they are, in my opinion, valuable, not only as indicating a long course of decision, but also as indications of the actual law and practice as understood by the population governed by the Benares school. As introductory to those rulings and indicating their effect, I quote the words of Sir Francis Macnaghten, one of the Judges of the Supreme Court of Fort William in Bengal, in his *Considerations on the Hindu Law*, published so long ago as 1824, at page 155 :—

"If a man, not having male issue, shall omit in his lifetime to adopt a son, the widow or widows may, in *pursuance of his instructions*, adopt one after his death. Adoption by a widow or widows, *without instructions from the husband* for that purpose, is mere nullity. This I lay down with confidence as the law. *Vasistha* says :—'let not a woman either *give or receive* a son in adoption unless with the assent of her husband." After the death of her husband the widow is not competent to *give* one of his sons in adoption."

Equally emphatic is the language adopted by Sir W. H. Macnaghten in his *Principles and Precedent of the Hindu Law*, vol. 1, p. 100 (edn. 1829) :—

"It is an universal rule in Bengal and Benares that a woman can neither adopt a son nor give away her son in adoption without the sanction of her husband previously obtained."

Perhaps the oldest reported ruling on the subject is Case No. VIII on adoption, printed at page 182 of Sir W. H. Macnaghten's work, vol. II, which was a case from Bundelkhand, and was decided on the 14th April, 1816, and it was there laid down that "a widow is incompetent to adopt a son; and if she has sons she cannot give one of them to anyone." The case was governed by the Benares school; but the question relating to the effect of express permission of the husband does not, however, seem to have been considered in that case. The question, however, arose and was decided by the Calcutta Sadar Diwani Adalat in *Raja Shymshere Mal v. Rani Dilraj Konwur* (1) which was a case from the [371] District of Gorakhpur, which in 1816 was within the jurisdiction of the Calcutta Sadar Diwani Adalat. It was there clearly laid down that, according to the Hindu law as current in Benares, an adoption made by a widow without authority from her husband is illegal. In that case the answer given by the Pandit is thus stated in the Report (p. 171) :—

"It is written in the *Viramitradaya* and *Sanskar Konstribha* that it is lawful for a widow to adopt a son without authority from her husband, provided she obtain the consent of her husband's heirs; but as this doctrine is overruled in the *Dattaka Mimansa*, a treatise of *greater authority*, the adoption of Partab Mal, by Rani Bakht Koer without authority from her husband Raja Bhim Mal, is illegal and invalid under the *Shastras* current in Gorakhpur, and such adoption being illegal, the appellant, as heir of his father Partab Mal, cannot maintain any claim to the estate in dispute."

(1) Calc. S.D.A. vol ii (1812-1819), p. 169.

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The report then goes on to state the authority and reasons upon which the Pandits based their answer:—

"In support of answer first, *Dattaka Mimansa Vasistha* having said 'let not a woman give or accept a son unless with the assent of her lord' it is evident that a widow cannot, unless with the assent of her husband, adopt a son. It has been argued that this text is applicable solely to woman whose husbands are alive, and not to widows, the wife alone being under control of the husband ; to this it is answered the word 'woman' is to be taken in a general sense, and applied equally to a widow as to a wife, both being under control, the widow under that of the husband's kindred ; to this it is urged in reply that a widow consequently may adopt a son with the assent of her husband's relations; but such a doctrine would be manifestly absurd; for if she could, with the consent of her husband's kindred, adopt a son, the word '*husband*' must necessarily bear the sense of kindred, which it does not ; and a son so adopted could not confer any benefit on the deceased husband, being adopted without his consent, where as a son adopted by a widow with the consent of her husband, is in truth the son of her lord.

[372] These views were adopted by the Sadar Diwani Adalat, and I have quoted them *in extenso*, as they were the subject of consideration and approved by the Lords of the Privy Council in *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (1). That was a case from the district of Etawah which is coterminous with the district of Mainpuri, to which this case belongs, and was therefore subject to the Benares school of the Hindu law. The Pandits of the Zilla Court had in that case declared that the authority of the husband was not essential for a valid adoption by the widow ; but the Pandits of the Calcutta Sadar Court overruled this opinion, and held that such permission was essential, and this opinion was adopted by the Sadar Court and affirmed by the Lords of the Privy Council on appeal. In dealing with the authorities there cited, their Lordships go on to say :—

"Upon a full consideration of these authorities, their Lordships are of opinion that they cannot come to the conclusion that the decision of the Court below is wrong. According to the native text-writers it seems to be clear that the ancient law of Hindustan required the authority of the husband ; but it is also clear that the strictness of that law has been in many districts relaxed or modified by local usage ; and the opinion of the *Sastries*, as published in Mr. Borradaile's Bombay Reports, is very strong to show that in the Mahratta States to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not, in their Lordships' judgment, established ; on the contrary, the weight of authority is in favour of the opposite conclusion. The opinion of the Pandits of the Sadar Court, both in this case and the case of Shumshere Mal (appendix, p. 83), and that of the Pandit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pandits of the Zilla and Provincial Courts of Etawah and Bareilly and of the City Court of Benares. Without pretending to decide what is the law in other districts of India, their Lordships feel bound to [373] say that in this particular district, upon the authorities brought forward in this particular case, they must pronounce that the law requires the direction of the husband in order to the validity of an adoption ; at all

(1) 2 Knapp, 203=Sutherland P. C. Judgments, vol. i, p. 4.

events they cannot say that it does not; which they must do in order to reverse the judgment in this case."

Now, I regard this exposition of the law as a distinct authority that even so far back as 1834, when these observations were made, it had never been decided that the authority of the husband was *not* essential to the validity of an adoption by the widow under the Benares school. The effect of the Privy Council ruling was so understood by the learned Judges of the Madras High Court in *Collector of Madura v. Muttu Vijaya Ragunada Muttu* (1). Referring to the case the learned Judges say (p. 216):—

"One other case was quoted for the appellants as a positive decision that in provinces governed by the Benares school of law the express assent of the husband was required, and by the respondents because it admitted the position that this ancient rule had in many places been modified. The case is reported in 2 Knapp, 203. The question arose in the zilla of Etawah, in the North-Western Provinces, subject to the Benares school of law, as we know, both from its geographical situation and from the *Mitakshara* being quoted as an authority, both by the *Pandits* who affirmed and by those who denied the validity of an adoption without the express assent of the husband (page 207 of the Report). The Bengal *Pandits* relied upon the *Mitakshara* and the *Dattaka Chandrika*, and the note of Mr. Colebrooke so often referred to and the passage of Sir T. Strange were quoted in favour of the validity of the adoption. This therefore is an express decision that there are places governed by the Benares school of law in which no assent but that of the husband will be sufficient to validate a widow's adoption......the materials contained in a case which, coincidentally with this, was before the Sadar Court of Bengal (*Raja Shumshere Mul* v. *Rani Dilraj Konwur*, II Sadar Dew. 170, 171), were also before the Privy Council. The *Pandits* of the Sadar Courts of Bengal quoted the *Viramitradaya* [374] and *Sanskar Konstribha* works, of paramount authority in the special school of Benares, and declared their authority overruled by the *Dattaka Mimansa* of Nanda Pandit. So far, therefore, as the decision goes it is an authority for the paramount weight of the *Dattaka Mimansa* over the treatise specially applicable to Benares, and in a case arising in a zilla proximate to Benares itself. Moreover, the case overruled the opinion of Mr. Colebrooke, if that opinion can be supposed to mean that the assent of the husband is not indispensable in countries following generally the doctrine of the *Mitakshara*. It is also of course an authority for the position that the *Dattaka Mimansa*, requires the direction of the husband to enable affiliation of the boy given to and accepted by the widow."

I have quoted these observations with especial reference to the circumstance that in this case, which is usually known as the *Ramnad* Adoption Case, the learned Judges of the Madras High Court did not go the whole length of Pandit *Ajudhia Nath's* argument on behalf of the appellant by holding that a widow can adopt a son without the permission of her husband, though the learned Pandit insisted upon its authority as governing this case. The passages which I have quoted clearly show that the learned Judges, whilst laying down the rule as to the dispensability of the husband's permission, had present to their mind the earlier rulings relating to the Benares school which I have already cited, and that they did not intend to lay down the rule as

(1) 2 M. H. C. R. 206.

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applicable to this part of the country which I may call as the Benares school proper. Moreover, in that case the majority of the husband's *sapindas* had given their consent to the adoption, and this was taken as sufficient substitute for his permission according to the Madras law. This circumstance must be distinctly borne in mind in considering the authority and application of the ruling; all the more so as the ruling has been affirmed by the Lords of the Privy Council on appeal in that very case. The case (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*), is reported at page 397 of 12 M. I. A., and at page 440 their Lordships of the Privy Council take care to point out that they are not to be undertood as overruling the rule laid down by them with [375] reference to this part of the country. Their Lordships observe (at p. 440):—

Against these authorities the appellants have invoked that of the case of a *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (1). But what was in fact decided by the very guarded judgment delivered by the late Lord *Wersleydale* in that case? It was that, according to the native text-writers, including probably *Vasistha*, certainly including the *Dattaka Mimansa* of Nanda Pandita, the authority of the husband was requisite to a valid adoption; that the strictness of the law had been in many districts and, particularly in the Mahratta States, relaxed or modified by local usage; but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular district of Etawah in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that district did not require the direction of the husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the Judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern a case arising in the south of India. Upon the whole, then their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the *Dravida* country, and particularly in that part of it wherein the *Ramnad zamindari* is situate, a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him."

This quotation is of supreme importance in considering this case, not only because Pandit *Ajudhia Nath* for the appellant has relied upon the *Ramnad* case, but also because this passage clearly shows that the Lords of the Privy Council were even more anxious than the learned Judges of the Madras High Court, whose judgment they affirmed to point out that the rule which they were laying down as to the dispensability of the husband's permission [376] to enable a widow to adopt was not to be held to apply to the whole of India, but was to be limited to the *Dravida* country, namely, the Madras Presidency, and perhaps also the *Maharashtra* country, namely the Bombay Presidency.

Now, this distinction renders the *Ramnad* Adoption case inefficatious for supporting the learned Pandit's argument on behalf of the appellant. In the case of *Ganga Sahai* v. *Lakhraj Singh* (2) I fully explained the various divisions and sub-divisions of the Hindu law, which must not be lost sight of, more especially in interpreting the Hindu law of adoption. I there pointed out that, although the *Mitakshara* school includes Bombay and Madras along with this part of the country, it is sub-divided into four important sub-divisions, namely, *Benares*, *Mithila*, *Maharashtra* and

(1) 2 Knapp. 203. (2) 9 A. 291.

Dravida; and that although these sub-divisions unite in respecting the authority of the *Mitakshara*, they do not unfrequently differ in interpreting that authoritative text on points of detail—each sub-division having its own authoritative commentaries on the text.

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The same distinction renders inapplicable to this case the more recent ruling of the Lords of the Privy Council in *Sri Vira Virada Pratapa Sri Ragunada Anunga Bhima Deo Kesari Maharaz* v. *Sri Brozo Kishoro Patta Deo* (1) even if the point now under consideration were the exact point in the case. There are, however, certain *dicta* in the judgment of their Lordships which, far from supporting the appellant, tend to weaken the argument so ably addressed to us in support of the appeal. At page 191 of the report their Lordships observe :—

"Positive authority, then, does not do more than establish, that, according to the law of Madras, which, in this respect, is something intermediate betweeen the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, *if duly authcrised by his kindred.*"

These remarks clearly indicate that their Lordships were dealing only with the *Dravida* sub-division of the *Mitakshara* school prevalent in Madras and the latter portions of their judgment clearly show [377] that even under the *Dravida* school, permission of the husband is necessary, though in that particular part of the country it may be substituted by the consent of the *Sapindas*. Their Lordships, after ruling that the assent given by one separated and distant *sapinda* (himself the father of the child taken in adoption) was not in law sufficient to authorize the adoption, go on to say :—

"In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorization of some kinsmen of the husband is required. To authorize an act implies the exercise of some discretion, whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is that Mahadevi, representing herself as having the written permission of her husband to adopt, asked the Raja of Piddakimidy to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Raja ever supposed that he was giving the authority to adopt which a widow, not having her husband's permission, would require. Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the Ramnad Case, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras."

And then their Lordships proceed to make observations which, I think, may well be borne in mind in deciding this case, though it is governed by the Benares school of law. Their Lordships says :—

It may be the duty of a Court of justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of propety, and it may be in the case of collateral succession, as in the present

(1) 3 I.A. 154.

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instance, the right [378] of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

Now, it must not be forgotten that these observations were made even with reference to a case governed by the *Dravida* school where, as I have already explained, the consent of the *sapindas* can take the place of permission given by the husband to enable a widow to make a posthumous adoption. I maintain that the principles of these observations apply *a fortiori* to a case such as this, which is governed by the stricter rules of the Benares school of law as to the necessity of the husband's permission.

This view is in accord with the manner in which Westroop, C. J., in the Full Bench case of *Ramji* v. *Ghaman* (1) regarded the matter in a case governed by the *Maharashtra* sub-division of the *Mitakshara* school, which sub-division upon this particular point of the widow's power of adoption may be said to occupy the other extreme opposite to the Benares school. The learned Chief Justice in that case, in delivering the judgment of the Full Bench, assumes all along that the permission of the husband to validate an adoption by the widow is necessary as the general doctrine of the Hindu law, and in laying down a different rule for the Bombay Presidency, he speaks of it as "*the Mahratta* deviation from ordinary Hindu law," when he holds "that the widow of a Hindu, dying without leaving male issue, may, *if her husband were separated from his family in estate* (or, other words, when she is his heir), to adopt without any express authority from him (if he have not prohibited her from so doing or otherwise implied his intention that she should not adopt) and without the consent of his relatives."

He then goes on to point out "that there is not any sufficient text or precedent for conceding any wider range to that *deviation*," [379] and expresses his concurrence in the remarks of Melvill, J., in *Rupchand Hindumal* v. *Rakhmabai* (2), where it was held that even under the *Maharashtra* school the power of a widow to adopt without the permission of her husband or of his kinsmen was limited to separated Hindu family estates, and the learned Chief Justice ruled that a Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners. The same is the effect of the *ratio decidendi* adopted by West, J., in the later case of *Giriowa* v. *Bhimaji Raghunath* (3), which also was governed by the *Maharashtra* school.

I have dwelt upon both these cases because they were seriously insisted upon as authorities in support of the appeal; but it is enough to say that they expressly proceed upon the doctrine of the *Maharashtra* school, and that if they are of any value in this case as references, that value, lies in showing as they do the untenability, in the Benares school, of the argument for the appellant as to the authority of the husband being presumed or implied as given to the widow for making an adoption because of the spiritual benefits which such adoption might bring to the soul of her deceased husband. And indeed it is only in this sense that the

(1) 6 B. 498. (2) 8 B. H. C. R. 154. (3) 9 B. 58.

Madras cases, which I have cited and considered at some length, are helpful in this case.

The effect of these cases, expressed briefly, is to show that in the *Dravida* country (that is, Madras), whether the family is joint or divided, the widow cannot make a valid adoption without the permission of her husband, unless she obtains the consent of the majority of her husband's nearest *sapindas*; and that in the *Maharashtra* country (that is, Bombay), where a more lax rule prevails, she may, when in possession of a *divided* estate as heir of her separated husband, make an adoption to him without any kind of express permission, either from him or his *sapindas*; but that in the case of a joint *undivided* Hindu family estate she cannot make [380] any valid adoption without the consent of her deceased husband's co-parceners in the joint Hindu family.

Now, I have no desire to enter into any elaborate discussion to show how the Benares school upon this point, as represented by the doctrines of the *Dattaka Mimansa* of Nanda Pandit, is more logical and consistent with the general spirit of the Hindu law than either the *Dravida* or the *Maharashtra* sub-division of that system of jurisprudence. But the exigencies of the question to be determined in this case do require me to point out that if the implication of the husband's authority for an adoption by his widow is to be assumed upon the ground of such adoption being beneficial to his soul, I fail to see any reason, either in common sense or in the spirit of the Hindu law, which would enable a dead man's *sapindas* or nearest kinsmen to deprive him from such spiritual benefits, by preventing or prohibiting his widow to make an adoption. Further, so far as the Bombay cases are concerned, I fail to see how the fact of a man being joint or separte in estate can affect the powers of his widow to make an adoption for the spiritual benefits of her husband. The devolution of inheritance upon an adopted son is a mere incident flowing from the fact of the adoption, and I am unaware of any authority in the Hindu law which lays down that the possession of property, whether moveable or immoveable, is a condition precedent qualifying the powers of the adoptive parents. Nor am I aware of any authority which would justify the view that the spiritual salvation of a childless Hindu is less important in the case of a member of a joint Hindu family than in the case of a separated member. And if this is so, and if it is also true that the solitary foundation of the Hindu law of adoption is the spiritual benefits to the soul of a childless Hindu, it seems unintelligible and almost irrational why such benefits which, according to the *Dravida* and *Maharashtra* schools, might be created by the widow's adoption, should be made dependent upon the will the deceased husband's *sapindas*, the very persons most interested, in a mundane sense, in preventing those spiritual benefits, because they would be depriving themselves of inheriting the property of their deceased kinsman the husband of the widow.

[381] Now, it is not because I have any desire to decide Hindu law cases of this character upon modern methods of reasoning that I have made these observations, which, I confess, assail the doctrines of both the *Dravida* and *Maharashtra* shools of the Hindu law of adoption, and tend to show that those doctrines are inconsistent with the general spirit of that system, both as to spiritual salvation and the right of inheritance which is founded upon that contemplation. I have made those observations because both the *Dravida* and *Maharashtra* shools are sub-divisions of the *Mitakshara* school in common with the Benares school which governs

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this case, and also because the learned Pandit for the appellant insisted upon maintaining that the Madras and Bombay cases must be taken to govern the decision in this case also. I have made these observations also in order to show that the doctrines of the *Dattaka Mimansa* of Nanda Pandit upon this point represent the correct view of the Benares school, and must be preferentially adopted in this case to maintain the harmony of decision as represented by the reported cases governed by the Benares school.

What then has been the course of decision in this part of the country, falling as it does within the area of what I call the Benares school *proper*? I have already shown that so long ago as 1816 the Sadar Diwani Adalat of Calcutta in dealing with a case from these Provinces, *Raja Shumshere Mull* v. *Rani Dilraj Konwur* (1), held the express permission of the husband to be an essential condition for the validity of an adoption by the widow, and that the rule was approved so long ago as 1834 by the Lords of the Privy Council in *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (2). I will now show that there are other cases which lay down the same rule. We all know that Behar is subject to the Benares school, and the Sadar Diwani Adalat of Calcutta in *Jairam Dhani* v. *Musan Dhani* (3) held, consistently with their ruling of 1816, that by the Hindu law applicable to Behar, the permission of the husband is necessary to legalize adoption by his widow, and the same principle was the foundation of the decision of the same Court in *Gournath Chaudhree* [382] v. *Arnopoorna Chaudhrain* (4) which was also a Behar case and governed by the Benares school.

So far as this Court is concerned, the only authoritative *dictum* to be found upon the point is in the judgment of Roberts, J., in *Thakoor Oomrao Singh* v. *Thakoranee Mahtab Koonwer* (5) at p. 103*k* and 103*l* of the report, where he says :—

"It is desirable to consider as regards the facts to be established in the two next issues of the husband's authority to adopt and the fact of what is the law on the subject and what is the view which has prevailed and would seem still to prevail on the subject. The law must be governed by the rules laid down in the *Dattaka Mimansa*, which is of paramount authority in the tracts governed by Benares law. In the present case the plaintiff must prove that the widow had the authority of her husband to adopt, that she made the adoption when the boy adopted was under six years of age and with the prescribed ceremonies. If the plaintiff does not succeed in establishing these points, the filial relation fails: he may be entitled to some compensation, but he has no right to inherit the property."

This view, so far as it insists upon the necessity of the husband's permission, which was expressed in 1868, has never yet been doubted by any Judge of this Court, and in my opinion furnishes evidence of how the law has been uniformly understood in this part of the country, and I feel that, I am in no small measure supported in this observation by the circumstance that in all the cases relating to the Benares school which I have already cited, the party interested to maintain the adoption pleaded that, as a matter of fact, the deceased husband had given permission to the widow, as indeed is the case in this very case also, although the lower

(1) Cal. S. D. A., vol. ii, p. 169.
(2) 2 Knapp. 203.
(3) Cal. S. D. A., 1830, p. 3.
(4) Cal. S.D.A., vol. viii, part I, p. 332.
(5) N.W.P.H.C.R. 1868, p. 103 *a*.

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Courts have held that no such permission is proved. Another notable instance of the same circumstance is the case of *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1) which was a case which went up to the Privy [383] Council from this part of the country, and their Lordships, referring to the pleadings of the parties in that case, go on to say :—

"The question as to the adoption of the appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority *must be strictly pursued*, and as the adoption is for the husband's benefit, so the child must be adopted to him, and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindu law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case, it was necessary for the appellant to prove—*first*, the authority given by *Hem Singh* to his wife to make the adoption ; and *second*, the actual adoption by *Khoosal Koer* of the appellant as the son of *Hem Singh*."

Now, I have cited this passage not because it specially decides the exact point now before us, but because it fully bears out the argument of the learned Pandit *Bishambhar Nath*, to the effect that ever since 1816 it has always beeen taken for granted and assumed as an unquestionable doctrine that express permission to the widow by her deceased husband is an essential condition precedent to the validity of an adoption by her in cases governed by the Benares school. And whilst this is so, the learned Pandit *Ajudhia Nath* for the appellant, beyond relying upon his interpretation of the original texts and relying upon the *Dravida* and *Maharashtra* cases arising in Madras and Bombay, has been unable, notwithstanding much research, to point out a single case reported or unreported in which the parties did not raise the plea as to the necessity of the husband's permission, or in which this Court, or any other, dealing with the question in cases governed by the Benares school has ever dispensed with such permission as an essential element for the validity of an adoption by the widow. Referring to my own personal experience both at the Bar and on the Bench, I think I may safely affirm that till so late as 1886, when my brother [384] Straight and I had to decide the case of *Gangā Sahai* v. *Lekhraj Singh* (2) it was never seriously contended that, under the Benares school of law and the actual living practice in this part of the country, the husband's permission was not essential to the validity of an adoption by the widow.

Speaking for myself, I cannot refrain from saying that in deciding this case I have received valuable help from the learned and able arguments addressed to us in the Full Bench by the learned Pandits who appeared for the parties ; and indeed it has been in view of this circumstance that I have considered it my duty to cover the whole ground of those arguments by delivering the judgment at such length upon a vexed question, such as this case has raised. And I trust that in dealing with that question I have not transgressed the advice given by the Lords of the Privy Council in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (3) nor their Lordships' observations in *Sri Raghunadha* v. *Sri Brozo Kishore* (4) as to the manner in which Courts of justice in this

(1) 12 M.I.A. 350. (2) 9 A. 253. (3) 12 M.I.A. 436.
(4) 3 I.A. 193.

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country must deal with vexed questions of the Hindu law where the original Hindu text and interpretations are divergent, and the case-law is also in conflict. I have already quoted the two passages to which I have just referred, and I think, under the circumstances of this case and the practice prevailing in this part of the country, it is especially important to bear in mind the advice given by their Lordships in the latter of those passages, where they say that "it is impossible not to see that there are *grave social objections* to making the succession of property dependent on the *caprice of a woman*, subject to all the *pernicious influences* which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property."

These observations are particularly applicable to this case, because as I have set forth at the outset of this judgment, the admitted circumstance that Musammat Lareti, defendant, in making the adoption of Tulsi, defendant, and executing a deed in his favour on the 16th of January, 1886, on that same day obtained from [385] Jhamman the grandfather and guardian of the adopted son, an *ikrarnama*, agreeing to pay Rs. 100 annually from this estate to one Ram Sahai, who is the son of the widow's brother, and in no sense entitled to inherit any interest in her husband's estate. The circumatance to my mind is a strong illustration of the circumstances contemplated by the Lords of the Privy Council in the passage which I have just cited as to the *caprice of a woman*, and the *pernicious influences* to which she, especially in widowhood, is subject in India.

But it is not upon the ground of any finding as to the capriciousness of the transaction of the 16th of January, 1886, or of collusion or fraud between the widow Musammat Lareti and Jhamman, the grandfather of the adopted son Tulsi, nor upon any suspicion of any undue influence exerted in behalf of Ram Sahai, the son of the widow's brother, that I decide this case. I decide it upon the doctrines of the Hindu law of adoption as they must be understood in the Benares school; as they have been uniformly understood ever since 1816 in the reported cases; as they have been uniformly acquiesced in and adopted in practice by the Hindu population inhabiting the territories governed by the Benares school: and I think that we should be doing nothing more or less than introducing not only a social but a religious innovation and disturbing the accepted rules of succession to property by adopted sons if we were to abrogate the uniform course of decision in this part of the country, dating so far back as 1816. If there is any validity in the judicial doctrine of *stare decisis*, which I think has validity and is applicable even to such cases, I hold that we should be shaking settled titles and undoing the uniform judicial exposition of more than half a century of the British Rule in India, if we were in 1890 to adopt the argument of the learned Pandit *Ajudhia Nath* for the appellant that ever since 1816 the Courts of British India have misunderstood the doctrines of the Benares school of Hindu law as to adoption, and have wrongly insisted upon the necessity of express permission by the husband as an essential condition precedent to the validity of an adoption by his widow.

[386] I am wholly unable to accept any such result, and hold that, according to the Benares school of Hindu law, no adoption can be legally made by a widow without the express permission of her husband; that where she makes an adoption without such permission, the doctrine of *factum valet* as understood in the Hindu law or in other systems of jurisprudence cannot cover the case, because it affects the very essence of the

competency to *take* a child in adoption; that therefore such adoptions, though actually made, are wholly illegal and invalid, null and void, under the Benares school of Hindu law prevalent in the territories within the jurisdiction of this Court.

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Since, in pursuance of my brother Straight's order of 6th June, 1888, the whole of this case has been referred to the Full Bench, the result of my judgment in the case is to dismiss this appeal with costs, and I would do so accordingly.

EDGE, C. J.—I have carefully considered the very exhaustive and instructive judgment which my brother Mahmood has just delivered, and with it I thoroughly agree. I feel that I can add nothing to it, but I wish to say that, having regard to the fact that the texts of the early commentators are more or less in conflict, to the fact that no single case which arose in the North-Western Provinces, in Oudh, or in those districts in Lower Bengal in which the Benares school is followed, has been cited to us in support of the contention that a Hindu widow subject to the Benares school can, without an express authority given to her by her deceased husband, make a valid adoption to him, and to the decision in the case from Gorakpur of *Raja Shumshere Mull* v. *Rani Dilraj Konwur*(1), to that in the case from Etawah of *Raja Haimunchul Singh* v. *Koomer Gunsheam Singh* (2) in 1834, to that in the case from Agra of *Thakoor Oomrao Singh* v. *Thakorannee Mahtab Koonwer* (3) in 1868, and to that in the case from Aligarh of *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (4), I would expect that any one who would now contend that a Hindu widow subject to the Benares school could make a valid adoption to her deceased [387] husband without express authority given by him, would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was, in the particular district recognized as valid by those subject to the Benares school. No such evidence has been given here and no such usage has been proved. I may further say that I entirely agree with my brother Mahmood that the principle of *factum valet* is inapplicable to a case like this.

In the view which I take of the case, it is not necessary to consider whether or not an only son or a sole surviving son can, according to the Hindu law, as interpreted by the Benares school, be given or taken in adoption.

I agree that this appeal should be dismissed with costs.

STRAIGHT, J.—I have very carefully read and considered the judgment of my brother Mahmood, and I concur in it, and in his order dismissing the appeal with costs.

BRODHURST, J.—I entirely agree.

TYRRELL., J.—I agree.

Appeal dismissed.

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(1) Cal. S.D.A., Vol. ii, p. 169.
(2) 2 Knapp 203.
(3) N.W.P.H.C.R, 1898, p. 103*a*.
(4) 12 M.I.A. 350,

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PRIVY COUNCIL.

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PRESENT:

Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

BHAGWAN SAHAI (*Defendant*) *v.* BHAGWAN DIN AND OTHERS (*Plaintiffs*). [11th March, 1890.]

Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for re-sale.

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repaying the purchase money within a certain time, is not on that account to be construed as if it were a mortgage. *Alderson* v. *White* (1) referred to and followed, the law of India and of England being the same on this point.

[F., 33 A. 585 (604) = 8 A.L.J. 389 (401) = 9 Ind. Cas. 1013; 8 A.L.J. 119 (121); 11 C.W.N. 400 = 6 C.L.J. 208; 9 Ind. Cas. 140 (141); 11 Ind. Cas. 124; 15 Ind. Cas. 423; R., 6 C.W.N. 192; 5 Bom. L.R. 1036; 8 O.C. 275; 12 P.R. 1901 = 114 P.L.R. 1901. Cons. 19 A. 434; D. 14 A. 195; 22 A. 149 = 27 I.A. 58 (P.C.); 33 A. 122 (124) = 7 A.L.J. 998 = 7 Ind. Cas. 911; 21 B. 704; 22 B. 245; 2 Bom. L.R. 1058; 15 Ind. Cas. 575.]

[N.B.—See in this connection 9 A. 97 whereon this appeal has arisen.]

APPEAL from a decree (16th November 1886) of the High Court (2) affirming a decree (20th August 1885), of the Subordinate Judge of Cawnpore.

[388] The question here was whether the parties were in the relation of mortgagor and mortgagee, so that a right to redeem could subsist.

The suit was brought by the respondents to redeem a mauza, Harbaspur, alleged to have been transferred in 1835 by way of conditional sale, by the plaintiffs' predecessors-in-title, to the predecessor of the defendant who was now appellant.

The plaint stated transfers both in, and subsequently to, 1835 alleging that the purchase-money had been repaid as the result of the defendant, and those through whom he claimed, having realized the profits of Harbaspur. A declaration of the plaintiffs' right to redeem, mesne profits, and an account, were demanded. The written statement, contained among other defences, that the transaction of 1835 was an absolute sale from the first, and not a mortgage.

The Subordinate Judge decided that the property was redeemable by the plaintiffs, and decreed the claim, subject to the condition that the plaintiffs should repay the purchase-money, *viz.*, Rs. 4,000. This was paid into Court on 29th August 1885, and a decree was thereupon made for redemption.

An appeal from this decree was dismissed by the High Court. In the judgment are the words—"the plaintiff's contended that the sale was a conditional sale, or mortgage by conditional sale. The correctnesss of this was admitted on behalf of the defendant." The judgment is reported in I.L.R., 9 All. 98.

Mr. *J.D. Mayne*, for the appellant, argued that the transaction of 1835 was an absolute sale, with the reservation of a right of repurchase by the vendor, which had not been exercised within the time limited by

(1) 2 De. Gex. and J. 105.

(2) 9 A. 97.

the agreement in that behalf; a right which had, therefore, ceased to have effect. There was, therefore, not existing here any conditional sale or mortgage, within the Regulation XVII of 1806, which could support a right to redeem. It was a question of whether the relation of mortgagee and mortgagor subsisted between the parties, not merely a question of limitation. It was **[389]** submitted that the English case (to which LORD MACNAGHTEN referred), *Alderson* v. *White* (1) was conclusive as to the law, identical on this point in both countries.

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Mr. *C. W. Arathoon* for the respondent, argued that there had been a mortgage by conditional sale, as in *Radhanath Dass* v. *Gisborne & Co.* (2). This case, however, their Lordships distinguished. He also referred to Macpherson on the Law of Mortgage (ed. 1868) p. 10, and to Bengal Regulation XVII of 1806.

Mr. *J. D. Mayne* was not called upon to reply.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

JUDGMENT.

SIR BARNES PEACOCK.—This case depends upon the construction of two documents, dated February 20th, 1835. By the first document Alum Singh and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to Ganga Din "in lieu of Rs. 4,000 of the current coin." That was an absolute sale by Alum Singh to Ganga Din. Then on the same day another document was executed, by which Ganga Din, reciting the deed, says that he has purchased the property for the Rs. 4,000, and adds:—"However, I have as a matter of favour, mercy, kindness, and indulgence, executed this deed, and do hereby stipulate that if all these vendors will within a period of ten years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same, and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid"—and their Lordships think that the construction of that is—"In case the whole of the principal is not paid according to the terms of this document,"—"the vendors shall not be able to cancel the sale by payment of the principal."

[390] Those documents having been executed in 1835, in the year 1884—nearly 50 years afterwards—a suit is commenced by the plaintiffs, representing the vendors, claiming to redeem the property upon payment of the Rs. 4,000. The defendant in his written statement says:—"An absolute sale-deed was executed in respect of the property in suit in favour of Ganga Din, whose proprietary interests were then afterwards purchased at auction by Sukh Din Bajpai." Then he says—"Under the deed of agreement alleged by the plaintiffs they have no right of redemption by law," and in the last two lines of paragraph 9 he says—"The two parties neither stood, nor do now anyhow stand, in the relation of mortgagor and mortgagee."

The first Court having held that the parties did stand in the relation of mortgagor and mortgagee, and having decreed that the plaintiffs were

(1) 2 De. Gex. and J. 105.

(2) 14 M.I.A. 1.

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entitled to redeem, an appeal was preferred to the High Court and the third ground of appeal is thus stated :—" Because under the terms of the agreement the plaintiffs cannot now sue to redeem the property in suit." The High Court upon the hearing of the appeal affirmed the decision of the lower Court, and held that the parties stood in the relation to each other of mortgagor and mortgagee and not in the relation of one being an absolute vendee with a right given to the vendors to re-purchase within a period of ten years upon re-payment of the full amount of the purchase-money. It does seems contrary to all principles of equity and good conscience that when it was stipulated that the money should be re-paid within the period of term-years from 1835, the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years. That this was not a mortgage, at any rate according to English law, seems clear from the decision of Lord Chancellor Cranworth in the case of *Alderson* v. *White* (1). In giving judgment, the Lord Chancellor says this—" These deeds taken together do not on the face of them constitute a mortgage; and the only question is whether, assuming the transaction to be a [391] legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage-transaction. The rule of law on this subject is one dictated by commonsense; that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase." In this case the vendors did not stipulate that they should have a right to re-purchase, but the vendee, as a matter of grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded—" In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment not of what should be due but of the full amount of the purchase-money of 4739*l*"—exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000—" Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to show that it was intended to be a mere mortgage? I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be; and I see but little evidence to that effect here." That passage was approved of in a case in the House of Lords, reported in the 13 Law Reports, Appeal Cases, page 568—*The Manchester, Sheffield and Lincolnshire Railway Company* v. *The North Central Waggon Company*. It is clear that this case was not one of mortgagor, and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

Under these circumstances their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships ought to give the judgment which the High Court ought to have given, namely, to reverse the decision of the first Court and to dismiss the suit with costs in both Courts.

(1) 2 De. Gex. and J. 105.

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[392] Their Lordships will humbly advise Her Majesty to that effect. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant : Messrs. *Barrow* and *Rogers.*
Solicitors for the respondents : Messrs. *T.L. Wilson* and *Co.*

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12 A. 392 (F.B.) = 10 A.W.N. (1890) 119.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

RADHA CHARAN AND OTHERS (*Judgment-debtors*) *v.* MAN SINGH (*Decree-holder*). [28th March, 1890.]

Execution of decree—Application for execution withdrawn by decree-holder—Rule in Sarju Prasad v. *Sita Ram—Civil Procedure Code*, ss. 373, 647 "*Suit*"—"*Appeal.*"

S. 647 of the Civil Procedure Code makes s. 373 applicable to proceedings in execution of decree. The words "suit" and "appeal" in s. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal.

An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off, upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid nor had the diet money been deposited, and no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held, by the Full Bench that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code.

Sarju Prasad v. *Sita Ram* (1), and *Fakir-ullah* v. *Thakur Prasad* (2), approved and followed. *Bijai Singh* v. *Haiyat Begum* (3) distinguished.

[Diss., 18 C. 462 ; 18 C. 515 ; 37 P.R. 1892 ; **Not F.**, 15 M. 240 ; 18 C. 635 ; **Appl.**, 15 A. 49 = 12 A.W.N. 222 ; **R.**, 13 A. 564 ; 26 B. 76 = 3 Bom. L.R. 431.]

THE appellants in this case were judgment-debtors, and the respondent was the decree-holder, of a decree passed on the 2nd March 1881, for recovery of money by enforcement of lien against certain immoveable property.

[393] The first application for execution of the decree was made on the 20th February 1884, but the application was struck off by order of the Court dated the 8th March 1884.

The next application for execution was made on the 1st February 1886, and notice was thereupon issued to the judgment-debtors to show cause why the application should not be granted, and the case came on for hearing on the 23rd February 1886, when the prayer in the application for execution as to the arrest of the judgment-debtors, was considered.

On the 23rd February 1886, the date fixed for the disposal of the application, the decree-holder's pleader, who had not deposited the necessary *talbana* fees, instead of desiring to prosecute the application, made a statement to the Court to the effect that the judgment-debtors were hiding, and requesting the Court to strike off the application for execution, because it was not desired to proceed with it any further. The Court.

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(1) 10 A. 71. (2) 12 A. 179. (3) 9 A.W.N. (1889), 163.

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in accordance with this request, struck off the application. No permission was applied for and given to the decree-holder to make a fresh application for execution of the decree.

On the 27th June 1888, a fresh application for execution was made by the decree-holder. Notice having been issued to the judgment-debtors, they filed objections, which were allowed, and the application dismissed by an order passed on the 8th December 1888. The order was in the following terms:—

"Execution was applied for on the 20th February 1884, and the case was struck off on the 8th March 1884. Then on the 1st February 1886, the decree-holder stated that "the judgment-debtor having concealed himself, the case cannot be prosecuted at present," the case was struck off. That application cannot save time, according to the ruling in *Sarju Prasad* v. *Sita Ram* (1) and as there are no words in the statement of the decree-holder from which an implied or express permission of the Court to file a fresh application might be inferred, the decree cannot be executed. Irrespective of the question of permission, the present application is barred by **[394]** limitation also, because it has been presented more than three years after the application of 1884. It is therefore ordered that the case be dismissed, and the costs charged to the decree-holder."

The decree-holder appealed to the District Judge of Agra, who gave judgment as follows:—

"In this case the fees were lodged for notice to issue to respondent. It is urged by the respondent that this does not amount to a step-in-aid of execution. The mode of execution was specified to be by arrest. When the fees for arrest should have been filed, the appellant stated that the judgment-debtor was at the time in hiding and not to be found, and prayed that the case might be struck off. The whole point is whether that impliedly asks for permission to renew the application when the debtor may be discovered. On the analogy of many cases that I have decided on this and closely similar points, I hold that these words amount to an implied request for permission to renew the execution, and decree the appeal with costs against the respondents."

The judgment-debtors appealed to the High Court. The appeal was referred to the Full Bench.

Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENTS.

EDGE, C. J.—This was an appeal from an order in execution of a decree. The question turns on what is the effect in law of what took place on the 23rd February 1886. Now, on the 1st February 1886, the second application for execution of the decree was presented, and notice was issued and served for the hearing of that application on the 23rd February 1886. On the 23rd February 1886, the pleader for the decree-holder appeared, and stated that the judgment-debtor was in hiding and that the decree-holder did not want to prosecute the application further. The application was one, I should have said, for execution against the person of the judgment-debtor by his arrest, and an order for a warrant had been issued, subject to the payment of fees. Those fees had not been paid, nor had the diet-money been deposited. In

(1) 10 A. 71.

fact, beyond [395] making his application on the 1st February and appearing by his pleader on the 23rd February, the decree-holder took no steps to proceed with his application. The Munsif struck off the application. On the 27th June 1888, the decree-holder presented his third application for execution. The question for us to consider is whether this is a case in which we can apply the procedure of s. 373 of the Code of Civil Procedure. Now, looking at these facts, in my opinion, the Munsif was justified in treating the case as one in which the decree-holder withdrew from his application or abandoned it. No permission to bring a fresh application was given. The application was, as I have said, struck off. This is a question which has been frequently considered by various members of the Court. It has been argued here to-day that s. 373 does not apply to proceedings in execution. Unless we are to apply, so far as may be, the principles provided for the guidance of Courts in the other sections of the Code of Civil Procedure, there would, in a great number of cases, be no provision for what should be done in execution-proceedings, as the sections which exculusively relate to execution-proceedings are deficient and far from exhaustive, if we are to regard them as the only sections which supply the procedure in execution-cases. In my opinion s. 647 makes s. 373 applicable. I think that "suit" and "appeal" in that section apply to those proceedings generally known as a suit and an appeal, that is, to suits and appeals in the strict acceptation of the terms, and that in s. 647 the words "suit" and "appeal" were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. The leading case in this Court on the question before us is that of *Sarju Prasad* v. *Sita Ram* (1), and I think the latest case on the subject in this Court is that of *Fakirullah* v. *Thakur Prasad* (2). In my opinion the case of *Sarju Prasad* v. *Sita Ram* (1) is correctly interpreted in the last-mentioned case, and with the view of the bearing of *Sarju Prasad's* case there expressed I agree. We have been referred to a case, *Bijai Singh Haiyat Begam* (3), in which my brother Tyrrell and I said that "an application for execution struck off [396] merely because *talbana* has not been paid or some step is not taken does not bar a further application." To avoid misapprehension, I have my brother Tyrrell's authority for saying that when we made that statement we were not contemplating a case in which time had been granted for payment of *talbana*, or to perform any other act which was necessary. If it had been a case where time had been granted and the Judge had proceeded under s. 158 of the Code of Civil Procedure, we would not have expressed the opinion which we are there reported to have expressed. My opinion is that this appeal should be decreed with costs and the order of the first Court restored.

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STRAIGHT, J.—I am of the same opinion, and as I have already in *Fakirullah* v. *Thakur Prasad* (2) very fully expressed my views on this point, which, it is satisfactory to me to find, have the approval of the learned Chief Justice and my brother Judges, I do not think it necessary to repeat them. I agree in decreeing the appeal, reversing the order of the Judge and restoring that of the Munsif.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur with the judgment of the learned Chief Justice.

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(1) 10 A. 71. (2) 12 A. 179. (3) 9 A.W.N. (1889) 163.

1890 MARCH 28. —— FULL BENCH. —— 12 A. 392 (F.B.) = 10 A. W.N. (1890) 119.

MAHMOOD, J.—I also concur, because I still adhere to the rule laid down by my brother Straight with my concurrence in the case of *Sarju Prasad* v. *Sita Ram* (1) which is the first of a series of rulings of this Court. How that ruling has been interpreted and applied was the subject of consideration by me in *Fakirullah* v. *Thakur Prasad* (2) and in delivering my judgment in that case I went *seriatim* into all the cases which had since been reported upon this point in this Court. There is a ruling, however, of a somewhat recent date of West and Birdwood, JJ., in *Shankar Bisto Nadgir* v. *Narsinghrao Ramchandra* (3) which was not before my brother Straight and myself when we decided the case of *Sarju Prasad* v. *Sita Ram* (1). I think, since this case has been cited, I may respectfully say that I am not prepared to accept that ruling, but I do not think I need say much about it, because Mr. Justice West [397] himself in his judgment points out the distinction which he drew between that case and the other two cases which turned on the construction of s. 373 of the Code of Civil Procedure and its application to execution cases. I agree also in the decree which has been made.

Appeal allowed.

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12 A. 397 = 10 A.W.N. (1890) 135.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

RAHIM BAKHSH AND ANOTHER (*Decree-holders*) *v.* DHURI AND ANOTHER (*Opposite parties*).* [30th May, 1890.]

Execution of decree—Sale of immoveable property set aside—Order refusing refund of price to purchaser—No appeal from such order—Civil Procedure Code, s. 315.

No appeal lies from an order refusing a refund of price to a purchaser, the sale to whom has been set aside under s. 315 of the Civil Procedure Code. *Soudagar Mal* v. *Abdul Rahman Khan* (4), *Tapesri Lal* v. *Deoki Nandan Rai* (5), and *Ram Dial* v. *Ram Das* (6), referred to, *Baijnath Sahai* v. *Moheep Narain Singh* (7) dissented from.

[Appl., 14 A. 201 ; R., 18 M. 439.]

IN execution of a simple money-decree, the decree-holders caused certain immoveable property to be sold as the property of the judgment-debtors. Certain third persons then intervened, and established by suit that they, and not the judgment-debtors, were owners of the property, and that the judgment-debtors possessed no saleable interest therein. The purchasers at the sale thereupon applied under s. 315 of the Civil Procedure Code for a refund of the purchase-money which had been paid to the decree-holder.

The Court of first instance (Munsif of Aligarh) rejected the application on the ground that the sale had not been actually set aside.

On appeal to the District Judge of Aligarh, an objection was taken on behalf of the decree-holders respondents that the order of [398] the lower Court was not appealable. The Judge overruled this objection, observing :—

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* First appeal, No. 2 of 1890, from an order of A.M. Markham, Esq., District Judge of Aligarh, dated the 6th December 1889.

(1) 10 A. 71. (2) 12 A 179. (3) 11 B. 467. (4) 10 A.W.N. (1890), 85. (5) 1 A. 181. (6) 10 A.W.N. (1890) 89. (7) 16 C. 535.

"I hold that the order is appealable. Under the last clause of s. 315 the repayment of the purchase-money, when allowed by the Court under the opening clauses of the section, can be enforced "under the rules provided by the Code for the execution of a decree for money." An exactly similar provision is appended to s. 293, and orders under that section have been held by the Calcutta High Court—*Baijnath Sahai* v. *Moheep Narain Singh* (1)—to be appealable, as being of the nature of questions arising under s. 244. It is argued, however, that there is this difference, that under s. 293, only executive action is provided for, whereas under s. 315 there has to be an antecedent finding come to as to the non-existence of the judgment-debtor's interest in the property sold. But it is not contemplated by s. 315 that that finding should be *under that section*, nor indeed could a finding on any such point be come to under s. 315. Moreover, if it be conceded, as it must be, in view of the recent ruling referred to above, that an order under the last clause of s. 315, as to the enforcement of the refund of purchase-money, can be appealed, *a fortiori* an order refusing to order the refund can be appealed. The argument from convenience would also support this; and even if the Calcutta ruling did not exist to guide me, I should, on the principle that *boni judicis est ampliare jurisdictionem*, hold that the order of the learned Munsif under s. 315 is appealable." The learned Judge proceeded to deal with the case on the merits, set aside the Munsif's order, and remanded the case under s. 562 of the Civil Procedure Code.

1890 MAY 30. — APPELLATE CIVIL. — 12 A. 397 = 10 A W.N. (1890) 135.

The decree-holders appealed to the High Court on the ground that "the order of the Munsif under s. 315 of the Civil Procedure Code, refusing to order refund, was not appealable, and therefore the lower Court's order of remand on appeal is illegal."

Babu *Durga Charan Banerji*, for the appellants.

Babu *Bishan Chandra Moitro*, for the respondents.

JUDGMENT.

[399] EDGE, C.J., and BRODHURST, J.—The Munsif made an order refusing to order a refund under s. 315 of the Civil Procedure Code. The purchaser, the sale to whom had been set aside in a suit, and who had applied for a refund of the purchase-money, appealed to the District Judge. The question before us now is whether an appeal lay from the order under s. 315. It appears to us that no appeal lay. The principles which we applied in deciding the case of *Soudagar Mal* v. *Abdul Rahman Khan* (2) and which were applied by our brother Tyrrell in *Tapesri Lal* v. *Deoki Nandan Rai* (3) apply equally to this case. We have been referred to *Baijnath Sahai* v. *Moheep Narain Singh* (1) and to the Full Bench judgment of this Court in *Ram Dial* v. *Ram Das* (4). Our decision and that of our brother Tyrrell are certainly in conflict with the case of *Baijnath Sahai* v. *Moheep Narain Singh* (1). For the reasons stated by us in *Soudagar Mal* v. *Abdul Rahman Khan* (2), we think that the decision was right. We adhere to it. As to the Full Bench case in *Ram Dial* v. *Ram Das* (4), we may say that we do not agree with the principles upon which that case was decided. One of the Judges there dissented, another of those Judges, Mr. Justice Turner, with one of us, had held to the contrary in *Mussammat Hurdei Beebee* v. *Babu Surjoo Pershad* (5). We are of opinion that an appeal did not lie to the Court below. We allow the appeal and set aside the order below. *Appeal allowed.*

(1) 16 C. 535. (2) 10 A.W.N. (1890). 85. (3) 10 A.W.N. (1890) 89.
(4) 1 A. 181. (5) N.W.P.H.C.R. 1874, p. 309.

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FULL BENCH.

12 A. 399 (F.B.) = 10 A.W.N. (1890) 125.

12 A. 399 (F.B.) = 10 A.W.N. (1890) 125.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

SUJAN SINGH (*Decree-holder*) *v.* HIRA SINGH AND OTHERS (*Judgment-Debtors*). [21st November, 1889.]

Execution of decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii*, No. 179 (4) —"*Step-in-aid of execution*"—*Application by decree-holder under Civil Procedure Code*, s. 258.

The expression "step-in-aid of execution" in Act XV of 1877 (Limitation Act) sch. ii, No. 179 (4) was intended to cover any application made according to law in [400] furtherance of the execution-proceedings under a decree. It includes applications made by a decree-holder under s. 258 of the Civil Procedure Code to enter up part satisfaction of the decree.

Per Mahmood, J.—Provided that the payment asserted in the application was actually made.

[Not. F., 103 P.R. 1908 = 142 P.W.R. 1908 = 207 P.L.R. 1908 ; F., 9 Ind. Cas 1023 (1024) = 8 A.L.J. 487 = 33 A. 529 ; 22 B. 340 ; 12 C.W.N. 621; 34 P.L,R. (1906); R., 19 A. 477 ; 35 B. 452 (458) = 13 Bom. L.R. 661 (668) = 11 Ind. Cas. 987 (988); 21 A.W.N. 29 ; 11 C.P.L.R. 161 ; 8 O.C. 161.]

THIS was an application for execution of a decree for enforcement of hypothecation, which was passed on the 17th August 1878. The application was made on the 20th November 1884, and the question was whether or not it was barred by limitation.

The first application for execution was made on the 29th June, 1879. On the 20th June, 1882, the decree being then alive, an application purporting to have been made on behalf of the judgment-debtors was presented to the Court executing the decree by the pleader for the decree-holder, and upon this application it was endorsed that Rs. 800 had been realized, and that certain conditions had been agreed upon with reference to the balance due under the decree being paid in six months. In the course of the proceedings under the application of the 20th November 1884, one of the judgment-debtors presented an application dated the 5th May 1885, in which he stated that he had paid Rs. 800 on the 20th June 1882, by means of an application which was made through the pleader for the decree-holder, and that certain other sums had been paid by this judgment-debtor himself in June and September 1883.

The present application was opposed by the judgment-debtors on the ground that it was barred by limitation.

The Court of first instance (Subordinate Judge of Aligarh) held that the application was made within time, with reference to the provisions of ss. 19 and 20 of the Limitation Act (XV of 1877).

On appeal by the judgment-debtors, the lower appellate Court (District Judge of Aligarh) found that Rs. 800 had been paid in part satisfaction of the decree on the 20th June 1882; that the application of that date was neither written nor signed by the judgment-debtors, but was put in by the pleader for the decree-holder; that ss. 19 and 20 of the Limitation Act were not applicable to the case; and that the application of the 20th November 1884 was barred [401] by limitation. The Court accordingly reversed the order of the Court of first instance.

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The decree-holder appealed to the High Court. The appeal came on for hearing before Brodhurst and Mahmood, JJ., who recommended that it should be referred to the Full Bench, and it was referred accordingly.

Mr. *Hamidullah*, for the appellant.

Mr. *Abdul Majid* and Babu *Jogindro Nath Chaudri*, for the respondents.

JUDGMENTS.

STRAIGHT, J.—Upon the statement of the facts in the order of reference, as well as from the learned Judge's findings as the Court of first appeal, I have no doubt that the petition filed in Court on the 20th June 1882 by Lala Juala Pershad, the pleader for the decree-holder, under a power-of-attorney, must be regarded as presented on the decree-holder's behalf, and that in this way he asked the Court executing his decree to enter up part satisfaction of it, as required by s. 258 of the Code. At the time this petition was filed, there was an execution-proceeding pending in the Court at the instance of the decree-holder, and, had he not authorized his pleader to put in this petition, he would have laid himself open to a proceeding by the judgment-debtor of the kind mentioned in paragraph 2 of s. 258 of the Civil Procedure Code, while the payment of Rs. 800, which in a petition of the 5th May 1885, the judgment-debtor admits he made, could not have been recognized by any Court executing the decree, unless so certified by the decree-holder. I think the petition of the 20th June 1882, therefore, was an application by the decree-holder in that execution-proceeding, and the only remaining point for consideration is, was it an application to take some "step-in-aid of execution" within the meaning of clause 4, column 3, art. 179 of the Limitation Act? In *Sitla Din* v. *Sheo Prasad* (1), I held with the approval of my brother Tyrrell that a joint application by a decree-holder and judgment-debtor asking sanction of the Court to the postponement of a sale [402] that had been advertised was an application to take a step-in-aid of execution. In *Kishori Lal* v. *Sham Karan* (2) my brothers Tyrrell and Mahmood held that an application by a decree-holder to take money out of Court, paid in by a judgment-debtor, was an application to take a step-in-aid of execution. I expressed a similar view in *Paran Singh* v. *Jawahir Singh* (3), which was concurred in by Duthoit, J., and a like opinion was stated by the Madras High Court in *Dharanamna* v. *Subba* (4). In *Bandopadhya* v. *Mukhapadhya* (5), Cunningham and Ghose, JJ., held that an application by a decree-holder under s. 258 was a step-in-aid of execution, and the same view was adopted by my brothers Tyrrell and Mahmood in *Muhammad Husain Khan* v. *Ram Sarup* (6). Mr. *Jogindro Nath* for the judgment-debtors, respondents, very frankly admitted that the rulings of the Court on the point were uniform and consistent, and, if my recollection serves me right, besides those reported, which I have noted above, there are many others to the same effect that have not been reported. These reported cases extend over a period from 1880 to 1886, and have, no doubt, been acted upon by the subordinate Courts and parties to execution proceedings therein; and though it is true that the cases to be found in I.L.R., 8 Calc., 89 and 10 Calc., 549, are the other way, I think that, if upon no other ground than that of avoiding disturbance of rights acquired upon the strength of them and

(1) 4 A. 60. (2) 2 A.W.N. (1882) 184. (3) 6 A. 366.
(4) 7 M. 306. (5) 12 C. 608. (6) 9 A. 9.

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other obvious inconveniences likely to follow from a contrary view, we should elect *stare decisis*. But apart from this, I am of opinion that such an application as that before us here is one to take a "step-in-aid of execution." I agree with what was said by Cunningham and Ghose, JJ., in the case reported in I.L.R., 12 Calc., 608 as to why it should be so regarded, and it is unnecessary for me to repeat what they said on the subject. Reading cl. 4, art. 179, sch. ii of the Limitation Act, it is clear that the Legislature, by mentioning first an application for execution and then an application to take some step-in-aid of execution, meant by these latter words to include something other than a mere application for execution pure and simple, **[403]** and in using the terms "in aid of execution." I think it was intended to cover any application made according to law, in furtherance of the execution proceedings under a decree. That such an application as was presented by the decree-holder's pleader in the case before us was one in this sense within this limitation article, I have no doubt. It therefore becomes unnecessary to consider or determine the point mentioned in the referring order with regard to the Full Bench ruling of this Court in *Ramhit Rai* v. *Satgur Rai* (1), though I may add that, had it become necessary to do so, I should have declined to reconsider or depart from it, seeing that it was given in 1880 and has been since then frequently followed, notably in *Janki Prasad* v. *Ghulam Ali* (2) by my brothers Tyrrell and Mahmood. Applying the view I have expressed to this second appeal from order, I am of opinion that the decree-holder's, applicant's, application for execution of the 20th November 1884, was not barred by limitation, and, the appeal being allowed, the order of the Judge is reversed, and the order of the Subordinate Judge should be restored, the decree-holder to get his costs in these proceedings.

Edge, C.J.—I can add nothing to my brother Straight's judgment, with which I thoroughly agree.

Brodhurst, J.—I concur.

Tyrrell, J.—I agree.

Mahmood, J.—The facts of this case are fully stated in the order of reference passed by my brother Brodhurst and myself on the 17th February 1888, and I need not repeat them here. The points of law to which they give rise, in the manner in which those points have been argued before the Full Bench, seem to me to be the following:—

(1) Whether the application of 20th June 1882 was an application "*in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree*" within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877).

[404] (2) Whether the payment of Rs. 800 to which the application of 20th June 1822 related, can be regarded as payment of "*interest on debt*" within the meaning of s. 20 of the Limitation Act (XV of 1877) so as to entitle the decree-holder "*to a new period of limitation*" to be "*computed from the date when the payment was made.*"

In considering the first of these questions it is important to bear in mind that the application of 20th June 1882, was framed and worded so as to purport to have been made not on behalf of the decree-holder but on behalf of the judgment-debtors, respondents; that according to the lower appellate Court's finding the application was neither written by the judgment-debtors nor signed by them, but that it was presented by the

(1) 3 A. 247.

(2) 5 A. 201.

decree-holder's pleader with an endorsement thereon as to the receipt of Rs. 800 in part payment of the decree; and that such certification was accepted by the Judge executing the decree. Upon these findings the learned Judge of the lower appellate Court has held that the application was wholly valueless for purposes of furnishing a fresh starting point of limitation to the decree-holder for his present application for execution, dated the 20th November 1884.

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It seems to me that in arriving at this conclusion the learned Judge omitted to consider whether or not, under the peculiar circumstances of this case, and upon his own findings, the application was not practically an application by the decree-holder under s. 258 of the Civil Procedure Code, certifying payment of money out of Court, namely the sum of Rs. 800, to which the endorsement by the decree-holder's pleader on the application itself related. I am of opinion that under the circumstances of this case the application of 20th June 1882, though puporting to have been made on behalf of the judgment-debtors, must by reason of the decree-holder's pleader's endorsement thereupon and the fact that such pleader presented it to the Court, be regarded in effect as an application, not on behalf of the judgment-debtors but on behalf of the decree-holder. I am glad to be able to adopt this view, because it renders it unnecessary for me to consider how far I am prepared to adopt the [405] rule laid down in *Ghansham* v. *Mukha* (1) that even an application by a judgment-debtor might constitute a step-in-aid of execution of a decree against himself.

The question then resolves itself into this, whether an application by a *decree-holder* certifying payment under s. 258 of the Civil Procedure Code, and asking the Court to enter partial or total satisfaction of the decree, is an application within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877).

In the argument upon this point before the Full Bench, much stress was laid upon the analogy of cases such as *Paran Singh* v. *Jawahir Singh* (2) where my brother Straight held that an application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree, is a step-in-aid of the execution of the decree within the meaning of cl. 4, art. 179, sch. ii of the Limitation Act (XV of 1877). To the same effect is the rule laid down by my brother Tyrrell and myself in *Kishori Lal* v. *Sham Karan* (3); but these rulings were assailed at the hearing on the authority of two rulings of the Calcutta Court. The first of these is *Hemchunder Chowdhry* v. *Brojo Soondury Debee* (4), where it was held by Morris and Tottenham, JJ., that an application made by a judgment-creditor to take out of Court certain moneys there deposited by his judgment-debtor cannot be considered to be an application to the Court to take a step-in-aid of execution, and is not therefore within the meaning of cl. 4, art. 179, sch. ii of Act XV of 1877. To the same effect is the second case, *Fazal Imam* v. *Metta Singh* (5), where Mitterand Maclean, JJ., expressed their dissent from a ruling of the Madras High Court in *Venkatarayalu* v. *Narasinha* (6). I cannot help feeling that a similar ratio would lead the learned Judges to dissent from another ruling of the Madras Court in *Dharanamma* v. *Subha* (7).

This leads me to consider whether or not the analogy upon which the argument addressed to us has rested is appliable or not.

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(1) 3 A. 320. (2) 6 A. 366. (3) 2 A.W.N. (1882) 184. (4) 8 C. 89.
(5) 10 C. 549. (6) 2 M. 174. (7) 7 M. 306.

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[406] I am of opinion that it is so applicable, because it seems to me that an action taken by the decree-holders for the purposes of acquiring the fruit of the execution of decree or rather partial fruit of the execution of decree is a step-in-aid of the execution of decree. There are in the two Calcutta cases which I have cited, no reason shown why such an application as that contemplated by my brother Straight in *Paran Singh* v. *Jawahir Singh* (1) would not amount to an action which intended not only to aid execution but to acquire the fruits of execution, namely, the recovery of fruits which in execution of decree became the property of him who executed the decree, namely, the decree-holder. I think it is not necessary after the concurrence which the Bench has given to the rule laid down in *Paran Singh* v. *Jawahir Singh* (1) for me to go further into the exact *ratio decidendi* which was adopted by the Calcutta Court in those rulings and in which they laid down the rule inconsistent not only with the rulings of this Court as referred to by my brother Straight, but also with the view taken by the Madras Court upon the same question. I hold therefore that when the decree-holder applies to obtain from a deposit in Court moneys therein deposited as the result of execution sale, he takes a step-in-aid of execution within the meaning of cl. 4, art. 179, sch. ii, Limitation Act (XV of 1877).

But then what I have said is an argument upon analogy. The exact question before us does not relate to any such application. It relaste to an application made by the decree-holder under s. 258 of the Civil Procedure Code certifying that out of Court a certain sum of money had been paid in part satisfaction of the decree, and I say part satisfaction because the application of 20th June 1882 was an application which, as I have interpreted it under the circumstances of the case, could bear no other interpretation. Upon this point the first case to which I wish to refer is the case of *Sitla Din* v. *Sheo Prasad* (2) in which my brothers Straight and Tyrrell agreed in regarding an application of such a character when made jointly by the decree-holder and the judgment-debtor to be an application which would furnish a step-in-aid of execution of decree. In the referring order I referred to [407] that case as if it was on all fours with the case of *Ghansham* v. *Mukha* (3), but upon reconsideration I find that the case did not undo the principle which I am inclined to hold, namely, that every application to take some step-in-aid of execution must come from the decree-holder, so that case is no authority against the principle which I have expressed.

The next case is that to which my brother Straight has referred, namely, the case of *Tarini Das Bandopadya* v. *Bishtoo Lal Mukhopadhya* (4), where Cunningham and Ghose, JJ., concurred in laying down the rule that an application by a judgment-creditor to bring an execution proceeding on the file and to record his certificate of the payment of a sum of money by the judgment-debtor, is an application to take some step-in-aid of execution of decree within the meaning of cl. 4, art. 179, sch. ii, Limitation Act (XV of 1877).

The ruling was before my brother Tyrrell and myself in *Muhammad Hussain Khan* v. *Ram Sarup* (5), and in that case in delivering our judgment I expressed some doubts as to whether or not the rule laid down in that case was sound. In delivering my judgment I think I went further than might have been said in thinking that the case of *Ghansham* v. *Mukha* (3), which I respectfully doubt here, was an authority in support of the proposition which was then expressed. My brother Tyrrell, in

(1) 6 A. 366. (2) 4 A. 60. (3) 3 A. 320. (4) 12 C. 608. (5) 9 A. 9.

expressing his view went further and in the same direction that I did, in expressing doubts as to the validity of the rule laid down by the Calcutta Court in *Tarini Das Bandopadhya* v. *Bishtoo Lal Mukhopadhya* (1).

This is the first case of this Court which required a decision of the proposition that certification of payment out of Court by the decree-holder under s. 258 of the Civil Procedure Code is a step-in-aid of the execution of decree, and when the order referring this case to the Full Bench was made by my brother Brodhurst and myself we felt that not only my judgment in that case, but also [408] the judgment of my brother Tyrrell was so liable to be taken as a judgment not settling the law, that such reference was necessary.

The same question, however, came up before me in *Kanhia Lal* v. *Rudar Sahai* (2), where with special reference to the ruling in *Muhammad Hussain* v. *Ram Sarup* (3), I held that before any effect could be given to the execution application for certification such as s. 258 of the Civil Procedure Code requires, it was necessary to decide whether or not such payment had been made as a matter of fact, as distinguished from the mere circumstance of such statement in the application which purported to certify the payment out of Court.

I wish now to say, because the matter has been fully considered by the whole Court, that the doubts which I expressed in *Muhammad Hussain Khan* v. *Ram Sarup* (3) in delivering my judgment no longer exist in my mind, and I hold that the rule laid down by the Calcutta Court upon the point in *Tarini Das Bandopadhya* v. *Bishtoo Lal Mukhopadhya* (1) is a sound rule of law, because where a decree-holder has not only out of Court acquired partial satisfaction of his decree, but when he also comes to certify such partial satisfaction under s. 258 of the Civil Procedure Code, he is taking a step by which he asserts enforcement of his decree in the exercise of those powers which are vested in him because he is a decree-holder. The later case, namely, *Kanhia Lal* v. *Rudar Sahai* (2) only supports this view, and following that ruling I hold that where an actual payment has been made by a judgment-debtor in partial satisfaction of the decree, and such payment is certified by the decree-holder by an application made under s. 258 of the Civil Procedure Code, such application is a step-in-aid of the execution of decree, and as such falls within the purview of cl. 4, art. 179, sch. ii, of the Limitation Act (XV of 1877), provided that the payment asserted in the application for certification was, as a matter of fact, actually made, but that in the absence of the truthfulness of such assertion no such certification is a step-in-aid of execution of the decree within the [409] meaning of the clause of the Limitation Act to which I have referred.

Fortunately in this case the finding of the learned Judge of the lower appellate Court shows that, as a matter of fact, the payment of Rs. 800 mentioned in the application of 20th June 1882, to which the endorsement by the decree-holder's pleader of that date related, was actually made, and I therefore hold that it was a step-in-aid of execution within the meaning of the article of the Limitation Act to which I have referred. The question then is whether it is necessary to enter into the second point which I pointed out at the outset of my judgment, namely, whether the payment of Rs. 800 to which the application of 20th June 1882 related, can be regarded as payment of "*interest* on a debt," within the meaning

(1) 12 C. 608. (2) 8 A.W.N. (1888) 23. (3) 9 A. 9.

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of s. 20 of the Limitation Act (XV of 1877) so as to entitle the applicant decree-holder to a "*new period of limitation*" "*to be computed from the date when the payment was made.*" I should have considerable doubt in giving an answer to such a question, though I feel constrained to respect the full Bench ruling in *Ramhit Rai* v. *Satgur Rai* (1), but it is not necessary to go into the matter further. I agree in the order which has been made.

Appeal allowed.

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12 A. 409 (F.B.) = 10 A.W.N. (1890) 145.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

SHANKAR SAHAI (*Plaintiff*) *v.* DIN DIAL AND ANOTHER (*Defendants*). [2nd December, 1889.]

Civil Procedure Code, s. 11—*Act XII of* 1881 *(N.-W.P. Rent Act), ss.* 61, 83, 85, 86, 93 *(f)—Distress—Suit for declaration of proprietary title in property said to have been wrongfully distrained—Jurisdiction of Civil Court.*

In execution of a decree against the tenants of certain zamindars, the plaintiff attached and sold certain trees upon the holding of the judgment-debtors, and the auction-purchaser in turn transferred them to the plaintiff, who obtained possession. Subsequently, one of the judgment-debtors vacated the land on which the trees were situate, and the zamindars let the land to another tenant. This last mentioned tenant having fallen into arrears of rent, the zamindars, purporting to act under s. 56 of the North-Western Provinces Rent Act (XII of 1881), distrained some of the trees of which the plaintiff was in possession under his purchase, sold them, and themselves bought them. The plaintiff then brought a suit against the zamindars, praying for a declaration of his right to and maintenance of possession of the trees.

[410] *Held* that the plaintiff was entitled, under s. 11 of the Civil Procedure Code to bring the suit in a civil Court, and that the civil Courts were not prevented from taking cognizance of it by ss. 83, 85, 93 (*f*) or any other provision of the North-Western Provinces Rent Act (XII of 1881.)

[R., 27 M. 483; 10 O.C. 188.]

THE facts of this case were as follows. The plaintiff, Shankar Sahai, held a decree against Pershad and Ratan, who were tenants of the principal defendants, Din Dial and Har Dial, zamindars. In execution of the decree, the plaintiff caused a number of trees upon the holding of the judgment-debtors to be attached and sold. The zamindars objected to the attachment, but their objections were disallowed, and the trees were sold on the 23rd December 1882, and were purchased by one Jawahir, Ahir, who in turn sold them to the plaintiff, who obtained possession. Subsequent to the sale of the 23rd December 1882, the judgment-debtor, Parshad, abandoned his holding, and it was let by the defendants-zamindars first to one Mulla and subsequently to Tula.

The defendants-zamindars brought a suit against the plaintiff and Jawahir to set aside the sale of the 23rd December 1882, and for cancelment of the deed of sale executed by Jawahir in favour of the plaintiff, and for maintenance of their right to the trees. That suit was ultimately dismissed on appeal, on the 14th May, 1884. The zamindars twice served the plaintiff with a notice of ejectment under s. 36 of the North-Western

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(1) 3 A. 247.

Provinces Rent Act (XII of 1881), but on each occasion the Revenue Court cancelled the notice.

On the 5th January 1886, the zamindars, purporting to act under s. 56 of the North-Western Provinces Rent Act, distrained 45 guava trees (part of those which had been purchased by the plaintiff in 1882 from Jawahir) with the fruit thereon, for arrears of rent due from the tenant Tula, and on the 9th February 1886, the trees and fruit were brought to sale and were purchased by the zamindars themselves.

The present suit was then brought by the plaintiff, Shankar Sahai, for a declaration of his right to and maintenance of possession of the trees, and damages for the appropriation of the fruit. He [411] joined as defendants to the suit the zamindars Din Dial and Har Dial, and the tenant Tula.

The Court of first instance (Munsif of Phaphund) decreed the claim in respect to some of the trees and dismissed it as to others, and also decreed Rs. 5 damages for the fruits misappropriated. It was pleaded by the defendants, *inter alia*, that the suit was not cognizable by a civil Court. The Munsif rejected this plea on grounds which he stated as follows:—

"I find that neither s. 83 (*a*) nor ss. 85 and 90 of Act XII of 1881, nor s. 93 (*f*) of the said Act, which was relied on by the defendant's pleader in the course of his argument, bar the cognizance of this suit by a civil Court, inasmuch as those sections relate to property attached under s. 56 of Act XII of 1881, which allows distress of produce of land in the occupation of a tenant, and not of standing trees, which, as will be noticed in my finding on the fifth and sixth issues are not included in the produce of land, within the meaning of s. 56 of the Rent Act. The produce of the land to be attached or distrained under s. 56 of the N. W. P. Rent Act is specified in s. 61 of the said Act, and it appears from the perusal of the latter section that "standing crops and other ungathered products of the earth, and crops or other products when reaped or gathered and deposited in any threshing floor or place for treading out grain or the like, whether in the field or within a homestead," may be distrained under s. 56, Act XII of 1881. The defendants' act in distraining or attaching the trees in dispute under s. 56 of Act XII of 1881 was quite illegal, and in contravention of the express provisions of the N.W. P. Rent Act (XII of 1881), and I do not think that they are entitled to benefit by their own act, which is at once illegal and blameable. Though the defendants allege themselves to have attached the trees under s. 56 of Act XII of 1881, that section never allows or gives power to a landholder to attach trees growing on the land in his tenant's occupation. I therefore think that the defendants' act in attaching the trees in dispute of their own authority, under colour of a legal title, is no better than that of a trespasser, and all the proceedings taken by them in distraining or attaching [412] the trees and bringing them to sale are *ab initio* null and void, and consequently the cognizance of this suit by a civil Court is not barred by ss. 83 (*a*), 85, 90 and 93 (*f*) of Act XII of 1881. The present suit is, moreover, not prohibited by the terms of ss. 83 (*a*), 85 and 90 of the Rent Act, which simply prescribe a form of procedure to be adopted by a person who claims "as his own, property which has been distrained for arrears of rent alleged to be due from any other person," and s. 93 (*f*) is not applicable, because the proceedings taken by the defendants are altogether void on account of their illegality, and the relation of landlord and tenant does not exist between the parties to the suit. Hence my finding on this

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issue is that the suit is within the cognizance of the civil Court, and this Court, being a civil Court, has jurisdiction to try it."

The defendants appealed to the District Judge of Mainpuri. The Judge reversed the Munsif's decree and dismissed the suit, on grounds which he stated as follows:—

"I think the jurisdiction of the civil Court is clearly ousted by s. 93 (*f*) of the Rent Act. It is there laid down that "no Courts other than Courts of revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought." One of the classes of suits mentioned is "suits for contesting the exercise of the powers of distress conferred on landholders and others by this Act, or *anything purporting to be done in the exercise of the said power, or for compensation for wrongful acts or omissions of the distrainer*."

"Now I think it cannot be denied that the action of the landlord, whether right or wrong, in distraining and selling the guava trees and their fruit, purported to be done in the exercise of the powers of distress conferred by the Act, and the plaintiff in the case, might, if he had chosen, have instituted a suit under s. 83 to try the right to the property, or might have sued for compensation under s. 85. I think the use of the expression "*purporting to be done*," extends the jurisdiction of the revenue Courts to illegal as well as to legal distraints, and as that jurisdiction in an exclusive one, I hold the Munsif had no power to hear the case.

[413] "Had this case been instituted in what I hold to be the proper Court, *i.e.*, in the Revenue Court, no appeal would have lain to this Court, and therefore I think I cannot deal with the case under s. 206, Rent Act. It is unnecessary to go into the other grounds of appeal.

"For the above reason I reverse the decision of the lower Court, and decree the appeal with costs."

The plaintiff appealed to the High Court, on the ground that "the suit was cognizable by the civil Court," and "no Revenue Court could grant the relief claimed in the suit." The appeal came for hearing before Straight, J., who, being of opinion that, "looking to the terms of ss. 83 and 85, the question raised was not without difficulty," referred the case to a Division Bench. Eventually, the Division Bench ordered that the appeal should be heard by the Full Bench, and it was heard accordingly.

Pandit *Sundar Lal* and Munshi *Nawal Behari Bajpai*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

ORDERS.

EDGE, C. J.—The plaintiff brought his suit in the civil Court for a declaration of title to trees and produce of trees, and for damages. The plaintiff alleged that the trees and the fruit were his property, and that they had been wrongfully distrained and sold by the zamindars, and wrongfully purchased and taken possession of by the defendants, Din Dial and Har Dial. He joined as a defendant one Tula, who was or had been a tenant of the land on which the trees were. The Munsif on the question of jurisdiction held the suit was maintainable in the civil Court. The learned District Judge was of a different opinion, and on appeal dismissed the suit on the ground that the prohibition contained in s. 93, cl. (*f*) of the Rent Act (XII of 1881) barred the jurisdiction of the civil Court. I have, I may say, very great respect for the opinion of the particular District Judge, but I think in this case he hardly

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appreciated the position of the parties who where before him in the suit. I do not think it necessary to consider whether or not the civil [414] Court would have jurisdiction to try this suit if it had been brought against the zemindar as zemindar and distrainer. Here we have a plaintiff who says that his property has been wrongfully sold and wrongfully taken possession of by the two principal defendants, in fact, the two defendants who have appeared in the suit. In my opinion it does not matter whether those defendants who were sued here for having wrongfully purchased and taken possession of what is alleged to be the plaintiff's property, were the zemindars or distrainers or outsiders. I cannot find anything in ss. 83, 85 or 93 of the Rent Act to deprive a civil Court of the general jurisdiction which it has under s. 11 of the Code of Civil Procedure, to hear and determine a suit in which a man says, "my property has been wrongfully converted and taken possession of by the defendants who purchased it."

In my opinion this is nothing more or less than a civil suit maintainable in the civil Court. Pandit *Sundar Lal* has relieved us of the necessity of considering whether the suit, so far as the fruit was concerned, was a revenue Court suit or a civil Court suit. He has on behalf of his client the plaintiff, expressly withdrawn the claim in respect of the fruit. As to the trees not being distrainable, this Court has already previously held on more occasions than one that trees are not subjects of distress. I am of opinion that the appeal should be allowed, the case remanded under s. 562, Civil Procedure Code, to the Court of the District Judge, to be disposed of by the Judge on the merits. Costs will abide the result.

STRAIGHT, J.—The plaintiff in the suit to which this appeal relates, in execution of a decree against two persons of the name of Parshad and Rattan, attached certain trees belonging to his judgment-debtors and upon the 23rd December 1882, those trees were sold and purchased by one Jawahir Ahir, who, in turn, for good consideration, assigned them over to the plaintiff, and that is his title.

Subsequently, in the year 1886, Parshad and Rattan having disappeared from the land of which they have been in occupation, and one Tula having been placed in occupation of that land by Din Dial and Har Dial, the zemindars, they, upon the 5th January, 1886, [415] purporting to act under the distress chapter of the Rent Act, attached 45 of the trees that had been purchased by the plaintiff in 1882 with the fruits thereon, and on the 9th February, 1886, those trees and the fruits were sold and purchased by these defendants for a sum of Rs. 5-8-0 and As. 8 respectively. The plaintiff in the present suit asserts that he was unaware of that sale, and he now comes in, in the civil Court for a declaration of his proprietary title to the 45 trees so distrained and sold, and for the value of the fruits appropriated by the defendants. The latter question is not now before us, and I need not discuss or deal with it.

There were a variety of pleas taken by the defendants to the plaintiff's claim; among others a plea that this was a suit exclusively within the cognizance of the revenue Court, and that not having been brought in the revenue Court, the plaintiff could not succeed, and accordingly his claim should be dismissed.

The Munsif, as a Court of first instance, was against that view, and, after discussing all the matters connected with the litigation, came to the conclusion that the plaintiff was entitled to recover in respect to 40 trees, and have a declaration of his proprietary title, as well as to receive Rs. 5, the price of 150 guavas misappopriated by the defendants. There was

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then an appeal to the District Judge; and he was of opinion that the case was instituted in the wrong Court; that if instituted at all, it should have been in the revenue ourt, and he laid great stress upon cl. (*f*) of s. 93, Rent Act, as read in conjunction with the first paragraph of that section, which excludes the jurisdiction of the civil Court.

As I said in the order of reference, so I repeat now, that unless this suit is prohibited by any positive statutory provision, the civil Court must take cognizance of it. It is immaterial and unnecessary to discuss any question with regard to the plaintiff's right to damages. The case, therefore, stands before us as simply one in which the plaintiff seeks a declaration of his proprietary title to 45 trees which were purchased by the defendants onthe 9th February, 1886 Is that, then, a suit for "contesting the exercise of the powers of distress conferred on landholders and others by this Act, **[416]** or is it a suit for contesting "anything purporting to be done in the exercising of the said power," or is it a suit "for compensation for wrongful acts or omissions of a distrainer?"

Now, on former occasions in dealing with this section, I took occasion to say that in my opinion cl. (*f*) of s. 93 must be read in reference to, and as limited by, what appears in the preceding chapter relating to distress. It cannot be suggested for a moment seriously that trees upon land are capable of distraint as being within the definition of "standing crops and other ungathered products of the earth, which are liable to distress within the meaning of s. 61, Rent Act, and it could only be in reference to things capable of distress that the provision of chapter IV of the Rent Act could have any application. In every respect the plaintiff's claim appears to me to be one that does not fall within the four corners of the Rent Act. Taking s. 83, upon which so much strees has been laid by the learned Judge, it is clear to my mind that s. 83 contemplates cases in which, prior to a sale having been ordered to take place under a distress, a party comes in and seeks to induce the Court to stay its hand; and that this is so is abundantly clear from the orders that the Court may make; as the statute says his right may be tried "in the same manner and under the same conditions as to the time of instituting the suit and to the consequent postponement of sale, as a person whose property has been distrained for an arrear of rent alleged to be due from him may institute a suit to contest the demand." When we come to look at the following clauses of the section as to what orders can be made, I find nothing to show that those orders when made would preclude a person from coming into the civil Court to have his title declared, It is only necessary to add that this case does not in my opinion fall within s. 86, Rent Act.

I am therefore of opinion that the order proposed by the learned Chief Justice is the right order, and I would decree this appeal, and, reversing the decree of the learned Judge, I would remand the case for disposal upon the merits.

BRODHURST, J.—I also concur with the learned Chief Justice.

[417] TYRRELL, J.—I concur with the remarks of the learned Chief Justice and my brother Straight.

MAHMOOD, J.—I also concur in the conclusion at which the learned Chief Justice has arrived in this case, and also in what I regard as the turning point of the decision of this case as stated by my brother Straight. I am, however, anxious to indicate the main features of the reason which have induced me to concur in the order which has been made,

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Now, the facts of the case and the nature and scope of the suit are well described in the judgment of the Court of first instance, and their general and important effect has also been already stated by my brother Straight in his judgment, and as to that I wish to add nothing. What, however, seems to me necessary to state is that I attach a very liberal and vast interpretation to the general terms of s. 11 of the Code of Civil Procedure, for purposes of determining the question whether or not suits which are, as a matter of fact, instituted in the civil Court are or are not cognizable by such tribunals. I have before now said that s. 11 is of vast scope including even what are known as rent-suits or suits cognizable by the revenue Court, but for the circumstance that such suits, though civil in their nature, are expressly excluded from the jurisdiction of the civil Courts by dint of some special statutes.

In the present case, the solitary statute which has ever been referred to, either by the learned Judge of the lower appellate Court, or in the course of the argument of the case before us in the Full Bench, has been the Rent Act, with special reference to some of its clauses. It is, therefore, relying on that statute that it has been contended that the civil Court has no jurisdiction to entertain this suit at all. In dealing with that matter I wish to call especial attention to the preamble of that enactment, which limits the scope of the whole of that statute to purposes of amending the law by saying that its object was to "amend the law relating to the recovery of rent in the North-Western Provinces of the Presidency of Fort William in Bengal."

[418] I have held before now that in cases of doubt, and in the absence of express provision to the contrary, the preamble must be taken in restricting and governing the rest of the enactment. In this case I may safely say that the preamble has not been transgressed by anything that the enactment provides in the subsequent sections of which it consists.

Reading the enactment in this light, ss. 83, 84 and 85 upon which so much emphasis was laid by the learned Judge of the Court below, seem to me to provide, what by brother Straight has called a summary remedy, which cannot debar any other remedy which the law allows under the general enactment such as s. 11 of the Civil Procedure Code. I have also before now said that where the law provides two or more remedies, there is no reason to think that the one debars the other; and therefore both must be understood to remain open to him who claims a remedy such as a tribunal of the class that the civil Court is, is called upon to award.

Viewing the case and the points raised therein in this light, the solitary question of importance here seems to me to rest entirely upon the interpreation of cl. (*f*) of s. 93 of the Rent Act, and reading that clause as I have repeatedly done, I have no doubt that it does not debar the ordinary remedy open to a person claiming ownership of immoveable property such as the trees claimed in this case, and does not prevent such property being made the subject of civil suit.

Pandit *Sundar Lal* has withdrawn the claim so far as it relates to the fruit of the trees in dispute, and as to that, I, following the example of my brother Straight, will not say anything further. No process of Court such as the Rent Act contemplates can oust the jurisdiction of the civil Courts in suits relating to title to immoveable property. When such a dispute arises over an action pretended to have been taken under some clause or other of that enactment, and is contested upon the ground that the purchaser has purchased nothing, the civil Court is not debarred from saying that that process was wrongfully issued and that the purchaser

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[419] under it acquired no title, and that the original owner continued to be the owner and could maintain the action.

I shall add nothing beyond saying that I agree in the order that the learned Chief Justice and my brother Straight have made in this case.

Cause remanded.

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12 A. 419 (F.B.) = 10 A.W.N. (1890) 162.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

MADHO LAL AND ANOTHER (*Plaintiffs*) *v.* SHEO PRASAD MISR AND OTHERS (*Defendants*). [4th December, 1889.]

Act XII of 1881 (*N.W.P. Rent Act*), ss. 9, 93, (*b*), 94, 206—*Occupancy tenant—Mortgage of occupancy holding—Such mortgage not an " act inconsistent with the purpose for which the land was let"—Suit to eject mortgagee in possession—Jurisdiction of civil Court—Appeal—Objection to jurisdiction not taken in first Court.*

A mortgage of his holding by an occupancy tenant, under which the mortgagee obtains possession, is not an act " detrimental to the land " or " inconsistent with the purpose for which the land was let," within the meaning of s. 93(*b*) of the N.W.P. Rent Act (XII of 1881). An act detrimental to the land means an act which injures the land itself. An act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering the character of the land, as, for instance, turning it from agricultural land to building land.

But a mortgage with possession, whether the possession is given at the time of the granting of the mortgage, or is obtained later by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the N.W.P. Rent Act.

A suit by the zemindar to eject the mortgagee of an occupancy holding or his representatives in possession, does not fall within ss. 93 (*b*) and 94 of the N.W.P. Rent Act, but is cognizable by a civil Court, under the rules of limitation applicable to suits in such Courts.

Under s. 206 of the N.W.P. Rent Act, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction is not to be entertained in the appellate Court, but the Judge must try the case upon the facts, and apply the law applicable to those facts. *Debi Saran Lal* v. *Debi Saran Upadhia* (1) approved.

[Diss., 15 A. 219; R., 14 A. 223; 11 A.W.N. 191, 4 O.C. 314.]

THE facts of this case were as follows. The defendant, Sheo Prasad, held 8 bighas 12 biswas and 5 dhurs of land in mauza Deokali as an occupancy holding, and on the 18th August 1877 he executed a simple mortgage of the holding in favour of one Mahip [420] Singh for Rs. 399. The deed was registered on the 8th September 1877. By the deed it was agreed that the mortgagor should remain in possession, and that, if the mortgage-money with interest should not be paid in five years, the mortgagee should be put in possession and should thenceforth take the profits in lieu of interest until the whole principal and interest were paid.

The mortgagor having made default in payment of the mortgage-money with interst, the heirs of the mortgagee brought a suit for possession of the holding in accordance with the mortgage-deed, and on the 21st March 1883 they obtained a decree, under which they obtained possession on the 18th November 1885.

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(1) 6 C. 378.

The present suit was instituted on the 28th April 1886 by Madho Lal, and Sahdho Lal, zemindars of the occupancy holding mortgaged; and it purported to be brought under s. 93 (*b*) of the North-Western Provinces Rent Act (XII of 1881), for the ejectment of the heirs of the mortgagee. The mortgagor, Sheo Prasad, also was made a defendant. The suit was brought in the Court of the Assistant Collector of Jaunpur.

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One of the pleas taken by the defendants was that the suit was barred by the limitation of one year prescribed by s. 94 of the North-Western Provinces Rent Act. No objection was taken that the suit was not cognizable by a revenue Court. The Court of first instance held that the cause of action arose on the 8th September, 1877, the date on which the deed of mortgage was registered; that the plaintiffs became aware of the execution of the deed at a time considerably more than one year before the 28th April 1886, when the suit was instituted; and that under s. 94, the suit was barred by limitation. The Court further held that the mortgage executed by the occupancy tenant, Sheo Prasad, was an act "inconsistent with the purpose for which the land was let" within the meaning of s. 93 (*b*) of the North-Western Provinces Rent Act.

The plaintiffs appealed to the District Judge of Jaunpur, who held that s. 93 (*b*) was applicable; that the suit should, under s. 94, have been brought within one year from the date of execution of the mortgage-deed; and that, not having been so brought, it was barred **[421]** by limitation. He accordingly dismissed the appeal. No objection to the effect that the suit was not cognizable by the revenue Court was raised before him.

The plaintiffs presented a second appeal to the High Court. The appeal came on for hearing before Edge, C. J., and Brodhurst, J., who passed the following order:—

Having regard to the decisions in *Debi Prasad* v. *Har Dayal* (1), *Fatima Begam* v. *Hansi* (2), and *Gopal Pandey* v. *Parsotam Das* (3), we think that this case should be heard by a Full Bench of five Judges. With the consent of Mr. *Juala Prasad*, for the appellants and of Mr. *Kashi Prasad* for the respondents, we order that this appeal be heard by a Full Bench."

Munshi *Juala Prasad*, Munshi *Madho Prasad* and Munshi *Sukh Ram*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

ORDER.

EDGE, C. J.—This was a suit brought in the Rent Court by the zemindars for ejectment under s. 93, cl. (*b*), of the Rent Act (XII of 1881). The defendants were the occupancy tenants, who were out of possession, and the heirs of his mortgagee, who had obtained possession under the mortgage to the mortgagee. There was no objection raised in the first Court as to the jurisdiction of that Court, nor in fact was there any objection of that kind raised in the appellate Court. On appeal the District Judge dismissed the suit, holding that the period of limitation applicable to the suit was one year, and that the cause of action arose on the making of the mortgage in 1877. If the 12 years was the period of limitation applicable, the suit was in time. We have to consider whether this was a suit which must be brought in the civil Court, because on the decision of that question depends the question as to whether the Judge

(1) 7 A. 691. (2) 9 A. 244. (3) 5 A. 121.

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was right in applying the period of one year's limitation to the suit. The meaning of cl. (*b*) of s. 93 of the Rent Act has been from time to time discussed in the Benches of this Court, and I think I am justified in saying that now [422] we are all agreed as to the meaning of that section, so far as a case of this kind is concerned, and in the view that I am about to express I think I am expressing the opinion of my brother Judges on the Bench. In our opinion, an act is not detrimental to the land, within the meaning of that clause, unless it injures the land itself. It is quite plain that the making of a mortgage would not in itself injure the land within the meaning of cl. (*b*). An act, to be inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering of the character of the land, as, for instance, by turning it from agricultural land to building land. The mere granting of a mortgage cannot be an act inconsistent with the purpose for which the land was let.

The plaintiff's case is that this is an occupancy holding, and if Sheo Prasad was an occupancy tenant he became an occupancy tenant by virtue of the application of s. 8 of the Rent Act, and there is nothing appearing here to show that, when he orginally became a tenant, or during any part of his tenancy, there was any agreement between the zemindar and him by which his present act was inconsistent with the purpose for which the land was let. Consequently I am of opinion that the act of mortgaging which was relied upon here was not, within the meaning of cl. (*b*) can act detrimental to the land, or inconsistent with the purpose for which the land was let.

It is another question altogether whether this mortgage, under which the mortgagee obtained possession of the land, was not an act inconsistent with the provisions of s. 9 of the Rent Act itself, so far as its validity was concerned. On that point also we are all agreed, and I think I am expressing the opinion of the rest of the Court in saying that, at any rate, a mortgage with possession, whether the possession is given at the time of the granting of the mortgage or is obtained later under the mortgage by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the Rent Act (XII of 1881).

Under these circumstances I am of opinion that this was a suit for the civil Court, and that we must allow this appeal to this [423] extent, that the case will have to be sent back to the District Judge of Jaunpur to be replaced on his file of pending appeals and to be disposed of by him according to law. I may only say that I agree with what was said by my brother Straight as to the effect of s. 206 of the Rent Act in the case of *Debi Saran Lal* v. *Debi Saran Upadhia* (1). He there says: "Under s. 206, if such an objection was not taken in the first Court, the appellate Court is to disregard it and to dispose of the appeal independent of all considerations as to whether the first Court had or had not jurisdiction." As I understand that judgment, my brother Straight meant, and I think rightly, that, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction was not to be entertained in the appellate Court, and the Judge must try the case upon the facts, and apply the law applicable to those facts. The case is remanded, and costs will abide the result.

STRAIGHT, J.—The defendant, Sheo Prasad, on the 18th August 1877, executed a mortgage of what for the purposes of this decision must be

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(1) 6 A. 378.

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regarded as an occupancy holding. The term of that mortgage was that the mortgagor was to remain in possession as before, and that if, at the end of the period of five years, the mortgage-money was not paid up with interest, the mortgagee should take possession of the occupancy holding. The mortgagor did not pay up the mortgage-money with interest, and consequently the mortgagee had to bring a suit for possession, in which he obtained a decree on the 21st March, 1883. In execution of that decree the mortgagee obtained actual possession on the 18th November 1885, and he was admittedly in possession at the date of the institution of the present proceeding on the 28th April 1886.

Now this suit, whatever be the particular forum that had special cognizance of it under the law, was a suit that was mainly directed to the displacement of the mortgagee in possession, and that displacement could only take place by reason of showing that the act of the occupancy tenant in putting him in possession was either illegal, that is to say, contrary to the provisions of the statute, or [424] of a character detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let. If the act of this making of the mortgage and giving possession under it was in the latter category, then the suit properly fell within cl. (*b*) of s. 93 of the Rent Act. If it fell within the former category, it was undoubtedly a civil suit for a civil Court, and I desire to say most emphatically that, in my opinion, the jurisdiction of the civil Court to entertain suits of a civil nature should not be excluded unless the language is so clear and specific that there can be no doubt about it that a particular Court of limited jurisdiction was intended to have sole cognizance of the particular proceeding.

In this present case it is quite obvious from the facts, as stated in the plaint, that what the plaintiff complained of was that a trespasser, in the shape of a person who had no right upon the land within the ambit of his zemindari, which land ought to have been occupied by his occupancy-tenant, was in possession of that land, and his sole object was to get that person out. It was idle to suggest that it was a suit for the ejectment of the occupancy tenant, because he was not in possession, and an order of ejectment as against him in the summary shape that is provided for by the Rent Act would have been a *brutum fulmen*, because the mortgagee would have remained in possession and could not have been moved by any order of the Rent Court. Such being the shape of the suit, it is true that no objection was taken when it came before the revenue Court, that it was a civil suit, and so far no difficulty could arise. But it went in appeal to the learned Judge, and that officer, because he fills the position of a Court of appeal in certain rent cases, and as the civil Court of appeal of highest subordinate character under our jurisdiction, had the power to deal with this case under the statute; according as he found it to be a rent suit he was to deal with it as a rent suit and apply the rules and the strict rules of limitation of the rent law, on the other hand, if he found it to be a civil Court suit, he was bound to apply the rules of limitation and the law applicable to the trial of civil suits. In the case to which the learned Chief Justice has [425] referred, and it is a satisfaction to me to know that he approves what I then said, I took some pains to define in very clear and intelligible language what is the specific and precise operation of these particular sections of the rent law, that is to say, ss. 206, 207 and 208 of the Rent Act, and as to what are the precise powers that a Judge sitting in appeal has in dealing with cases thereunder. The learned Judge, when this case came before him,

1889 DEC. 4. — FULL BENCH. — 12 A. 419 (F.B.) = 10 A.W.N. (1890) 162.

dis-closing the matters which I have mentioned as appearing upon the plaint, the statement of defence and the evidence, should have treated this as a civil suit, namely, as a suit brought by the plaintiff for the purpose of recovering possession from a trespasser in the person of the mortgagee, who, under a document that was not worth the paper it was written upon, because void under the rent law, had obtained possession.

Then if that was the form in which he should have regarded the suit, he was wrong in applying the shorter period of limitation, and it was his business to find out what was the ordinary limitation applicable to this case. Under these circumstances, as he has not done so, he must be told to do so, and the case must be put into train to enable him to do what the law required him to do. I entirely concur with the learned Chief Justice that this is a civil Court suit; that the limitation applicable to the suit is the limitation applicable to civil suits, and the case should be remanded under s. 562, Civil Procedure Code, to the Court of the District Judge for restoration to his file of pending appeals and disposal according to law. Cost will follow the result.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I concur with the learned Chief Justice and my brother Straight.

MAHMOOD, J.—I have no doubt, notwithstanding some rulings of this Court to the contrary, that a mortgage by an occupancy tenant, in spite of the prohibition against transfer contained in s. 9 of the Rent Act (XII of 1881), and corresponding section preceding that enactment in the same behalf, is not an act detrimental to the [426] land, or inconsistent with the purpose for which the land was let within cl. (*b*) of s. 93 of the present Rent Act, or the Act which in that behalf preceded it. This is the effect of what I held in *Debi Prasad* v. *Hardayal* (1), and my ruling in that case was approved by the present learned Chief Justice in *Fatima Begum* v. *Hansi* (2). The suit here was therefore a civil suit, whether the mortgage of the 18th August 1877, was or was not valid under the rent law, and reading ss. 206, 207 and 208 of the Rent Act together, I have no doubt, following the ruling of my brother Straight in *Debi Saran Lal* v. *Debi Saran Upadhia* (3), that the District Judge should have decided the case upon the merits. I therefore agree in the order made by the learned Chief Justice.

Cause remanded.

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12 A. 426 (F.B.) = 10 A.W.N. (1890) 117.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

SAFDAR ALI, (*Defendant*) *v.* DOST MUHAMMAD AND ANOTHER (*Plaintiffs*). [5th December, 1889.]

Pre emption—Wajib-ul-arz—"Co-sharer,"—Purchaser of isolated plot of land in mahal —Purchaser of sir land.

The *wajib-ul-arz* of a village gave a right of pre-emption to "co-sharers in the mahal." One of the co-sharers brought a suit for pre-emption which the vendee-

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(1) 7 A. 691. (2) 9 A. 244. (3) 6 A. 378.

defendant resisted on the ground that he also was a co-sharer in the mahal, and the plaintiff had therefore no preferential right. This contention was based on a former purchase by the defendant under a deed of sale executed by a co-sharer, and comprising (i) an isolated plot of land in the mahal, (ii) *sir* lands in the mahal. **1889 DEC. 5.** **FULL BENCH.** **12 A. 426 (F.B.) = 10 A.W.N. (1890) 117.**

Held by the Full Bench that it being found that the vendee-defendant had already become a co-sharer in the mahal prior to the date of the purchase which was in question in the suit, the plaintiff had no preferential right of pre-emption.

Per Mahmood, J.—The decisions of the Full Bench in *Niamat Ali* v. *Asmat Bibi* (1) and *Sital Prasad* v. *Amtul Bibi* (2) have overruled *Hazari Lal* v. *Ugrah Rai* (3) and *Rup Ram* v. *Mangni* (4).

[F., 28 A. 124 = A W.N. (1905) 219 = 2 A.L.J. 612; R., 3 O.C. 110.]

THIS was a second appeal from a decision of the Subordinate Judge of Allahabad. The facts are fully stated in the judgment of the lower appellate Court, which was as follows :—

[427] "This appeal arises in a suit brought by the respondent to enforce his right of pre-emption under the *wajib-ul-arz* in respect of a sale of a 10 kirants share in mauza Kathaula; effected by one Sital Prasad in favour of the appellant, on the 13th September, 1886. The amount of sale-price mentioned in the sale-deed is Rs. 300. The village Kathaula has been partitioned and formed into several pattis. The disputed share appertains to patti Karim Bakhsh. The plaintiff is the owner of the patti which stands in his own name. The plaintiff stated that the real purchaser of the share was Yar Muhammad, brother of the appellant; that both of them were strangers; and that he (plaintiff) had a right of pre-emption. He alleged the actual amount of consideration for the sale to be Rs. 175.

"The defendant-appellant pleaded *inter alia* that he was a co-sharer in patti Rajjab Ali, and that the plaintiff had no preferential right of purchase.

"It appeared that by a sale-deed, dated 5th May, 1884, Rajjab Ali sold to the appellant, out of a 7 pie 10 kirants share of the zemindari, 10 bighas of land bearing a revenue of Rs. 10 a year, together with all rights appertaining thereto. It is by virtue of this purchase, that the appellant claimed to be a co-sharer. The lower Court has found that, with the exception of one piece of land, the remainder of the 10 bighas aforesaid was the *sir* of Rajjab Ali. It is of opinion that a purchaser of *sir* lands is not a co-sharer, and that therefore the purchaser-defendant is not a co-sharer. It has accordingly passed a decree in the plaintiff's favour for possession, conditional upon his paying Rs. 300, which it holds to be the correct amount of sale consideration.

"The defendant-purchaser has appealed, and the plaintiff has preferred objections under s. 561 of the Code in regard to the sale consideration.

"The principal question which arises in appeal is whether Dost Muhammad, the purchaser, became a co-sharer in the mahal by right of his purchase from Rajjab Ali.

"The *wajib-ul-arz* is in these terms: "When a *hakiat* is transferred for the price which a stranger might give, the right of pre-emp-[428]tion will vest, first in co-sharers *ek jaddi i.e.*, decended from the

(1) 7 A. 626. (2) 7 A. 633. (3) 4 A.W.N. (1884) 103. (4) 6 A.W.N. (1886) 136.

1889 DEC. 5. — FULL BENCH. — 12 A. 426 (F.B.) = 10 A.W.N. (1890) 117.

same stock, next in partners in the share (*sharik hissadar*), and lastly in co-sharers in the Mahal.

"It is admitted that the plaintiff is not an *ek jaddi* co-sharer. It is also clear that he is not a partner in the share sold, as the said share is in patti Karim Bakhsh, and he owns patti Safdar Ali. He is therefore a pre-emptor of the third class specified in the *wajib-ul-arz*, and if it be found that the appellant is a co-sharer in patti Rajjab Ali, the plaintiff will not have a superior right to purchase the property.

"As I have stated above, Rajjab Ali sold to the appellant 10 bighas of land out of his 7 pie 10 kirants share. The sale-deed gives a detail of the said land as follows :—

		Big.	Bis.
No.	225,	3	0
,,	774,	0	15
,,	989,	2	4
,,	990,	1	19
,,	1110,	1	16
,,	1717,	0	6
Total	...	10	0

"It has been proved that, with the exception of land No. 1110, the other pieces of land were recorded as the *sir* of Rajjab Ali, and may be assumed to have been his *sir*. The land No. 1110 is the occupancy holding of Dilawar Husain, a tenant.

"The lower Court holds that by purchasing specific pieces of land, most of which were the *sir* of his vendor, the appellant did not become a co-sharer in the village, and as an authority for this view it relies upon the ruling of the Hon'ble High Court in *Hazari Lal* v. *Ugrah Rai* (1).

"I am of opinion that the above ruling is not strictly applicable to this case, inasmuch as the property sold to the appellant consisted not only of *sir* lands, but also of a piece of land in which the vendor [429] had nothing more than a proprietary right. Therefore, irrespective of the *sir* lands, the appellant acquired by his purchase the proprietary right of his vendor in respect of one piece of land No. 1110, and thus became a co-sharer in the mahal. This is a much stronger case than that of *Gokal Singh* v. *Mannu Lal* (2) and the principle laid down in it applies with equal, if not greater, force to this case.

"I am of opinion that the purchase of the remaining pieces of land also made the appellant a share-holder in the mahal. It appears that his vendor, Rajjab Ali, was the sole owner of a patti of that name. The said patti consisted of a 7 pie 10 kirant share comprising 138 bighas 9 biswas 8 dhurs bearing a revenue of Rs. 115-3-9. He was the sole owner of the whole of this land, and therefore he was competent to part with his proprietary right in any part of the said land. After the sale to the appellant, his name is entered in the *khewat* as a co-sharer in patti Rajjab Ali, owing 10 bighas and liable for a revenue of Rs. 10-0-9, and the name of Rajjab Ali himself is entered in respect of the remaining 128 bighas 9 biswas 8 dhurs, bearing a revenue of Rs. 105-3-0. The appellant has thus been recognised in the *khewat* as a co-sharer in patti Rajjab Ali, which is a part of an entire mahal containing 3,632 bighas 1 biswa 10 dhurs of land, add assessed with a revenue of Rs. 2,950. He is thus a co-sharer in the mahal.

(1) 4 A.W.N. (1884) 103. (2) 7 A. 772.

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"The lower Court is of opinion that it is only when a person purchases a specific share in a zemindari, with all the appurtenances thereto, that he becomes a co-sharer in it. This view is opposed to the ruling of the Full Bench in *Niamat Ali* v. *Asmat Bibi* (1), and is evidently unsound law.

"It was no doubt held in the case of *Hazari Lal* v. *Ugrah Rai* (2) that the sale of *sir* lands did not give rise to a right to claim pre-emption, and could not be regarded as a transfer of a share in the zemindari. But that ruling was virtually overruled by the Full Bench in *Sital Prasad* v. *Amtul Bibi* (3), and the Hon'ble Mr. Justice Mahmood held that "the *sir* lands of a joint co-sharer in a mahal [430] form an essential part of his proprietary right in the mahal, and that he can sell his proprietary right in such lands, much in the same manner as he could have sold the whole of his share." The other learned Judges were of the same opinion, with some qualifications which do not apply to this case. According to the *ratio decidendi* of this ruling, the sale of *sir* lands is a transfer of a part of the proprietary rights in the mahal to which the said lands appertain, and therefore the purchaser of such land becomes a proprietor in the mahal. Consequently, the appellant, by purchasing the *sir* lands of Rajjab Ali, became a share-holder in the mahal, and as the plaintiff had no higher rights than those of a share-holder in the mahal he had no preferential right of pre-emption, and his claim was untenable.

"It has not been contended in this Court that the appellant is not the actual purchaser of the disputed property, and no evidence was adduced on the point in the Court below.

"The appeal is accordingly decreed. The decree of the Court below is set aside, and the plaintiff's claim dismissed with all costs. The objections under section 561 are necessarily disallowed."

The appeal came on for hearing before Mahmood, J., who referred it to a Division Bench. The Division Bench (Straight and Brodhurst, JJ.,) referred it to the Full Bench.

The Hon. Pandit *Ajudhia Nath*, Pandit *Bishambhar Nath*, Munshi *Ram Prasad*, and Maulvi *Zahur Husain*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENTS.

EDGE, C. J.—This is an appeal by a plaintiff in a pre-emption suit. He brought his suit on the allegation that the vendee was a stranger in the mahal within the meaning of the *wajib-ul-arz*. It is found as a fact that the vendee had already become a sharer in the mahal prior to the date of the purchase which is in question in the suit. That is the only point in the case. Upon that finding the plaintiff's appeal must be dismissed, and the decree below dismissing the suit confirmed wih costs.

STRAIGHT, J.—I concur.

[431] BRODHURST, 1.—I concur.

TYRRELL. J,—I concur.

MAHMOOD, J.—This case would not have required reference to a Full Bench of this Court but for the reason that there were conflicting judgments of the various Benches of this Court which the learned Judge of the lower appellate Court has referred, and also others, on the question whether the purchase of an isolated piece of ground within the limits of a mahal does not constitute such purchaser or owner a co-sharer in the village for

(1) 73 A. 626. (2) 4 A.W.N. (1884) 103. (3) 7 A. 633.

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purposes of enforcing the pre-emptive right under the pre-emptive clause of the *wajib-ul-arz* governing such mahal.

It is needless for me either to wait to find out all those rulings or to dwell upon them with any greater minuteness than by saying that so many of those rulings as lay down the proposition that the purchase of a piece of land in the *abadi* area of a village or mahal is not a co-sharer in the village or mahal, and, also those laying down that the purchaser of specific fields of *sir* land does not become a co-sharer of the village or mahal for the purposes of exercising the pre-emptive right, are based. (I say this with profound respect) upon a misapprehension of the nature and incidents of the *zemindari* tenure as understood in this country. The reasons for this view were stated by me in my dissentient judgment in the Full Bench case of *Sahib Ram* v. *Kishan Singh* (1), which was referred to in the later Full Bench case of *Niamat Ali* v. *Asmat Bibi* (2) as to an isolated piece of grove-land, and the ruling of the whole Court proceeded upon a *ratio* which I cannot distinguish from the principle of my dissentient judgment in the former case. Nor is the Full Bench ruling in *Sital Prasad* v. *Amtul* (3) as to *sir* lands distinguishable. These rulings must be understood to have overruled earlier rulings which proceed on the contrary principle: *Weekly Notes*, 1884, p. 103; *Weekly Notes* 1886, p. 136. In the present case I have no doubt that although this one plot of land, No. 1110, was an isolated piece of land, and the rest was *sir* land, the defendant's [432] purchase of 5th May 1884, conferred upon him the right of pre-emption, because he became a co-sharer in the village. The sale in his favour of 13th September, 1886, cannot, therefore, be assailed by the plaintiff, and it would be delaying my judgment if I said anything more than that the judgment delivered by the learned Judge of the lower appellate Court meets with my full approval, and that in that light I would dismiss this appeal with costs as the learned Chief Justice has suggested.

Appeal dismissed.

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12 A. 432 = 10 A.W.N. (1890) 73.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* FATEH SINGH. [6th December, 1889].

Harbouring an offender—Act XLV of 1860 (*Penal Code*) *s.* 212.

To justify a conviction under s. 212 of the Penal Code, it is necessary that there should be an offence committed, and consequently an offender who has been harboured or concealed. *Empress* v. *Abdul Kadir* (4) referred to.

[Appl.,—14 M. 400 (404) = 1 Weir, 195; R & D.,—U.B.R. (1892—1896) Vol. I, 196.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

The appellant was not represented.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This case was sent for by me upon a perusal of the Shahjahanpur Judge's sessions record for the month of August, and since then the accused person has filed an appeal. I am of opinion that the

(1) 2 A.W.N. (1882) 192. (2) 7 A. 626. (3) 7 A. 633. (4) 3 A. 279.

conviction cannot be sustained. The charge against the appellant was that provided for in s. 212 of the Penal Code, that is to say, it was alleged that one Sita Ram having been murdered, the appellant knowing or having reason to believe that one Reoti was the murderer, harboured and concealed that person with the intention of screening him from legal punishment. Now, it is obvious for the purpose of constituting an offence under that section that three positions should be established. First, that there should have been an offence committed, and consequently that there [433] should be an offender; secondly, that there should be a harbouring or concealing of the person known or reasonably believed to be the offender; and thirdly, that such harbouring or concealing should be done with the intention of screening that person from legal punishment.

Under s. 201 of the Penal Code, which contains a somewhat analogous provision, a Full Bench of this Court in *Empress* v. *Abdul Kadir* (1) expressed in no uncertain terms that an essential ingredient to a conviction under that section was that an offence should have been committed for which some person had been convicted or was criminally responsible. In my judgment in that case I took occasion to state what appeared to me to be the full extent and the extreme length to which that section should be carried. If it was essential for the purpose of a conviction under that section that there should have been an offence *committed a fortiori* under s. 212 that element is imperatively necessary, and indeed in my opinion the words of s. 212 leave no room for doubt upon that point. I have read all the evidence in this case both upon the trial of the appellant and upon the trial of Reoti: and it does not appear to me, and in this view the learned Government Pleader agrees, that there is any proof to show that the death of Sita Ram was caused by the unlawful act of any person. Reoti was tried for that offence and unhesitatingly acquitted, and for aught that appears to the contrary, the death of Sita Ram, though no doubt caused by violence, may have taken place under circumstance which would have rendered it no crime on the part of the person who caused his death. It is therefore sufficient for the purpose of disposing of this case to say that there is no proof upon this record that any offence had been committed. That being so, it becomes unnecessary to enter into the question whether the other two ingredients going to constitute the offence under s. 212 are to be found in the evidence. I allow the appeal, and, reversing the learned Judge's conviction and sentence, I acquit Fateh Singh and direct that he be released.

Conviction set aside.

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12 A. 434=10 A.W.N. (1890) 99.

[434] REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. PIRTHI AND OTHERS. [7th December, 1889.]

Practice—Revision—Criminal—Procedure Code s. 437—Order of Sessions Judge rejecting application under s. 437—Subsequent order of District Magistrate granting similar application.

Where a Sessions Judge has passed orders under s. 437 of the Criminal Procedure Code, a District Magistrate acting under the same section should not pass

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(1) 3. A. 279.

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REVISIONAL CRIMINAL.

12 A. 434= 10 A.W.N. (1890) 99.

orders of a contrary kind, but if he thinks that the Judge's orders were wrong, he should submit them to the High Court, through the medium of the Public Prosecutor. *Queen-Empress* v. *Shere Singh* (1) referred to.

Where a Sessions Judge had, under s. 437 of the Criminal Procedure Code, refused to order further inquiry into the case of an accused person who had been discharged, the High Court set aside a subsequent order of the Magistrate of the district passed under the same section and ordering further inquiry into the same case.

[R., Rat. Unrep. Cr. Cas. 525 (527) ; 1 Sind. L.R. 40 (41) Cr. ; D., 15 A.W.N. 38.]

THE facts of this case which was a reference under s. 438 of the Criminal Procedure Code, by the Sessions Judge of Shahjahanpur, are sufficiently stated in the judgment of straight, J.

The *Public Prosecutor* (Mr. *C. H. Hill*), appeared for the Crown.

JUDGMENT.

STRAIGHT, J.—The learned Judge has very properly referred this matter to the Court, because it is obvious that unless some rule is laid down for the guidance of the Sessions Judges and Magistrates, considerable confusion and conflict of decision would arise. The facts here are these. Certain persons were charged before a Magistrate with the offences of riot and causing grievous hurt; and after a careful inquiry the Magistrate discharged them in the manner provided by law. The complaining parties then went to the Sessions Judge, and he, after considering the matter, came to the conclusion that he ought not to interfere with the order of discharge or direct further inquiry under the powers conferred upon him by s. 437 of the Criminal Procedure Code. Having failed to move the learned Judge in the matter, the complaining parties went to the District Magistrate; and whether he did or did not know of the learned Judge's order, it appears to me indifferent for the deter-[435] mination of this question, save that I would observe that if he did know of it, it was a somewhat strong step on his part to take the action that he did. In the result the Magistrate thought proper to direct a further inquiry, and that further inquiry was to be made by another Magistrate. It will thus be obvious that here are two orders on the same materials directly opposed the one to the other; that is to say, the learned Judge's order refusing to direct a further inquiry and the subsequent order of the District Magistrate granting a further inquiry.

Now, it is quite impossible that this condition of things could be approved by this Court; and although I am not prepared to say that the language of s. 437 of the Criminal Procedure Code left the District Magistrate absolutely without jurisdiction when once the matter was disposed of by the District Judge, I am nevertheless of opinion that it is a most inconvenient thing that when once a matter of this kind has gone to the District Judge and he has passed orders one way or the other, the District Magistrate should take the matter into his hands and pass orders of an exactly opposite kind. Mr. *Hill*, who was good enough to look into this matter at my instance, it being one of some considerable importance, yesterday called my attention to some remarks made by me on a reference in a somewhat analogous matter—*Queen-Empress* v. *Shere Singh* (1). I have had the advantage since yesterday of consulting the learned Chief Justice upon this point, and he entirely agrees with me that what I pointed out in that case as the desirable practice to follow in matters of that description will be well adapted to and followed in matters of the present kind.

(1) 9 A. 362.

I think, therefore, the most convenient course for me to adopt here will be to set aside the order of the Magistrate of the district; but to leave it open to him if so advised, to submit to this Court the order of the learned Sessions Judge declining to direct further inquiry under s. 437 of the Criminal Procedure Code through the medium of the learned Public Prosecutor, by which means he will have the benefit of the learned Public Prosecutor's advice as to whether the case is one in which the somewhat unusual step is prayed, namely, that an order of discharge of [436] a person, which has been granted should be set aside and the proceedings re-opened. It will be convenient to add as by way of guidance to the District Magistrate that this appears to me to be the most convenient course to pursue so as to avoid that conflict the orders in a district which will otherwise arise. I set aside the Magistrate's order directing the further inquiry; and until it is assailed by any proceedings by the Magistrate through the medium of the learned Public Prosecutor, the learned Judge's order will stand. *Order set aside.*

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12 A. 436 (F.B.) = 10 A.W.N. (1890) 95.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

SHADI AND ANOTHER (*Defendants*) v. ANUP SINGH (*Plaintiff.*) [10th December, 1889.]

Co-sharers—Dealing with joint property—Building by one co-sharer against the wish of others—Suit for injunction to restrain building—Discretion of Court—Act I of 1877 *(Specific Relief Act)*, s. 54.

One of several co-sharers in a mahal having begun to erect certain kachcha buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated.

Held by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time. *Paras Ram* v. *Sherjit* (1) referred to.

Per Straight, J., that it was for the defendant-appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere.

[F.—A.W.N. (1908) 19=5 A.L.J. 93; Appl.—18 A. 115; R.—2 A.L.J. 455=27 A. 688—A.W.N. (1905) 158=4C.L.J. 198; 33 P.R. 1901=71 P.L.R. 1901; D.—4 C.W.N. 788; 20 A.W.N. 55; 3 N.L.R. 126.]

THE facts of this case are sufficiently stated in the judgment of Edge, C.J. The case was referred to the Full Bench by the Chief Justice on the recommendation of Mahmood, J., with reference to the judgment in *Paras Ram* v. *Sherjit* (1).

Mr. *Khushwakht Rai*, for the appellants.

[437] The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the respondent.

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(1) 9 A. 661.

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12 A. 436 (F.B.)= 10 A.W.N. (1890) 95.

JUDGMENT.

EDGE, C.J.—In this case one of the sharers in a *mahal* brought a suit to restrain the defendant, who is also a sharer in the *mahal*, from continuing to erect certain buildings upon the common ground belonging to the co-sharers. The suit was brought within three or four days after the defendant had commenced to erect his *kachcha* buildings. The defendant's case was that the land in question was his own exclusive property, that he had a right to it, and consequently a right to exclude the plaintiff and other co-sharers from any participation or in enjoyment of the land in question. The plaintiff's case, in fact, was that the defendant was ousting him, a co-sharer, from a portion of the common land. An *interim* injunction was granted in the case, and on appeal the District Judge, having regard to the ruling of my brother Mahmood in *Paras Ram* v. *Sherjit* (1), went into the question as to whether on partition the plaintiff could be compensated for the interference with his rights by the defendant and he found that the defendant was building upon land which was in excess of the share that would come to him on partition, and that on partition the plaintiff could not be adequately compensated. Now this finding of fact would in my judgment have entitled the plaintiff to a mandatory injunction to pull down the buildings even if they had been built, assuming that they had been built without the acquiescence of the plaintiff. But in my opinion it was unnecessary to go into the question as to whether or not the defendant was appropriating more of the common lands than would have come to him on partition. The law provides the means by which common lands may be lawfully partitioned in a proceeding in which all the co-sharers will get their fair *quantum* of the common land, having regard to possession, quality and the amount of their shares. In this case the defendant without having recourse to the Courts to give him lawful partition, proceeded to appropriate to himself lands in which each of his co-sharers had an interest, and thus he proposed to exclude **[438]** his co-sharers from all use and enjoyment of a portion of common land. We need not in this case consider what a civil Court should do if the defendant has erected at great expense buildings which a Court of equity might hesitate to order him to pull down. All we have got to consider is that almost instantly on the unlawful attempt of the defendant to appropriate, and, in fact, to make partition on his own behalf, one of the co-sharers invoked the assistance of the civil Court to prevent the defendant from interfering with his rights as a co-sharer. In my opinion the plaintiff is entitled to a perpetual injunction. I would dismiss the appeal with costs.

STRAIGHT, J.—It is found by the lower appellate Court that 3 bighas, 8 biswas of land on a part of which the defendant Shadi has commenced to make certain erections, was *shamilat* land, the common property of himself, the plaintiff and other persons. It is clear that almost immediately after the commencement of these erections the plaintiff with expedition went to the civil Court and asked the Court to restrain the action of the defendant Shadi, and obtained an *interim* injunction to that effect. It has been found by the learned District Judge that the land built upon and occupied by the defendant Shadi was greatly in excess of his share; that his action in commencing the erections upon the land had caused injury, and if allowed to be continued would cause injury to the plaintiff that could not be possibly remedied by partition. Holding this view, and upon these facts, the learned Judge below in the exercise of the discretion

(1) 9 A. 661.

vested in him by law has granted a mandatory injunction restraining the defendant from proceeding further with the building, and directing the building, so far as it had proceeded, to be pulled down, and prohibiting the defendant from building upon the land as exclusive owner at any future time. This second appeal, which had been referred to the Full Bench, attacks the discretion exercised by the learned Judge, and before I could interfere in a case of this kind I should require the appellant to satisfy me that the discretion has been improperly exercised. Now I am not going at length into the numerous cases that are to be found in our law reports and in the Calcutta series bearing upon the question. I take it that the [439] rules for our guidance are to be found in chapter X, Specific Relief Act, ss. 54 and 55. The English cases to which reference can be made are, after all, only of use as illustrative of the principles embodied in those sections from the aspect that the Courts of Chancery in England have had to treat matters of a similar description. It is purely a question of discretion whether the Court can grant relief of this description, and I hold that unless I am satisfied that the District Judge improperly exercised that discretion, I ought not to interfere. As the learned Chief Justice has said, we are not concerned with the question whether if a valuable building had been erected upon the land and there had been a delay on the part of the plaintiff to come into Court and assert his rights, it might not have been within the competence of the Judge to withhold the relief granted. But upon the facts as found by the learned Judge, I cannot say that he has exercised a wrong discretion in granting the injunction, and I therefore dismiss the appeal with costs.

1889 DEC. 10. — FULL BENCH. — 12 A. 436 (F.B.) = 10 A.W.N. (1890) 95.

BRODHURST, J.—I concur with the learned Chief Justice.

TYRRELL, J.—I concur with the learned Chief Justice and in the order that he has passed in the case.

MAHMOOD, J.—I also concur in the order which has been made by the learned Chief Justice and my learned brethren. All I wish to add is, that, in reference to the rule laid down by me in *Paras Ram* v. *Sherjit* (1) the learned Judge upon the evidence before him recorded the following finding :—

"I must find that the respondent Shadi has, by building the house, encroached on common land in excess of his share, and as this injury cannot be remedied by partition, the appellant-plaintiff is entitled to the relief claimed of having the house pulled down."

Now I take this to be a finding of fact, as the learned Chief Justice and my learned brethren have taken, rendering the principles upon which my ruling in *Paras Ram* v. *Sherjit* (1) proceeded inapplicable, and it is enough to say that, whilst still adhering to the [440] principles to which I there gave expression, I think the reference need not have been made if the authority of the ruling had not been doubted, the reference being suggested by the circumstance that it was a ruling of myself sitting as a single Judge.

Appeal dismissed.

(1) 9 A. 661.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

SHEO PRASAD (*Judgment-debtor*) *v.* HIRA LAL (*Decree-holder*).§
[19th December, 1889.]

Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Subsequent sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss. 234, 276, 311, 312.

S. 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life-time, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's life-time. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damnified by the sale, his remedy is by application under s. 311 of the Code.

So *held* by the Full Bench, Mahmood, J., dissenting.

Where, subsequent to the attachment of immoveable property in execution of a simple money-decree, the judgment debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale-proceedings,—*held* by the Full Bench (Mahmood, J., dissenting) that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar* v. *Bagirathi Ammal* (1) dissented from.

Held by Mahmood, J., that on the principle of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under s. 647, be applied to execution-proceedings (those proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale-proceedings was an irregularity: but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311; **[441]** and that as in the present case no such substantial injury was either alleged or proved, the sale was valid.

Held also by Mahmood, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of s. 311 of the Code. *Asmutunnissa Begum* v. *Ashruff Ali* (2) dissented from. Abdul Huq *Mozoomdar* v. *Mohini Mohun Shaha* (3) followed.

[Diss., 22 M. 119; F., 17 A. 162=15 A.W.N. 35; R., 19 B. 276; 21 B. 424; 23 C. 686; 19 M. 219; 20 A.W.N. 99; 11 C.W.N. 163=5 C.L.J. 80; 12 C.P.L.R. 73; D., 19 A. 337=17 A.W.N. 75.]

THE facts of this case are stated in the judgments of Edge, C. J., and Mahmood, J.

Mr. *Dwarka Nath Banerji*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J.—In execution of a decree, which, so far as this case is concerned, was one for money against Bhim Sen and Dal Chand, a *bagh* of 16 biswas in mauza Lashkarpur was put up for sale by auction on the 3rd September, 1880, and was at that sale purchased by one Bhabuti.

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(1) 6 M. 180. (2) 15. 488. (3) 14 C. 240.

That sale was confirmed on the 19th November, 1880, and Bhabuti obtained possession of the *bagh*. He also obtained a sale-certificate. By a sale-deed, dated the 20th July, 1881, Bhabuti conveyed the *bagh* to Pandit Hira Lal, the plaintiff in this suit. In July, 1884, the defendant without any authority from the plaintiff entered upon the *bagh*, and cut down and removed some of the trees. In respect of that alleged wrongful entry and the alleged wrongfuly cutting down and removal of the trees by the defendant, the plainiff brought the suit out of which this second appeal has arisen.

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The defendant raised several defences, one of which only we need consider, the findings of facts having disposed of the others adversely to him.

The question which we have to consider arises on the defendant's plea that Dal Chand had died before the sale, and that the defendant as the representative of Dal Chand was not made a party to the proceedings in execution of the decree under which the *bagh* was sold.

It has been found as a fact by the lower appellate Court that Dal Chand died before the sale, but that beyond that fact there is [442] no reliable evidence to show when he died. It is admitted that the defendant was not made a party to the proceedings in execution.

On behalf of the defendant, who is the appellant before us, Mr. *Banerji* contended that the omission to make the defendant as the representative of Dal Chand a party to the proceedings in execution rendered the sale, so far as the interest which was of Dal Chand in his lifetime, a nullity, and that it was for the plaintiff to prove his title and establish a good and valid sale to Bhabuti, his vendor, by showing that Dal Chand was alive not only at the dates of the sale and confirmation of sale, but at the date of the decree. Mr. *Banerji* in the course of his argument relied on the cases of *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Asmutunnissa Begum* v. *Asaruf Ali* (2), *Jasoda* v. *Mathura Das* (3), *Ram Chand* v. *Pitam Mal* (4), *Ganga Prasad* v. *Jag Lal Rai* (5), *Imam-un-nissa Bibi* v. *Liahat Husain* (6), *Dulari* v. *Mohan Singh* (7), and *Bakhshi Nandkishore* v. *Malak Chand* (8). Mr. *Kashi Prasad*, for the plaintiff relied upon the cases of *Stowell* v. *Ajudhia Nath* (9) and *Gulab Das* v. *Lakshman Narhar* (10).

The question as to the onus of proving the date of Dal Chand's death may be easily disposed of. At the date of the alleged trespass in July 1884, the plaintiff was in possession, and between that date and 1880 he or his vendor Bhabuti, had been in possession of the *bagh*. That possessory title was a sufficiently good one to enable the plaintiff to maintain his suit until the defendant proved a better title. Further, the certificate of sale afforded *prima facie* evidence against the defendant, claiming as the representative of Dal Chand, of a good title in Bhabuti from whom the plaintiff derived title. Again, the defendant had not pleaded that Dal Chand had died before the decree. If it had been open to the defendant on the pleadings in my judgment it was not to prove that Dal Chand had died before the date of the decree, it was for him to prove it, and thus to rebut the inference that the decree was properly [443] and lawfully made. In my opinion, if the question had been open to the defendant, the onus of

(1) 6 M. 180. (2) 15 C. 488. (3) 9 A. 511. (4) 10 A. 506.
(5) 11 A. 333. (6) 3 A. 424. (7) 3 A. 759. (8) 7 A. 289.
(9) 6 A. 255. (10) 3 B. 221.

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proving that Dal Chand had died before the date of the decree was upon him.

The other question, namely, what effect, if any, had the omission to make the defendant as the representative of Dal Chand a party to the execution proceedings, is a more difficult one, and that I now propose to consider. We must take it, as the contrary has not been pleaded or proved, that the attachment took place and the order of sale was made in the lifetime of Dal Chand, and that they were duly made

Many of the authorities which have been cited appear to me to have little or no bearing upon the point which we have to consider here. The case of *Ram Chand* v. *Pitam Mal* (1) is merely an authority showing that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money. In the case of *Imam-un-nissa Bibi* v. *Liakat Husain* (2) the judgment-creditor in execution of a decree for money and without making the representative of the deceased judgment-debtor a party, took out, after the death of the judgment-debtor, attachment of certain immovable property which had been of the deceased judgment-debtor and was then in the possession of his representative. The cases of *Bakhshi Nand Kishore* v. *Malak Chand* (3) and *Ganga Prasad* v. *Jag Lal Rai* (4) turned on the construction of ss. 290 and 311 of the Code of Civil Procedure, whilst that of *Jasoda* v. *Mathura Das* (5) turned on the construction of ss. 287, 290 and 311 of that Code.

In *Asmut-un-nissa Begam* v. *Ashruff Ali* (6) the question was whether a person who claimed to be a purchaser from a judgment-debtor prior to an attachment was entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale of the judgment-debtor's property.

Of the cases more directly in point, that of *Slowell* v. *Ajudhia Nath* (7) decided that a sale in execution of a decree is not rendered [444] invalid by reason of the judgment-debtor having died before the sale and no representative of his having been made a party to the execution proceedings.

In *Gulab Das* v. *Lakshman Narhar* (8), the Bombay High Court held that Act X of 1877 did not provide that applications for execution should, like suits, abate by the death of the judgment-creditor. In *Dulari* v. *Mohan Singh* (9) the majority of the Court held that a sale was not invalid by reason of its having taken place after the death of the decree-holder and without his representative having been brought into the execution proceedings. The only authority to which we have been referred or of which I am aware for holding that a sale in execution of a decree, after attachment in the lifetime of the judgment-debtor, could not legally be had after the death of the judgment-debtor, unless his representative was brought into the execution proceedings, is that of *Ramasami Ayyangar* v. *Bagirathi Ammal* (10). In that case the learned Judges of the Madras High Court did not give their reasons for their opinion, but I infer that they thought, but why I do not know, that s. 234 of the Code of Civil Procedure appliable, in that case. S. 234 of the Code of Civil Procedure applies, in my opinion only to cases in which, after thedeath of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment at the suit of the judgment-creditor. That section contemplates that property which was of the

(1) 10 A. 506. (2) 3 A. 424. (3) 7 A. 289. (4) 11 A. 333. (5) 9 A. 511.
(6) 15 C. 488. (7) 6 A. 255. (8) 3 B. 221. (9) 3 A. 759. (10) 6 M. 180.

judgment-debtor in his lifetime may not only have come to the hands of his legal representative, but may before the making of the application under the section have been duly disposed of by the representative, and indicates that in respect of property so duly disposed of the legal representative would not be liable. That section also provides a means by which the liability of the representative may be ascertained.

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How, having regard to the provisions of s. 276 of the Code of Civil Procedure, the representative could, as against the judgment-creditor, duly dispose of property which was under attachment at [445] the suit of the judgment-creditor, I fail to see. Nor do I see what necessity there could be for providing in s. 234 a means by which to ascertain the liability of the representive in respect of property under attachment at the suit of judgment-creditor.

I can find nothing in the Code of Civil Procedure to warrant the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to take any steps to keep in force an attachment of property made in the lifetime of the judgment-debtor.

After a careful examination of the sections in the Code of Civil Procedure relating to attachment, I am of opinion that property under attachment must be considered as in the custody of the law.

West, J., in delivering the judgment of the Court in *Gulab Das* v. *Lakshman Narhar* (1), at p. 222, pointed out, I think correctly, the distinction which exists between pending suits and pending proceedings in execution. In the one case the rights of the plaintiff against the defendant have to be ascertained. In the other case and before execution of the decree is had, these rights have been already ascertained, and it only remains to enforce the decreed rights by execution. If the judgment-debtor's property is under attachment the execution of the decree can proceed against such property, but if at the time of the death of the judgment-debtor his property is not under attachment, the judgment-creditor must, except in the case of a decree under s. 89 of the Transfer of Property Act, proceed under s. 234, if he desires to execute his decree against property which was of the judgment-debtor in his lifetime and which came into the hands of his legal representative at his death, or if he desires to make the legal representative personally liable by showing that property which was of the judgment-debtor came to the hands of the legal representative and was disposed of by him otherwise than "duly" within the meaning of that section. Under s. 275 any person interested in property under attachment may, in the case contemplated by that section, apply for the withdrawal of the attachment.

[446] S. 280 provides for the releasing of property under attachment on the allowance of a claim or objection. S. 284 empowers a Court to order a sale of property under attachment. I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment.

S. 311 enables "any person whose immoveable property has been sold under" Chapter XIX to apply in the cases therein specified to set aside the sale. It is difficult to see how the legal representative, as such of a deceased judgment-debtor could be damnified by a sale of property attached and ordered to be sold in the lifetime of the judgment-debtor,

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(1) 3 B. 221.

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except in one of the events provided for by s. 311. I can find no section in the Code which provides that the legal representative, any more than a stranger whose property is sold, is to get notice of the sale of property under attachment, except as one of the public by the proclamation of the sale which is required under the Code.

The defendant here has shown no case on the merits; his defence so far as it is not met by the findings of fact, is a purely technical defence at the best, and in my opinion he is not entitled to succeed on that defence.

To hold otherwise would be to impose upon the purchaser at an execution-sale under a decree, the necessity of ascertaining before he paid the purchase-money whether the judgment-debtor was alive at the actual moment when the sale took place, or the risk of losing the purchase-money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale-certificate if subsequently challenged by the legal representative of the deceased judgment-debtor, the exact date of whose death it might be impossible for the purchaser to ascertain or prove.

I may say further that I am of opinion that there would have been no necessity for any attachment in this case if the sale, as we at first assumed it was, had been under a decree under s. 89 of the Transfer of Property Act directing the sale of the property in ques-[447]tion in enforcement of a mortgage specifically affecting it. I may say that this is the view which was expressed by my brother Straight in *Stowell* v. *Ajudhia Nath* (1).

When under a decree under s. 89 of the Transfer of Property A property of a person other than the judgment-debtor is sold, such other person has his remedy by suit.

I would dismiss this appeal with costs.

STRAIGHT, J.—I concur.

BRODHURST, J.—I concur.

TYRRELL, J.—I concur.

MAHMOOD, J.—I understand the facts of this case to be the following:—

On the 13th June 1876, Bhim Sen and Dal Chand executed a hypothecation bond in favour of one Mr. C. W. Stowell, who sued them for the money due on the bond and obtained a decree against both of them jointly on the 3rd December 1879. The decree was partly a decree enforcing hypothecatory lien against certain properties mentioned therein, and it was partly a simple money-decree against the judgment-debtors personally, and it has been expressly conceded by Mr. *Kashi Prasad* on behalf of the plaintiff-respondent that the decree awards no enforcement of hypothecation against the property now in suit, namely, *bagh* No. 911.

For the purposes of this case therefore that decree must be dealt with as a *simple money-decree*.

The decree was put into execution on the 6th May 1880, and it is admitted that in the course of execution proceedings the property now in suit was attached and notified for sale by auction, which took place on the 3rd September 1880, at which one Bhabuti Singh purchased the rights and interests of the judgment-debtors in the property now in suit.

(1) 6 A. 255.

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The Court executing the decree confirmed the sale on the 19th November 1880, and granted a sale-certificate to the aforesaid Bhabuti Singh on the 19th March 1881.

[448] On the 20th July 1881, the present plaintiff-respondent, Hira Lal, purchased by private sale from Bhabuti Singh the rights and interests which the latter had acquired under the auction-sale of 3rd September 1880, to which the sale-certificate of 19th March 1881 related.

The present litigation began in a suit instituted by the plaintiff respondent on the 20th July 1885, in which he alleged that the property now in suit belonged exclusively to Bhim Sen and Dal Chand, the judgment-debtors of 3rd December 1879; that their rights were duly purchased by the aforesaid Bhabuti Singh in the auction-sale of 3rd September 1880, to which the sale-certificate of 19th March 1884 related; that those rights were duly purchased from him by the plaintiff under the sale-deed of 20th July 1881; that under such purchase the plaintiff acquired proprietary possession of the property in suit; that in the month of July 1881 the defendants Bhim Sen and Sheo Prasad forcibly arrested him from the *bagh* and felled certain trees of the *bagh* of the value of Rs. 124, and appropriated them.

Upon these allegations the plaintiff prayed for a decree awarding him possession of the property in suit and recovery of Rs. 124 damages as the value of the trees above mentioned.

It is clear from the plaint that the suit was in the nature of an action for ejectment and recovery of money as damages in connection with the property in suit, and there is no question that such a suit is maintainable in our Civil Courts.

The suit was resisted by the defendant Bhim Sen mainly upon the ground that the plaintiff had purchased only the rights and interests of him, Bhim Sen; that the other judgment-debtor Dal Chand had died before the auction-sale of the 3rd September 1880, and his heirs were not represented in the execution proceedings; and the defendant further pleaded that he had been unnecessarily impleaded in the suit as he had not felled or appropriated any of the trees to which the suit related. The other defendant, Sheo Prasad, appellant before us, pleaded that the plaintiff's purchase was limited to the rights and interests of Bhim Sen and Dal Chand, [449] and could not entitle him to claim any further rights; that three years before the suit the trees in question had been felled and appropriated by the plaintiff's vendor Bhabuti Singh; that at the time when the auction-sale of 3rd September 1880 took place the judgment-debtor Dal Chand had already died and his heirs were not represented in the execution proceedings; that therefore the auction-purchase by the plaintiff's vendor Bhabuti Singh was null and void, and could confer no title upon the plaintiff to maintain such an action.

There were also other pleas in defence, of which the only one which I need refer to was a plea to the effect that the *bagh* in dispute was ancestral property belonging ta a common ancestor, Bija Ram, and that the shares of Bhim Sen and Dal Chand were limited to two-fifths of the property, and the plaintiff therefore had no title to claim the whole of it.

Upon this state of the pleadings, the Court of first instance framed no less than seven issues, and, in a judgment which I cannot regard as adequate or satisfactory, decreed the whole suit on the 22nd September, 1885.

From that decree only the defendant Sheo Prasad appealed to the lower appellate Court on the 9th November 1885, and the appeal was

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dismissed by that Court on the 15th February, 1886, in which the learned Judge of that Court held, with reference to the evidence before him, that the *bagh* in question was exclusively owned by Dal Cand and Bhim Sen, who were for years separate from their brothers and nephews; and that the plaintiff's title therefore extended to the whole property in suit under the sale-certificate of 19th March 1881, notwithstanding the circumstance that at the time of the auction-sale of 3rd September 1880, to which that certificate related. Dal Cand was not alive and his heirs were not represented in the execution proceedings, In holding this view the learned Judge relied upon the ruling of this Court in *Stowell* v. *Ajudhia Nath* (1), interpreting that ruling to lay down that the antecedent of a judgment-debtor does not render the sale of his [450] property void. From the decree of the lower appellate Court this second appeal has been preferred, and it came on for hearing before my brother Brodhurst and myself, and we by our order of the 23rd May 1887, remanded the case to the lower appellate Court for ascertaining whether Dal Chand died before or during the pendency of the execution proceedings which resulted in the sale of the 3rd September 1880, and the confirmation thereof on the 19th November 1880, also whether during such proceedings any person was acting as the legal representative of the deceased Dal Chand.

Upon remand the learned Judge of the lower appellate Court has found (to use his own words) that "Dal Chand died some time before the sale, but whether that death took place before or after the execution proceedings were taken against him, the Court has no materials before it to found its opinion upon."

With this finding the case came on before my brother Brodhurst and myself again, and by our order of the 10th January 1888, and in view of the rulings which were then cited to us, we directed that the case be laid before the learned Chief Justice, with a recommendation that the same may be heard by the whole Court, and it is in pursuance of his order of the 16th January 1888, that the case has been heard by a Bench consisting of the whole Court.

Now, upon this state of things, Mr. *Dwarka Nath Banerji*, on behalf of the defendant-appellant, Sheo Prasad, has argued, and I think soundly, that, inasmuch as the action is in ejectment and for damages for an alleged trespass, the plaintiff-respondent was bound to show a good title to maintain such an action; and that since the solitary title alleged by him rested upon the auction-sale of the 3rd September 1880, which was confirmed on the 19th November 1880, and to which the sale-certificate of 19th March 1881, related, that certificate represented what the learned Counsel called a "parliamentary title," and would for its validity depend upon proof that the statutory requirements for conveyance of such a title had been duly observed before the title-deed, namely, the sale-certificate of 19th March 1881, had been granted to the plaintiff. I think the learned Counsel was also right when he contended [451] that the validity of that title-deed depended upon the validity of the auction-sale of the 3rd September 1880, and that such a question was to be decided with reference to the rules contained in the Code of Civil Procedure and with especial reference to auction-sales in execution of simple money-decrees.

This argument has been met by Mr. *Kashi Prasad* on behalf of the plaintiff-respondent upon grounds other than those which would repudiate

(1) 6 A. 255.

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the principles upon which Mr. *Banerji's* argument for the defendant-appellant proceeded. The learned pleader has argued that although the rules of the Code of Civil Procedure would govern the validity of his client's title under the auction-sale of 3rd September 1880, yet those rules in themselves would justify our holding, as the lower appellate Court has held, that the plaintiff had a good title to maintain the action. Now, what really has to be considered in the case are two important questions of law :—

First,—Whether, when a sale in execution of a simple money-decree takes place of property which belonged to a judgment-debtor of such a simple money-decree, at a time when he was not alive and his legal representatives were not brought upon the record of the execution proceedings resulting in such sale, the sale is *ipso facto* null and void so as to convey no title to the purchaser at such sale.

Secondly,—Whether, when such a sale has actually taken place and the purchaser at such sale seeks to acquire the benefits of his purchase in an action such as this, he can be defeated upon the mere plea that, in consequence of the judgment-debtor whose rights he purchased being dead at the time of the sale, he has purchased nothing because the sale is null and void.

Before I proceed to consider the first of these questions, I think it is necessary to say that, upon the findings of the lower appellate Court on remand, and in view of the evidential presumption of law amply recognized by our own law in ss. 107 and 108 of the Evidence Act (I of 1872), as to the continuity of human life, I may take it, in the absence of evidence to the contrary, that on the 16th [452] May 1880, when the attachment of the property took place and on the 22nd July 1880, when the proclamation of sale was issued, the judgment-debtor Dal Chand was still alive. And before I go any further I wish to say that this finding relieves me of having to consider how far I am still prepared to abide by the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (1) to which I myself was a party and in which it was held that a regularly perfected attachment is an essential preliminary to sales in execution of simple money-decrees, and that where there has been no such attachment any sale that may have taken place is not simply voidable but *de facto* void. In this case, I take it that the deceased Dal Chand was alive when the attachment was duly made, and when in consequence of such attachment the property was proclaimed for sale. All that I take to have been found by the lower appellate Court is that he was dead at the time when the auction-sale of 3rd September 1880 took place, and to this circumstance alone I shall refer in dealing with the first point, as indeed also in dealing with the next.

Now, the only ruling of importance which has been cited on behalf of the defendant-appellant on this part of the case is *Ramasami Ayyangar* v. *Bagirathi Ammal* (2), where Innes and Kindersley, JJ., concurred in holding that where a judgment-debtor died after his land had been attached, and the creditor brought the land to sale without making the representatives of the deceased parties to the proceedings, the sale was illegal and must be set aside, apparently as the report suggests, without any investigation as to whether such sale had caused any "substantial injury" within the meaning of s. 311 of the Code of Civil Procedure. As a counterpoise to this ruling, a judgment of the Bombay High Court in *Gulab Das* v. *Lakshman Narhar* (3) has been cited to maintain the proposition that

(1) 5 A. 86. (2) 6 M. 180. (3) 3 B. 221.

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"the Code of Civil Procedure does not provide that applications for execution shall, like suits, abate by the death of the judgment-creditor;" but to neither of these extreme views can I find it possible to give my consent.

[453] What I have to consider is whether the mere circumstance of the judgment-debtor Dal Chand being dead on the 3rd September 1880, when his rights were sold to Bhabuti Singh, from whom the plaintiff derives his title, renders the sale null and void for purposes of conveying title.

To this question my answer is in the negative, and the best way in which I can explain my views is to pass on to the second point as enunciated by me in this judgment. I hold, as I have long held, that the provisions of the Civil Procedure Code as to the array of parties are applicable, not only to original suits in the Court of first instance, but also applicable *mutatis mutandis* to appeals and miscellaneous proceedings in the civil Courts, such as s. 647 of the Code contemplates, including, of course, proceedings in execution of a decree. But it is one thing to say that those rules as to the array of parties in execution proceedings are applicable to them, and it is a totally different thing to say that where those rules have not been duly observed, and in execution of a decree an actual attachment has duly taken place, and proclamation of sale duly issued in the lifetime of the judgment-debtor (as in this case) the auction-sale is null and void, because at the date of the sale the auction-purchaser purchased the rights of one who at that date was not alive, and whose representatives had not been brought upon the record as representing the deceased.

In *Lekraj Roy* v. *Becharam Misser* (1) the High Court of Calcutta laid down the rule that execution cannot issue against the estate of a deceased person if there is no one on the record as representing the estate and I think the rule so laid down was not only sound under the old Code which governed that case, but it was also sound under the present Code of Civil Procedure; because the rule of law, notwithstanding recent legislation, still stands firm that *audi alteram partem*, and no judicial process requiring the hearing of both parties could therefore be issued without the chance being given to the opposite party to say what he has to say against any proposed judicial process when (and this is important) the law [454] requires that he should have such a chance. There are of course numerous provisions of the Code of Civil Procedure which contemplate the existence of the judgment-debtor, enabling him to raise objections in the course of execution proceedings or to take measures to satisfy the decree in order to save his property from being brought to sale. As illustrations of this I may refer to ss. 257 A., 258 and even to s. 291 of the Code, which all contemplate the existence of a living judgment-debtor during execution proceedings. Similarly, there are many provisions in the Code which contemplate that, when a judgment-debtor is dead, execution proceedings should be taken against his legal representative. Illustrations of this class of provisions are to be found in ss. 234, 248 (*b*), 249, and I think there was much cogency in what Mr. *Banerji* urged in his argument that clause (*c*) of s. 244 distinctly contemplates that the legal representative of a deceased judgment-debtor should be made a party to execution proceedings, and that the last paragraph of that section is in-keeping with the argument, that when execution proceedings terminate in a sale and a

(1) 7 W. R. 52.

certificate of sale is granted under s. 316, the title, not only of the original judgment-debtor, but also of his legal representatives passes to the purchaser, which could not be the case unless such legal representative was made a party to the execution proceedings. So far I accept Mr. *Banerji's* argument, and I go even further with him when he contended that objections to a sale with the object of setting it aside, such as those contemplated by ss. 311 and 312, are available to the legal representative of a deceased judgment-debtor as much as to the original judgment-debtor himself; because when a sale-certificate is granted under s. 316 after confirmation of the sale, the law in that section prescribes that "so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before." But I do not think that the views which I have thus expressed overcome Mr. *Banerji's* real difficulty in supporting the case of his client Sheo Prasad, defendant-appellant. His position in the litigation has already been described by me, as also the main outlines of the defence which he set up, showing as it does that the **[455]** position taken up by him was not that of being the legal representative of the deceased judgment-debtor Dal Chand, but rested mainly upon the assertion of a paramount or independent title, and also upon the technical plea as to defect in the plaintiff's title, by reason of Dal Chand being dead when the auction-sale in execution of decree took place on the 3rd September 1830.

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Now, so far as the plea as to paramount or independent title is concerned, the finding of fact by the lower appellate Court is conclusive in second appeal, that no such title existed in Sheo Prasad at the date of the sale, for the judgment-debtors, Bhim Sen and Dal Chand, were exclusive owners of the property then sold. This being so, all that is left to Mr. *Banerji* is the technical defect in the plaintiff's title which the defendant appellant seeks to find, by reason of what has been addressed on his behalf under the provisions of the Civil Procedure Code, as to the title conveyed under s. 316 by a sale-certificate.

In the case of *Ramchhaibar Misr* v. *Bechu Bhagat* (1), I dwelt at some length upon the various divisions of the Civil Procedure Code as to execution of decrees, with especial reference to the scope of ss. 311 and 312 in their connection with s. 244 of the Code. I said—"I take it, that when execution of a decree is prayed for by a decree-holder, all the questions which may arise between the decree-holder, and the judgment-debtor relating to the execution, &c., of the decree, may be disposed of under s. 244. There may be questions relating to the validity of attachment, the mode of execution, &c., but when one and all of these matters do terminate in sale, I maintain that all that is comprehended within the definition of execution comes to an end there, because the purchaser comes as a third party, and is not bound by s. 244 as to proceedings antecedent to sale. The 'execution' so far as s. 241 is concerned, is over, and the questions that may arise *after* the *sale* are no more, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree within the meaning of cl. (*c*) of s. 244. As soon as there is a sale, the execution of the decree, so far as the **[456]** decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree."

(1) 7 A. 641.

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I had again to consider a cognate question in *Ram Chand* v. *Pitam Mal* (1), where, in deference to the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (2), I held, with my brother Brodhurst's concurrence, that absence of a valid attachment in execution of a simple money-decree was a matter which might be complained of under s. 311 of the Code for purposes of setting aside a sale, *without proof* of substantial injury, since the Full Bench judgment declared such sales to be absolutely *void*.

In this case, however, as I have already said, no question as to the absence of a valid attachment at the time of the sale arises, and the question is limited to what the defendant-appellant might have done subsequent to the sale of 3rd September 1880, if he had been either impleaded as the legal representative of the deceased judgment-debtor Dal Chand, or had taken up the position of a paramount and independent title, as he has done in his defence in this case.

Now, as I understand Mr. *Banerji's* argument, I took his contention to be that the defendant-appellant, having never been brought upon the record as the legal representative of the deceased Dal Chand, could raise no objections under s. 311 to set aside the sale of 3rd September 1880, and that, as claiming under title paramount to or independent of the deceased Dal Chand, he could not avail himself of the provisions of that section. For the latter part of this contention the learned Counsel relied upon a recent Full Bench ruling of the Calcutta High Court in *Asmutunnisa Begum* v. *Ashruf Ali* (3), where the learned Judges concurred, by overruling a Division Bench ruling of their Court in *Abdul Haq Mazoomdar* v. *Mohini Mohun Shaha* (4), in holding "that a person claiming by title paramount to the judgment-debtor is not within the meaning of the words '*any person*' in the section, inasmuch as his title to the pro-[457]perty is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale."

In adopting this rule the learned Judges purport to have approved and followed a judgment of Westropp, C.J., in *Krishnarav Venkatesh* v. *Vasudev Anant* (5); but I respectfully think that the principle of that ruling, though it interpreted the old Code of 1859, was opposed to the rule laid down by the Full Bench of the Calcutta High Court, the effect of which I understand to be that the words "*any person*" as they occur in s. 311 do not include persons who may seek to set aside a sale under a title independent of the judgment-debtor, even if they can show that they have sustained substantial injury by the sale within the meaning of that section. With all respect due to the Full Bench ruling of the Calcutta High Court, I find myself unable to accept the conclusion at which their Bench arrived; because I think it is seldom safe, and always risky, to credit the Legislature with notions that it does not clearly express in a statute, and it is even more disastrous, as a matter of interpretation, to limit words of broad and general import when the statute itself provides no such limitations. I confess, therefore that the rule laid down in *Abdul Haq Mozoomdar* v. *Mohini Mohun Shaha* (4) which was overruled by the Full Bench of the Calcutta Court, is the rule which I adopt in interpreting s. 311 of the Code in this case. And in this view Mr. *Banerji's* contention that his client could not, after the sale of 3rd September, 1880, avail himself of ss. 311 and 312 of the Code of Civil

(1) 10 A. 506. (2) 5 A. 86. (3) 15 C. 488. (4) 14 C. 240.
(5) 11 B.H.C.R. 15.

Procedure if he wished to set aside the sale, fails. I do not say that his omission to do so debarred him from raising the defence which he has raised in this. But what I do maintain is, that, he having failed in this case to prove any title in him paramount to the title of the deceased judgment-debtor Dal Chand, whose rights and interests were sold in the auction-sale of 3rd September 1880, he having been found to be the owner of the property in suit, the defendant-appellant cannot succeed in resisting the suit by dint of proving technical irregularities in the sale without proving substantial injury to him- [458] self within the meaning of s. 311, such as would vitiate the plaintiff-respondent's title, namely, the certificate of sale which his predecessor in interest obtained under s. 316 of the Code conveying to him the rights of the deceased Dal Chand.

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Now, upon this question as to what irregularities in an execution sale would justify its being set aside under ss. 311 and 312 of the Code, there is not, I am afraid, full accord in the *ratio decidendi* of the various rulings of this Court, and, so far as I am concerned in them, they were amply considered by my brother Brodhurst in *Ganga Prasad* v. *Jag Lal Rai* (1), where he dissented from the learned Chief Justice upon a question which does not arise in this case, and which I need not therefore consider any further, beyond saying that the difference of opinion in that case related to the exact effect to be given to s. 290 of the Code so far as it prohibits sales within thirty-days of the proclamation.

We are not in this case concerned with any imperative or prohibitory provisions of the Code as to execution sales, and I think that Mr. *Banerji's* argument proceeded upon inferences to be derived from the statute rather than upon any express provisions which, even according to his contention, would vitiate the auction-sale of 3rd September 1880, by the mere circumstance of the judgment-debtor Dal Chand not being alive at the time of the sale. I have already pointed out that he must be taken to have been alive at the date of the attachment and proclamation for sale, and that those proceedings must therefore be presumed to have been duly taken by the Court executing the decree. I have also said enough to show that the heirs of Dal Chand should have been brought upon the record, also that the defendant-appellant, though a third party according to his case, might have appeared on the scene to set aside the sale under ss. 311 and 312 of the Code. But the fact remains that he did not do so, and though as I have already said, he is not debarred from raising his present defence to the action any more than he would have been from other remedies, such as objecting to attachment under s. 278 or maintaining a suit under s. 283 or s. 335 [459] of the Code, we have to consider whether in the absence of any title in himself independent of the deceased Dal Chand, he has sustained any substantial injury such as would have induced the Court if he had objected under s. 311 to set aside the sale or should induce us now in this regular action to vitiate the sale, for the solitary reason that at the date of the sals the judgment-debtor Dal Chand was not alive.

It seems to me that the omission to bring upon the record the legal representative of the deceased Dal Chand was a mere irregularity which could not *per se* vitiate the sale without proof of substantial injury within the meaning of s. 311 of the Code. In *Jasoda* v. *Mathura Das* (2) I suggested a doubt whether what might be called a "material irregularity" within the meaning of s. 311 would not by itself vitiate a sale without proof of

(1) 11 A. 333.

(2) 9 A. 511.

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substantial injury, and in *Ram Chand* v. *Pitam Mal* (1) I doubted my own suggestion in the earlier case, and I think I may say that the latter case was governed entirely by the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (2), as my remarks at page 517 of the report show.

What I hold now, however, is that, for purposes of setting aside a sale under s. 311, the irregularity, whether material or simpler irregularity is not sufficient unless "substantial injury by reason of such irregularity" is proved. I think this is the effect of much of what was said by the Lords of the Privy Council in *Girdhari Singh* v. *Hurdeo Narain Singh* (3) and in *Olpherts* v. *Mahabir Parshad Singh* (4), and I think the law now may be taken to be settled by the latest ruling of their Lordships on the subject in the case of *Arunachellam Chetti* v. *Arunachellam Chetty* (5).

The principles upon which these rulings proceed leave no doubt in my mind that even if the defendant-appellant had been impleaded as the legal representative of the deceased Dal Chand, or had come in as a third party to set aside the sale under ss. 311 and 312, he [460] could not have succeeded without proof of substantial injury, and indeed Dal Chand himself if he had been alive and made such objections after the sale of 3rd September, 1880, he too could not succeed in setting aside the sale without proving such injury. In the present case there is no allegation of such substantial injury as would require the setting aside of the sale, and the defendant-appellant naturally could not proffer such a plea consistently with the rest of his defence as to his title being independent of Dal Chand, —a plea which has been found against him by the lower appellate Court upon the evidence.

This being so, I fail to see what the defendant-appellant has to complain of. He is not the owner of the property which the plaintiff's predecessor in title purchased on the 3rd September 1880, in a sale which could not,in the absence of substantial injury be set aside at the instance of Dal Chand himself or of his legal representatives much less at the instance of a third party like the defendant-appellant who claims a title independent of Dal Chand. For the reason which I have stated, I hold that, though the sale of 3rd September 1880 was irregular by reason of the legal representative of the deceased judgment-debtor Dal Chand not being brought upon the record, notwithstanding his death subsequent to the attachment and proclamation for sale, the irregularity not having been proved to have caused any substantial injury within the meaning of s. 311 of the Code of Civil Procedure to the defendant-appellant or to any one else, the sale was not vitiated, and conveyed validly to the plaintiff's predecessor in title, Bhabuti Singh, the purchaser at that sale, all the rights and interests which the deceased Dal Chand possessed, and that therefore the suit was rightly decreed by the Courts below.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

(1) 10 A. 506. (2) 5 A. 86. (3) 3 I. A. 230. (4) 10 I.A. 25.
(5) 13 I.A. 171.

12 A. 461 (F.B.)=10 A.W.N. (1890) 149.

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[461] *Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst. Mr. Justice Mahmood and Mr. Justice Young.*

BECHI (*Plaintiff*) *v.* AHSAN-ULLAH KHAN AND OTHERS (*Defendants*). [14th June, 1890.]

Civil Procedure Code, ss. 542, 587—Court competent to raise question of limitation not raised by the parties—Act XV of 1877 (Limitation Act) ss. 4, 5 and 12, sch. ii, art. 152—Time requisite for obtaining a copy of a decree—Exclusion of time between delivery of judgment and signing of decree—Exclution of time between furnishing of estimate of cost of copy and compliance with the estimate.

Judgment was pronounced by the Court of first instance on the 23rd May, 1887. The decree was signed on the 31st May. An application for copies was made by the defendants on the same day. Information of the estimate of the costs of copies was given to them on the 1st June; but they did not comply with that estimate until the 9th June. The copies were delivered on the 11th June. On the 30th June, the defendants filed their memorandum of appeal in the lower appellate Court which, on an office report that it was within time, admitted it, and fixed the 19th August for the hearing. On the 1st August, another office report was submitted, which showed that the appeal was beyond time. Accordingly the Judge on the 2nd August, directed the defendants to be informed that their appeal was dismissed. On the 27th August, however, the defendants presented a petition to the Judge in consequence of which he readmitted the appeal and, cancelling his order of the 2nd August, directed that the appeal should be heard.

Held that the appeal was barred by limitation under art. 152, sch. ii of the Limitation Act (XV of 1877).

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause within the meaning of s. 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal.

S. 5 of the Limitation Act cannot be applied in making the computation of time provided for by s. 12, and does not become applicable until after such computation has been made. *Raj Coomar Roy* v. *Shaikh Mahomed Wais* (1) dissented from.

In computing the time to be excluded under s. 12 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhub Mitter* v. *Matungini Dassi* (2), dissented from.

[462] *Per* Edge, C. J., Brodhurst and Young, JJ.—A Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them.

Per Edge, C. J.—The only section in the Limitation Act which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act, is s. 5.

Per Mahmood, J.—Where there is delay in compliance with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy." Whether or not such delay is unaviodable is a question of fact in each case.

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(1) 7 W.R. 337. (2) 13 C. 104.

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Per Mahmood, J.—A bare mistake of law is not a "sufficient cause" within the meaning of s. 5 of the Limitation Act for extending the period of limitation. *Huro Chunder Roy* v. *Surnamoyi* (1) dissented from.

See *Krishna* v. *Chathappan*, 13 M. 269.

[F., 3 L.B.R. 62 (F.B.); 10 Ind. Cas. 866 (868) = 7 N.L.R. 67; Rel. on., 39 C. 766 (770); Appr., 23 B. 442 (445); R., 16 C 184; 34 C. 216 = 5 C.L.J. 380; 25 M. 166 = 11 M.L J. 406; 5 N.L.R. 50; 13 C.P L.R. 78; U.B.R. (1905), C.P. C. 24; 1 S.L.R. 71; 2 L.B.R. 283; 8 N.L.R. 174 (176).]

THE facts of this case are fully stated in the judgment of Mahmood, J.

Mr. *Amiruddin* and Pandit *Sundar Lal*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

JUDGMENTS OF THE FULL BENCH.

MAHMOOD, J.—This case has come up for hearing before a Full Bench by order of the learned Chief Justice and my brother Young, dated 8th May 1890, in which they express their doubts as to the accuracy of the ruling of this Court in *Fatima Begam* v. *Hansi* (2) and state the question which they have referred to be "whether the minor's appeal in the Court below was properly admitted."

The question so referred, taken with the manner in which it has been argued before the Full Bench, seems to relate entirely to the question whether the lower appellate Court acted rightly in admitting the appeal to its register, only some of the defendants-appellants before that Court being minors. In order to understand the question which has arisen, it is necessary to bear in mind the following dates. The Court of first instance decided the case on the 23rd May 1887, and the decree of that Court was signed by the Subordinate Judge on [463] the 31st May 1887. On the same day the defendants applied for copies of the judgment and the decree, and on the next day, *i.e.*, the 1st June 1887, they were informed of the estimated cost. It was not, however, till the 9th June 1887 that they fulfilled the requirements of the estimate by paying in the costs of the copies applied for, and the copies were delivered to them on the 11th June 1887.

On the 30th June 1887 the memorandum of appeal was filed in the lower appellate Court, and the office report being that the appeal was within time, it was accordingly registered, fixing the 19th August 1887, as the date of the hearing, and notices appear to have been issued accordingly.

Meanwhile on the 1st August 1887, the office of the lower appellate Court reported to the Judge that the former report was erroneous, and that the appeal was one day beyond time, as May should have been counted as a month of 31 days. In consequence of this report, and apparently without the presence of either of the parties, the learned Judge of the lower appellate Court passed the following order on the 2nd August 1887 :—

"Let the appellant be informed that this appeal must be rejected, being beyond time."

No notice, however, appears to have been given to the appellants in the lower appellate Court, nor does it appear whether the appeal was called on for hearing, and the parties or any of them attended on the 19th August 1887, which had been originally fixed for the hearing of the appeal.

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(1) 13 C. 266.

(2) 9 A. 244.

On the 27th August 1887, however, the defendants-appellants in the lower appellate Court filed a petition complaining of the order of rejection, dated the 2nd August 1887, and praying that, since that order was passed in their absence, it might be reconsidered and the appeal might be heard. The application was granted by the Judge's order of the same day *i.e.*, 27th August 1887, which runs as follows:

"As my order of 2nd instant was to inform appellant, and he has not apparently been informed till this petition is presented, and [464] now appears to show cause for the appeal not being rejected, the appeal will remain on register and come on for hearing in due course."

It does not appear under what rules of procedure the learned Judge acted in rejecting the appeal in the absence of the appellants on the 2nd August 1887; nor is it clear under what section of the Civil Procedure Code the order of 27th August 1887, directing that the appeal should be heard, was passed. The appeal, however, came on for hearing in usual course, resulted in the lower appellate Court's judgment of the 14th February 1888, whereby the appeal was decreed and the decree of the first Court reversed by dismissing the plaintiff's suit *in toto*.

It is from this decree that this second appeal has been preferred, and although no ground in the memorandum of appeal has been taken in this behalf, Pandit *Sundar Lal* on behalf of the plaintiff-appellant before us, has, in addressing his argument upon the point referred to the Full Bench, contended that the lower appellate Court should have dismissed the appeal before it, as it was barred by limitation under art. 152 of the Limitation Act (XV of 1877), and the circumstances of the case did not furnish sufficient grounds for extending the period of limitation by applying the provisions of the second part of s. 5 of that enactment. This preliminary plea was allowed to be argued by the Division Bench which referred the case, and has also been heard by the Full Bench, not only under the power contained in s. 542 (read with s. 587 of the Civil Procedure Code) but also in view of the stringent requirements of s. 4 of the Limitation Act, which casts upon the Judges the duty of applying the rules of limitation even where they are not pleaded. There is therefore no force in the preliminary objection taken on behalf of the defendants-respondents, to the effect that we should not allow the plea taken on behalf of the appellant to be argued at this stage.

With reference to the facts and dates abovementioned, the arguments of the learned pleaders for the parties raise four main questions for decision.

[465] *Firstly*.—Whether, under the rule of computation contained in the second paragraph of s.12 of the Limitation Act (XV of 1877), the defendants, who were appellants in the lower appellate Court, were entitled to the exclusion of (*a*) the period intervening between the day on which the first Court's judgment was pronounced (*i.e.*, the 23rd May 1887), and the date when the decree was signed (the 31st May 1887); and (*b*) the period intervening between the date when the estimate of the costs of copying was intimated to them (*i.e.*, the 1st June 1887), and the day on which they actually paid in the copying charges and fees (*i.e.*, the 9th June 1887).

Secondly.—Whether the circumstance that some of the defendants-appellants in the lower appellate Court were minors brought the appeal within the period of limitation when it was filed in the lower appellate Court (*i.e.*, the 30th June 1887).

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Thirdly.—Whether, assuming that the appeal was beyond limitation, the circumstances of the case rendered the appeal a fit one for extension of limitation under the second paragraph of s. 5 of the Limitation Act.

Fourthly.—Whether, with reference to the ruling of this Court in *Fatima Begam* v. *Hansi* (1) the learned Judge of the lower appellate Court having admitted the defendants' appeal and heard and determined it, we should at this stage interfere with his order of 27th August 1887.

I will deal with these various questions in the order in which I have stated them, but before doing so, I consider, in view of the manner in which the Full Bench ruling of this Court in *Parbati* v. *Bhola* (2) and my ruling in the Single Bench in *Sheogobind* v. *Ablakhi* (3) were referred to and discussed, that some explanation is due from me. The former of these cases was an application under s. 592 of the Code of Civil Procedure for leave to appeal *in forma pauperis* which was barred by limitation but had been by inadvertence admitted by me, provisionally, in the Single Bench, [466] as if it was an appeal and entitled to the benefit of s. 5 of the Limitation Act. After the case had been heard and partly dealt with by a Division Bench consisting of my brother Brodhurst and myself, when no plea of limitation was taken by the respondent, it finally came on for hearing before a Full Bench consisting of the learned Chief Justice, my brother Brodhurst and myself, under circumstances which are fully stated at the outset of the judgment which the learned Chief Justice delivered in the case. He pointed out for the first time that the case was not an appeal, but an application for leave to appeal *in forma pauperis* for which art. 170 prescribed only a limitation of 30 days; that the second paragraph of s. 5 of the Limitation Act could not cover such applications for purposes of extending limitation; that the application being presented beyond the prescribed period was altogether barred by limitation. In the course of the arguments Mr. *Chaudhri*, on behalf of the applicant, relying upon the Full Bench ruling of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (4), contended that under s. 12 of the Limitation Act, time during which the decree remained unsigned must also be excluded in computing the period of limitation. The learned Chief Justice dissented from that ruling, and gave expression to his views as to the meaning of the phrase "the time requisite for obtaining a copy of the decree" in the second paragraph of s. 12 of the Limitation Act. In delivering my judgment in that case I did not refer to the Full Bench ruling of the Calcutta Court because, according to my view of the facts and dates of the case, even if that ruling were to be adopted by excluding the period between the 29th March and the 1st April 1887, when the decree had remained unsigned, and even if the period between the 16th April 1887 and the 19th April 1887, during which the applicant, after intimation of the estimate to furnish the charges and fees for the copies, did not furnish them, were to be excluded, her omission to attend on the 23rd April 1887, which was fixed for delivery of the copies and her not obtaining them till the 25th April 1887, rendered her application beyond limitation under any computation, and it could not be admitted except [467] under s. 5 which, I held, in concurrence with the learned Chief Justice, was wholly inapplicable to the application. I referred to s. 12 of the Limitation Act only to indicate, as fortifying the conclusion at which the whole Bench had arrived as to the inapplicability of s. 5 to pauper appeals, that the distinction which the Limitation Act draws between such

(1) 9 A. 244. (2) 12 A. 79. (3) 12 A. 105. (4) 13 C. 104.

appeals and ordinary appeals was at least at first sight noticeable even in the penultimate paragraph of s. 12 of the Act as to the time allowed for obtaining copies of judgments as distinguished from decrees. But my silence as to the other points of the interpretation of that section must not be understood as in any sense indicating my dissent from the views which the learned Chief Justice had expressed upon them, and if, in the course of the argument in this case, I referred to the matter, it was with no object other than pointing out, what the head-note of the printed report indicates, that the ruling of the Full Bench as a whole was limited to holding that the application was barred by art. 170 of the Limitation Act, and that s. 5 of that enactment could not be applied to such applications, the judgments of my brother Brodhurst and myself being silent on the other points upon which the learned Chief Justice had expressed his views. It would be total misapprehension, and it could not be that, in thus referring a the case, when Pandit *Ajudhia Nath* for the respondent discussed it, I had any intention to shake the authority of the Full Bench ruling, or to show anything less than the profound respect which is always due from the members of this Court to any exposition of the law by the learned Chief Justice. Far from this being possible, I am, as I shall presently show, going to adopt in deciding this case the views as to the interpretation of s. 12 of the Limitation Act, which the learned Chief Justice expressed in delivering his judgment in the Full Bench case, and I will also show that my ruling in the Single Bench case is not in conflict with those views as I understand them.

To begin with the first part of the first question as stated by me, namely, whether, under the second paragraph of s. 12 of the Limitation Act, the defendants, who were appellants in the lower **[468]** appellate Court, were entitled to the exclusion of the period during which the decree of the first Court, from which they were appealing, remained unsigned, that is, whether limitation should be computed from the 23rd May 1887, when the judgment was pronounced, or from the 31st May 1887, when the decree was signed. There is no doubt that, if this period is to be excluded, the defendants' appeal to the lower appellate Court would be within the period of thirty days allowed by art. 152 of the Limitation Act, and otherwise it would be barred by limitation, unless the second part of the first question relating to the delay in supplying the copying charges is decided in their favour. In arguing the first part of the question, Pandit *Ajudhia Nath* contests the views expressed by the learned Chief Justice in *Parbati* v. *Bhola* (1), and in doing so he relies upon the Full Bench ruling of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (2), which was expressly dissented from by the learned Chief Justice here, and which laid down the broad rule that the period during which the decree appealed against remains unsigned is to be excluded from computation, even though the decree was signed before application for copy was made. Indeed, the rule as stated in the judgment of Petheram, C.J., goes the length of laying down that even in cases where the decree remains unsigned for a period beyond that allowed for appealing from that decree, the appellant, by a subsequent application for obtaining a copy and procuring it, might prefer an appeal by excluding the whole period during which the decree had remained unsigned and during which he had made no application for a copy at all. That this rule, in the unqualified form in which it has been expressed, taken with the facts and

(1) 9 A. 244. (2) 13 C. 104.

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dates of the case before the Full Bench of the Calcutta High Court, has the effect of holding that the starting period of limitation for appeal is not the date of the decree, which under s. 205 of the Code of Civil Procedure must "bear date the day on which the judgment was pronounced," but the day on which it is signed, cannot be doubted. The learned Chief Justice of this Court in *Parbati* v. *Bhola* (1) declined to adopt the rule in this unqualified form, and expressed views in which [469] I entirely concur for reasons which I shall presently explain. He said :—

"In my opinion, applying s. 12 of the Limitation Act to such a case, allowance should be made for the time between the date when the decree was signed, if the delay in signing the decree delayed the applicant in obtaining a copy of the decree, and not otherwise. In such a case as that, it would clearly be, within the meaning of s. 12, time which was requisite for obtaining a copy of the decree, because a copy of the decree could not be obtained until the decree was signed by the Judge. But that is not the case here. Here no application was made until the 15th April; so that in no sense was the applicant delayed in obtaining a copy of the decree by the fact that the decree was not signed by the Judge on the date the judgment was pronounced, but was signed on the 1st April. Consequently the period between the 29th March and the 1st April cannot in my opinion be allowed."

In appreciating the full bearing of the rule so laid down, it must be borne in mind that, in this case, the application for copies was not made by the appellant till the 15th April 1887, that is, a fortnight after the decree had been signed, a state of things similar to that which existed in the case before the Full Bench of the Calcutta High Court, and in both cases the disallowance of the period during which the decree remained unsigned would bar the appeal. Thus the two rulings are in conflict with each other, and I proceed to state my reasons why I adopt the views of the learned Chief Justice of this Court which I have just quoted.

Now, in the first place I entertain no doubt that it is necessary and indispensable for a litigant who intends to appeal from a decree which is the result of a judgment against him, and which decree must, under the law, bear date the day on which the judgment was pronounced, to apply for a copy of the decree and, if necessary, of the judgment also, before the lapse of the period of limitation for the appeal which he intends to file, whatever that period may be. This view is amply supported by the ruling of Garth, C.J. (Cun-[470]ningham, J. concurring) in *Ramey* v. *Broughton* (2), which was an appeal from a decree passed on the original side of the High Court and was therefore governed by the 20 day's limitation under art. 151 of the Limitation Act. In that case the decree had remained unsigned for more than the period of limitation, and the appellant subsequently applied for and obtained a copy of the decree. It was there contended on behalf of the appellant "that where the decree was not drawn up and signed until after 20 days had expired from the delivery of the judgment, the 20 days ought to count from the time when the decree was made." In dealing with this contention, Garth, C. J., said (at P. 659-60) :—" But this is directly contrary to the express language of the law. By art. 151 of the schedule to the Limitation Act the 20 days are to be reckoned from the date of the decree; and by s. 205 of the Civil Procedure Code, the decree is to bear date the day on which the

(1) 9 A. 244.

(2) 10 C. 652.

judgment is pronounced, so that the appeal must clearly be filed within 20 days from the day on which the judgment is pronounced." This rule must be read with the observation of Garth, C.J., in the course of the argument, when he said "if the appellant had applied for a copy while the 20 days were running he would not be barred," and this is the effect of the judgment in the case.

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It appears to me upon general principles that it would be defeating the object of limitation to allow the would-be appellant to sleep over his right of appeal for more than the limitation period, and then by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree for obtaining a copy of which he had not taken even the first step, by filing an application therefor. This construction is in my opinion supported by the words of the second paragraph of s. 12 of the Limitation Act itself. The words referring to exclusion are "the time requisite for obtaining a copy of the decree. The words "requisite" and "obtaining" as they occur in the context seem to me to assume that some definite step ancillary to the obtaining, that is, acquisition, is not only [471] intended to be taken, but has already been taken. The first step for "obtaining" must be to take some step towards the obtainment, and the act of "obtaining" cannot be said to have even commenced before such step Taking it to be a sound rule of interpretation to interpret the words of a statute in their ordinary and usual sense, unless the contrary is shown, I have consulted Webster's English Dictionary, and it explains the word "obtain" to mean "to get hold of by effort; to gain possession of; to acquire," as the ordinary sense of the word. In this sense I interpret the word "obtaining" as it occurs in paragraph 2 of s. 12 of the Limitation Act, and hold that "the time requisite for obtaining a copy of the decree" cannot refer to any period antecedent to the appellant's asking for a copy by the usual mode of applying therefor, or to any period subsequent to its being ready for delivery. If at the time when the application for a copy is made, the decree is not ready, he will of course, be entitled to the allowance of such portion of time during which the decree remains unsigned, along with the time which may be occupied in preparing the copy for delivery; the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part. But when he has made no application to obtain a copy and the decree remains unsigned for a portion of, or the whole period of, limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced.

As an argument against this view Pandit *Ajudhia Nath* has presented an extreme illustration of a case in which a Court closes on the very day on which judgment is pronounced, excluding the possibility of an application for a copy on that day, and does not re-open till after the lapse of the period of limitation for the appeal. The learned pleader argues that, in such a case, even if the application for a copy of the decree be made on the very day when the Court re-opens and the time occupied by the office in preparation of the copy and its delivery be excluded, it would not benefit the [472] applicant or save limitation unless the appeal is filed on the very day when the copy is delivered. This result, the learned pleader contends, my view of the law necessarily involves, but which the Legislature could not have intended, for it would practically

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amount to a denial of the right of appeal, especially to litigants who have a distance to travel to reach the appellate Court. Upon this hypothesis the learned pleader contends that, in the case supposed, the period during which the Court was closed, though antecedent to the application for copy, must necessarily be included in "the time requisite for obtaining a copy" within the meaning of the second paragraph of s. 12 of the Limitation Act.

This argument, though plausible, is purely speculative and unsound. In the first place, in the state of things supposed, it would be the duty of the litigant to know that the exceptional circumstances of his case necessitated extra diligence on his part, and he should apply for a copy immediately the judgment is delivered, and since such application need not be made to the presiding Judge, I can scarcely conceive that the closing of the office upon the rising of the Judge would be so sudden and literally immediate as to exclude the possibility of such application being made to the office. If the application is made to the proper officer, and he, under the supposed hurry of the moment, improperly declines to take it, the matter would, of course, furnish adequate ground for holding that the application must be taken to have been made before the holidays, thus entitling the litigant to exclusion of that period as "time requisite," since the delay would not then be due to any negligence or fault on his part. But when he omits to take due steps by applying for a copy he must abide by the consequences and cannot complain if his own want of diligence in obtaining a copy bars his appeal. After the explanation which I have given of the word "obtaining," I cannot hold that the closing of the Court for holidays was "requisite" for or ancillary to the act of obtaining a copy. The act of obtaining which begins by an application for a copy had not yet commenced by any step taken by the litigant towards that end, and if in the case supposed, the antecedent holidays were to [473] be included in the "time requisite," it would be giving a false duration to the actual period occupied in the act of obtainment, and I would decline to exclude the antecedent holidays in computing limitation, for I hold that in such matters, more than in any other, the salutary maxim must not be forgotten that *vigilantibus non dormientibus jura subveniunt*.

There may, of course, be cases in which delay in applying for a copy, or in receiving it after it is ready for delivery, is due to wholly unavoidable causes beyond the control of the litigant, but this delay being antecedent to the application, and subsequent to the time when the copy is ready for delivery, cannot be called "time requisite for obtaining a copy" within the meaning of s. 12, for such time must be taken to begin when the application for copy is made and to end when the copy is ready for delivery. Any period outside these two limits falls beyond the purview of s. 12 altogether, and if there has been delay under excusable or unavoidable circumstances, that would be a matter for consideration under s. 5, unless the appeal is *in forma pauperis* to which that section does not apply.

The only reason suggested against such interpretation of s. 12 in the Full Bench Judgment of the Calcutta High Court is "that under s. 541 of the Code of Civil Procedure it is necessary that the memorandum of appeal shall be accompanied with a copy of the decree; it would be unfair to complete the period of limitation, in all cases from the date on which the judgment was delivered, because it is obvious that things may intervene so as to prevent the decree being signed until after the expiration of the whole period of 30 days allowed for preferring the appeal, and so the appeal may be rendered impossible without any fault of the parties." With due respect for the views thus expressed, I may observe that the right of

appeal is the creation of statute-law; that the right so conferred is subject to the restrictions and qualifications imposed by statute-law itself; that those in whose favour the right is created are necessarily expected to know that among those restrictions is the poriod of limitation which the law allows for the [474] exercise of the right; that if with this knowledge they sleep over their rights, by taking no step within limitation ancillary to filing an appeal, and allow the period of limitation to elapse, they can complain of no hardship if their right of appeal is extinguished by their own laches, as was the case before Garth, C. J., in *Ramey* v. *Broughton* (1).

In the present case the decree had already been signed on the 31st May 1887, and the defendants applied for a copy on that very day. It cannot be said that the fact of the decree having remained unsigned up to that date in any way delayed their obtaining a copy, and therefore no allowance should be made to them for the period antecedent to their application. Any other view would, I think, require that in the third column of art. 152 of the Limitation Act, we should read the words "the date of the decree" as if they were "the date on which the decree is signed," an interpretation which in my opinion is not justifiable by any rule.

I now proceed to consider the second part of the first question as enunciated by me, namely, whether the defendants, in appealing to the lower appellate Court, were entitled to deduct from the period of limitation the time intervening between the date when estimate of the costs of copying was intimated to them, that is, the 1st June 1887, and the day on which they actually paid the copying charges and fees, that is, the 9th June 1887. This part of the case has been the subject of anxious consideration by me, as it has been contended that the learned Chief Justice in *Parbati* v. *Bhola* (2) laid down an inflexible and stringent rule that the words "requisite for obtaining a copy" as they occur in the second paragraph of s. 12 of the Limitation Act are strictly limited to such time as is occupied in preparing the copy, and that in no case and under no circumstances can they be taken to refer to any time however short which may be required by the exigencies of the condition of the applicant for the copy. And upon this hypothesis it has been argued that my ruling in *Sheogobind* v. *Ablaki* (3) is in principle in conflict with the rule laid down by the learned Chief [475] Justice. Such being the contention, it amounts to maintaining that the learned Chief Justice laid down the hard and fast rule that in all cases, and no matter what the exigencies of the case may be preventing the applicant from abiding by the rule, he must pay the estimated costs of the copy the moment it is intimated then and there. It is only by this interpretation that my ruling in the Single Bench can in any sense be regarded as in conflict with the rule laid down by the learned Chief Justice. But I do not understand, and certainly could not have understood, from such recollections as I had of the case of *Parbati* when I delivered my judgment in the Single Bench, that the learned Chief Justice intended to lay down any such hard and fast rule. The passage to which the argument relates is very carefully worded and must be read together. The learned Chief Justice said :—

"There is another question about the computation of time, and that is, whether this lady having had notice on the 16th April of the amount of the estimate and delayed until the 19th April to pay into Court

(1) 10 C. 652. (2) 12 A. 79. (3) 12 A. 105.

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the money required for making the copies, such delay should be allowed? In my humble judgment, delay caused by the carelessness or negligence of a party applying for a copy cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite there does not mean requisite by reason of the carelessness or negligence of the applicant, it means the time which is occupied by the officer who has got to provide that copy in making the copy."

Now, as I have understood this passage, I do not take it to mean that ommission in its generic sense of being excusable or inexcusable avoidable or unavoidable, was intended. The word does not occur, and the interval between the intimation of the estimate and the payment of the copying charges is described as "the delay caused by the carelessness or negligence of a party applying for a copy" and this the learned Chief Justice held could not be deducted from the period of Limitation. The phrase occurs again towards the end of the passage, in the last sentence, which lays down that the time requisite "does not mean requisite by reason of the [476] carelessness or negligence of the applicant: it means the time which is occupied by the officer who has got to provide that copy in making the copy." The passage lays down no rules as to cases where the delay has been caused through no carelessness or negligence of the applicant but by wholly unavoidable causes, and understanding the passage in this sense, I fully agree in it, fortified as I am by the absense of the word "only" or any other equivalent expression justifying the inference that the passage intended to lay down any rule of an exhaustive character so as to exclude even unavoidable circumstances. The passage is followed by remarks doubting the legal authority of a Cicular Order of this Court (printed at pp. 204-5) of 1882, which prescribed rules for the guidance of Subordinate Courts and provided a certain number of days in every case for the party applying for the copy, as a matter of course, for compliance with the estimate furnished by the office to litigants applying for copies (1).

I myself regard that Circular Order as one of very doubtful legal authority, and I agree with the learned Chief Justice when he laid down the rule that the important date for purposes of computation for exclusion of time under s. 12 of the Limitation Act, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant, if he chooses to apply, where he has had notice that the copy will be ready on that date. This view is in accord with the ruling of the Calcutta Court in *Gopal Chunder Ray* v. *Brojo Behari Mitter* (2), and, I may here observe, in passing, that in the case of *Sheogobind* v. *Ablakhi* (3), one of the reasons for allowing the period up to the actual delivery of the copy was, to use my own words, "because in this case no date was fixed by the officers of the Court below, either as to the date when the copy would be ready or as to the date when it would be delivered, and the copy itself was not delivered until the 10th April 1888." In that case the estimate of costs for copies was intimated on the 29th March 1888, and the copying charges were paid on the 5th April 1888, that is, within a week, a laxness of practice somewhat [477] countenanced by the Circular Order of 1882 (*vide* Illustrations, especially D and E) already referred to, and I excused the delay in depositing the charges probably by a liberal or perhaps lax interpretation of

(1) General Rules and Circular Orders (Civil) N. W. Provinces, 1882, pp. 204, 205.
(2) 9 C. L. R. 293. (3) 12 A. 105.

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"time requisite," and possibly in view of other circumstances which, however, are not stated in my judgment. Whatever view as to the matter of detail may be taken, it cannot be said that according to the interpretation which I have understood of the views expressed by the learned Chief Justice in the case of *Parbati*, my judgment in the Single Bench case is in any matter of principle in conflict with these views.

Reverting to the interpretation of the exact words of the statute in the second paragraph of s. 12 of the Limitation Act, I am of opinion that in the phrase "the time requisite for obtaining a copy of the decree" the word "requisite" does not refer exclusively to the exigencies of the official work of the copying department of a Court, but also to the exigencies of the applicant's situation in respect of paying in the copying charges immediately upon intimation of the estimated cost. Usually, no doubt, the law expects that the applicant for a copy is ready with the charges and fees when he makes the application, but "requisite" as it occurs in the section must not be read irrespective of the word "obtaining" which follows it in the section and which as I have already explained refers to the action of the person applying for a copy. Nor can the word "obtaining" be read as if it were "preparing," "furnishing," "supplying," "granting," "giving" "issuing," or other similar words referring to the duties or action of the copying department of a Court to the total exclusion of such time as may be unavoidably requisite to the person "obtaining" the copy of a decree. This being so, whilst I hold that carelessness or negligence in paying in the estimated copying charges should not be considered as a part of the "time requisite," I hold that where the delay in payment of such charges is due to causes beyond the control of the litigant, that is, unavoidable circumstances, the rule of what I may call "requisiteness" will be available to the applicant for a copy. In saying this, I contemplate cases such as the closing of a Court [478] for holidays immediately after the estimate of copying costs is intimated and cases in which for unavoidable reasons such as the court-fees stamps not being procurable, or other similar circumstances beyond the control of the litigant, the copying charges could not be immediately paid. In *Nobin Chunder Roy* v. *Brojendro Coomar Roy* (1) Garth, C. J., and Macpherson, J., seem to have held that "the matter must be determined by the practice in force in the Court concerned, as to what is requisite time for obtaining a copy." In *Gunga Dass Dey* v. *Ramjoy Dey* (2) Wilson and Beverley, JJ., in expressing their views on this point said:—

"We are asked in second appeal to say that the District Judge is wrong in the interpretation he has put on the words 'the time requisite for obtaining a copy' in s. 12 of the Limitation Act. We think that no hard and fast rule can be laid down to meet all cases that occur under that section. Ordinarily no doubt the application for copies of the judgment and decree should be accompanied with a sufficient number of sheets of stamped paper for the copies; and parties should not be allowed to extend the period prescribed for appeal by any unnecessary delay in putting in the requisite papers. But, on the other hand, it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required. Each case, we think, must be decided on its own merits."

In this view of the law I concur, but subject to definite qualifications or rather explanations. Of course, no "hard and fast rule" of universal

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(1) 12 C. L. R. 541. (2) 12 C. 30.

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application can be laid down to meet the details of all cases, and "each case must be decided on its own merits," as to its details. But it is possible to lay down as a general rule or principle of universal application, that "time requisite" as used in s. 12 of the Limitation Act means only the interval between the time when the copy is applied for and the time when it is ready for delivery; that during that interval due diligence on the part of the litigant is required by the law, and that no delay, unless such as was caused by circumstances over which the litigant had no control and which he [479] could not by due diligence have avoided, can form part of the time requisite for obtaining a copy, the question whether such circumstances existed is a pure question of fact and not a matter of discretion such as is implied in the phrase "sufficient cause" as it occurs in s. 5 of the Limitation Act. The very word "requisite," as it occurs in s. 12, understood in its natural sense, means, as Webster explains it, "so needful that it cannot be dispensed with," thus importing that no discretionary power is intended to be conveyed by the section and that its operation is therefore radically different from the discretionary power contemplated by paragraph 2 of s. 5.

In the present case the application for copy of the decree was made on the 31st May, 1887, and the estimate was intimated the very next day, namely, the 1st of June, 1887. Why the defendants did not immediately furnish the copying charges, and delayed payment till the 9th June, 1887, does not appear, nor does their application of the 27th August, 1887, contain any statement of any unavoidable cause for the delay, although the object of the application was to secure reconsideration of the Judge's order of the 2nd August, 1887, whereby he directed that the appellants (defendants) were to be informed that their appeal was beyond time. Nor is any explanation for the delay now offered by the learned Pandit *Ajudhia Nath* who appears on their behalf in this Court, other than the circumstance that some of the defendants are minors and that the delay of eight days was not unreasonable. But it is not shown nor affirmed how this circumstance delayed the payment of copying charges immediately upon the intimation of the estimate on the 1st June, 1887, and I hold therefore that under the circumstances of this case, so far as they are apparent to us, the delay must naturally be attributed to carelessness or neglect in complying with the estimate, and that therefore the period between the 1st and the 9th June, 1887, cannot in any sense be regarded as time requisite for obtaining a copy, and must therefore not be excluded from the period of limitation.

The effect of the views which I have expressed on both parts of the first question is to hold that the defendants' appeal to the lower [480] appellate Court was beyond limitation when it was presented on the 30th June 1887.

What effect the minority of some of the defendants has upon the case is the subject of the second question as enunciated by me. And upon this point I am of opinion that the defendants-respondents have no case. It is true that some of them are minors, but they are duly represented by guardians whose interests are the same as theirs, and the fact of minority could not prevent the guardians from showing due diligence on behalf of the minors. It is noticeable that s. 7 of the Limitation Act, in extending the period of limitation on account of minority, refers only to suits and applications and makes no mention of appeals, and its provisions are therefore unavailable to the minor defendants.

Then as to the third question, namely, whether the defendants' appeal

to the lower appellate Court presented a fit case for extending limitation under s. 5 of the Limitation Act, my answer, after what I have already said, must necessarily be in the negative, for no "sufficient cause" within the meaning of that section has been shown, or even alleged. On the contrary, it appears from the facts already mentioned that the defendants obtained the copy of the decree on the 11th June, 1887, and they would be within time if they had shown ordinary diligence in filing their appeal to the lower appellate Court; but they did not do so till the 30th of June, 1887, when the period of limitation had expired, even if all allowance of time were to be made in their favour according to the Circular Order of 1882, to which reference has already been made.

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But then Pandit *Ajudhia Nath* argues that the defendants were under a *bona fide* impression that they would be entitled to the exclusion of the period during which the decree had remained unsigned; that even if this impression be regarded as a mistake of law it cannot in view of the Full Bench ruling of the Calcutta High Court in *Bani Madhab Mitter* v. *Matungini Dasi* (1), which justifies the impression, be regarded as an unnatural, unreasonable or unexcusable mistake of law, and that it must therefore be taken into account [481] in applying the second paragraph of s. 5 of the Limitation Act to the circumstances of this case. As an authority for this argument the learned Pandit has relied upon another ruling of a Division Bench of the Calcutta High Court in *Huro Chunder Roy* v. *Surnamoyi* (2) where Mitter and Grant, JJ., concurred in saying:—"It appears to us that the lower appellate Court in this case has rejected the appeal as filed out of time and refused to admit it under s. 5, on the ground that a *bona fide* mistake made by the appellant in respect of the limit of time within which according to law he is bound to file his appeal is under no circumstances a valid ground for admitting an appeal under s. 5. We are of opinion that is not a correct view of the provisions of s. 5. It is for the Judge in each case to exercise his dissretion, having regard to the particular facts established before him." In the case before the learned Judges the filing of the appeal to the District Judge was delayed by reason of an impression that the appeal would lie to the High Court, and they held that such an impression, though erroneous in law, was a sufficient cause for extending the period of limitation under the latter part of s. 5 of the Limitation Act.

Now I may say at once that this ruling is entirely in favour of the learned Pandit's contention, but with due respect for it I am wholly unable to follow it. I had to consider a similar question in *Jaglal* v. *Harnarain Singh* (3) where the contention for the appellant was that there had been a *bona fide* mistake of law as to jurisdiction, and the aid of s. 5 of the Limitation Act was invoked by asking the Court to resort to the analogy of the rule contained in s. 14 of the Limitation Act. In dealing with this contention I pointed out that s. 14 of the Limitation Act applied only to suits and applications and had no concern with appeals, and that to apply it to appeals would be to regard the latter part of s. 5, to that extent, as surplusage. I did not rule that the analogy of s. 14 might not in some cases be available to the appellant in claiming extention of limitation by showing that he had "sufficient cause" for delaying the appeal, but I distinctly pointed out that such suffi-[482] cient cause could not include bare mistakes of law, however easily they may have been induced. The same question was more fully considered by me

(1) 13 C. 104. (2) 13 C. 266. (3) 10 A. 524.

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in *Ramjiwan Mal* v. *Chand Mal* (1) where, as to the question of *bona fides* of erroneous impressions of law, I said;—" I am of opinion that, so far as this contention concerns mistakes of law, the authority of the maxim *ignorantia legis neminem execusat*, has been so formally settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and as such, furnish elements for extending the period of limitation which the statute-law has provided. In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent and clear, but is limited to cases where from *bona fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase "other cause of a like nature" which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to know the law of the land in which he lives." The law jealously guards its behests and will not tolerate their infraction. Speaking with strict accuracy, there can be no such thing as a *bona fide* mistake of law, for good faith implies due care and caution. It is true that *lex non cogit ad impossibilia*, but knowledge of law is not an impossiblity, but a duty imposed upon every humanbeing who lives under the protection of law. To use the words of West, J., in *Sitaram Paraji* v. *Nimba* (2) " mere ignorance of the law cannot be recognized as a sufficient reason for delay under s. 5 of the Act, for that would be a premium on ignorance " (3).

It now remains for me to consider the last part of the learned Pandit's argument on the point which forms the subject of the fourth question as enunciated by me, namely, whether the fact that the lower appellate Court admitted the defendant's appeal and heard [483] and determined it, precludes us from interfering at this stage with the admission of the appeal in that Court. The learned Pandit relies upon a Single Bench ruling of Sir Louis Jackson, J., in *Raj Coomàr Roy* v. *Shaikh Mahomed Wais* (4), where he laid down that " it was entirely in the discretion of the Judge to consider whether sufficient cause had or had not been shown for not presenting the appeal within proper time, and that this Court has no authority to interfere with the exercise of this discretion." I respectfully think that this somewhat unqualified repudiation of the jurisdiction of the High Court in respect of the exercise of discretionary powers by the lower Courts is scarcely justified by any authority or general principle of law, and in matters of limitation it is certainly inconsistent with the language and spirit of s. 4 of the Limitation Act which, as Sir Richard Garth, C. J., pointed out in *Ramey* v. *Broughton* (5) irrespective of the pleadings of the parties, casts upon the Judge the duty of determining whether the appeal is within limitation so as to be heard by him. This being so, it seems to me to follow that it is the duty of the second appellate Court to see whether the duty thus cast upon the Judge of the lower appellate Court has been properly discharged by him, and to interfere, if by a wrong, improper and judicially unsound exercise of discretion under s. 5 of the Act, he has admitted an appeal which was barred by limitation. To hold otherwise would be to confer an amount of finality and conclusiveness upon the adjudications of District Judges in this respect which the law could never have intended, for the logical result of such a view would be

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(1) 10 A. 587. (2) 1 B. 320. (3) See *Krishna* v. *Chathappan*, 13 M. 269.
(4) 7 W.R 337. (5) 10 C. 652.

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to paralyze the hands of this Court, even in a case where the lower appellate Court by a grossly improper and unsound exercise of discretion under s. 5 of the Act had admitted, and heard, and determined an appeal which had for a century or more been barred by limitation. What would under such circumstances become of the laws of limitation which have justly been denominated as "statutes of repose?" I cannot but hold that the imperative requirements of s. 4 of the Limitation Act not only justify us, but require us, as a Court of second appeal, to satisfy ourselves whether the appellate Court has properly applied [484] the provisions of s. 5 of that enactment, and, if the discretion has been wrongly exercised, to undo its effects by interference in second appeal.

In opposition to this view, however, the ruling of the learned Chief Justice and our late colleague Mr. Justice Oldfield in *Fatima Begam* v. *Hansi* (1) has been cited and relied upon. That was a case of a somewhat peculiar character, and the appeal was presented to the District Judge long after the period of limitation, but was admitted by him in consideration of the especial circumstances of that case, by exercising discretionary power to extend limitation under s. 5 of the Limitation Act. In second appeal the matter was brought to the notice of this Court, and whilst Mr. Justice Oldfield considered the circumstances of that case as constituting sufficient cause to justify the District Judge in admitting the appeal under s. 5, the learned Chief Justice expressed himself in very guarded language, which I wish to quote here, has the ruling as been the main reason why this case has been referred to the Full Bench. The learned Chief Justice, after stating the facts and dates of the case went on to say (at p. 246) :—

"I may at once say that if I had been sitting as the judge of Allahabad, I would not have held that the defendant had shown 'sufficient cause' within the meaning of s. 5 of the Limitation Act. The Judge of Allahabad, to whom the application to admit the appeal was made, exercised his discretion and admitted it. In my opinion we ought not to interfere, unless when the Judge has clearly acted on insufficient grounds or has improperly exercised his discretion. We ought not to interfere with the discretion of the Judge when he has applied his mind to the subject-matter before him. However, as I have said before, under these circumstances I would not have admitted the appeal, but I do not see my way to hold that the Judge has so improperly exercised his discretion as to say that the appeal ought not to have been admitted."

Now in this passage it is important to notice that the learned Chief Justice did not repudiate the jurisdiction of the second appellate [485] Court in matters of discretionary admission of appeal by the lower appellate Court; this point distinguishes the case in principle from Sir Louis Jackson's ruling in the Calcutta case. Again, the learned Chief Justice expressed his opinion that if he were presiding in the lower appellate Court he would not have admitted the appeal, but he refrained from interference, because, although not fully agreed with Mr. Justice Oldfield's view as to the sufficiency of the cause for delay, he was not prepared to go the length of holding that the exercise of discretion by the District Judge was absolutely improper so as to require interference in appeal. This, then, is the exact scope of the rule laid down by the learned Chief Justice in that case; it does not repudiate the jurisdiction of the second appellate Court to interfere, but points out that, when discretion has been actually exercised, it must not, upon light grounds and in the

(1) 9 A. 244.

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absence of strong reasons, be disturbed in appeal. In the principle thus expressed I fully concur, because, in matters of this kind, as indeed in matters of conclusions on the weight of evidence, the appellate Court should always act cautiously and not distrub findings of the lower Court, unless it is absolutely satisfied that the conclusions at which the lower Court arrived were erroneous.

But whilst I thus express my concurrence in matters of principle expressed by the learned Chief Justice, in that case, I respectfully confess that if I were a member of the Bench which heard it, I should have, judging from the facts as stated in the report, dissented from Mr. Justice Oldfield's view as to the sufficiency of the cause for delay, and, agreeing with the learned Chief Justice, in so far as he regarded the circumstances as insufficient cause, should have disagreed with him in the view that the case did not call for interference. According to my view of that case, I should have held that the District Judge had exercised an improper discretion in admitting the appeal after limitation, and I should by my decree, have undone the effects of such wrong admission of the appeal. And for the reasons which I have stated, I would do the same here by setting aside the District Judge's order of the 27th August 1887, whereby he admitted the appeal, and by declaring [486] that he should have dismissed it with such effect as such dismissal may have upon the rights of the parties; for I observe that the District Judge had also certain cross-objections by the plaintiff under s. 561 of the Civil Procedure Code before him.

With this answer I would return the case to the Division Bench which has referred it to the Full Bench.

EDGE, C.J.—I have had an opportunity of reading the judgment of my brother Mahmood in this reference, and with that judgment, subject to what I am about to say, I agree. The difference, if there is any, between us, I doubt if there is any, arises on the construction of s. 12 of the Indian Limitation Act. So far as I can see, the only section in the Indian Limitation Act, 1877, which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act is s. 5. So far as I can see, there is not any other section in the Indian Limitation Act, 1877, which enables a Court to admit a suit or an application, other than an application for a review of judgment, which is presented after the period prescribed by that Act for the institution of a suit or the presentation of an application.

Ss. 6 and 10 exclude certain cases from the period of limitation prescribed by the Act.

Ss. 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 merely enact how the prescribed periods of limitation are to be computed and what allowances are to be made in such computations. In making such computations a Court may have to ascertain certain facts, but those sections relating to the computation of time do not appear to me to give a Court any discretion as to extension of time for the admission of a suit, appeal or application.

In order to ascertain how, under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a decree must be computed, and what allowances, if any, can be made in computing that time, and to test the proposition that a Court in computing the time to be allowed under s. 12 for the obtaining by a party of a copy of a decree or a judgment has a discretion in the matter, I shall take [487] the case of a person entitled under the Code of Civil Procedure to appeal, who, being unable to pay

the fee for the petition of appeal, presents an application for leave to appeal as a pauper. I take such a case, for as I shall presently show, if any allowance is to be made to such a person in respect of delay in obtaining a copy of a decree or a judgment, it must be made under s. 12 and cannot be made under s. 5 of the Act.

A litigant cannot appeal as a pauper unless his application for leave to appeal as a pauper be allowed under s. 592 of the Code of the Civil Procedure. Art. 170 of the second schedule of the Indian Limitation Act, 1877, provides that an application for leave to appeal as a pauper must be made within 30 days from the date of the decree appealed against. The periods of limitation for appeals are specified in the second division and those applications in the third division of the second schedule of that Act. S. 12 of the Indian Limitation Act, 1877, expressly applies not only to appeals but to applications for leave to appeal as a pauper.

I consequently conclude that the Legislature in framing and passing the Indian Limitation Act, 1877, did not confound appeals with applications for leave to appeal as a pauper, and did not overlook the distinction between an appeal and an application for leave to appeal as a pauper, a distinction which is kept clearly in view in the Code of Civil Procedure.

By s. 541 of the Code of Civil Procedure, so far as appeals from original decrees are concerned, by that section as made applicable by s. 587, so far as appeals from appellate decrees are concerned, and by s. 541 as made applicable by s. 590, so far as appeals from orders under the Code of Civil Procedure are concerned, appeals from original decrees from appellate decrees and from such orders under the Code of Civil Procedure as are appealable must be made in the form of a memorandum in writing presented by the appellant. That "memorandum in writing" is in pauper cases "the memorandum of appeal" referred to in s. 592 of the Code by which the application for leave to appeal as a pauper must be accompanied.

[488] As I have pointed out, the Legislature in the Code of Civil Procedure and also in s. 12 of the Indian Limitation Act, 1877, and in the second schedule to that Act, observed a distinction between an appeal and an application for leave to appeal as a pauper, and did not confuse the one with the other.

The first paragraph of s. 5 of the Indian Limitation Act, 1877, applies to all suits, appeals, and applications for which a period of limitation is by that Act prescribed, including applications for leave to appeal as a pauper. The second paragraph of that section applies only to appeals and to applications for review of judgment, and does not apply to suits, or to applications other than applications for review of judgment; it consequently, as has been held, does not apply to application for leave to appeal as a pauper. Having regard to the principles of construction and to the distinction elsewhere observed by the Legislature between appeals and applications for leave to appeal as a pauper, it could not be held that the Legislature intended the second paragraph of s. 5. of the Indian Limitation Act to apply to applications for leave to appeal as a pauper, or that an application by a pauper for leave to, appeal as a pauper, and appeal on allowance of his application, his pauper appeal, should be treated as one and the same thing.

By s. 592 of the Code of Civil Procedure a person may be allowed to appeal as a pauper, subject to the rules contained in Chapters XXVI, XLI, XLII and XLIII of that Code, in so far as those rules are applicable. A perusal of that section and ss. 541, 587 and 590 show that the

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memorandum of appeal in pauper cases must be accompanied by a copy of the decree or order appealed against and of the judgment on which it is founded. It is thus necessary that an application for leave to appeal as a pauper must not only be presented within 30 days from the date of the decree appealed against, but must be accompanied by the memorandum of appeal, a copy of the decree or order appealed against, and a copy of the judgment upon which the decree or order is founded. An order allowing a person to appeal as a pauper is an order admitting his appeal as a pauper. As there can be no appeal by a pauper as such [489] unless an order allowing him to appeal as a pauper has been made, I conclude that the second paragraph of s. 5 of the Indian Limitation Act, 1877, not only does not apply to applications for leave to appeal as a pauper, but is inapplicable to an appeal by a pauper as such, and that the Legislature did not intend that want of pecuniary means to present an application for leave to appeal as a pauper within the specified time should, so far as such an application or an appeal by a pauper is concerned, extend the time within which such an application should be made, or should be treated as "sufficient cause" for the non-presentation of an appeal by a pauper as such within the period of limitation prescribed. In other words, the effect of ss. 4 and 5 of the Indian Limitation Act, 1877, is, in my opinion, to deprive a litigant who desires to appeal as a pauper of all right to appeal as a pauper if he has not within the prescribed period of 30 days, computed as provided by the Act, presented his application for leave to appeal as a pauper, and this, no matter what the cause may have been which prevented him from presenting his application within the 30 days so computed. The next question is how, in the case of a person desiring to appeal as a pauper, are the 30 days to be computed so far as s. 12 of the Indian Limitation Act, 1877, is concerned. Under that section the day from which the period of 30 days is to be reckoned and "the time requisite for obtaining" a copy of the decree appealed against and a copy of the judgment on which it is founded, are to be excluded from the computation of the period of limitation. As I have shown, a copy of the decree appealed against and a copy of the judgment upon which it is founded, must accompany an application for leave to appeal as a pauper. In ascertaining the time which was requisite for obtaining a copy of such decree and a copy of such judgment in the case of an application for leave to appeal as a pauper, can any allowance be made for delay caused by the inability, on receipt of the estimate, of the pauper, by reason of his want of money, to pay for such copies?

If such an allowance is to be made in the computation of time, in respect of what period is it to be made? Is the period of limitation within which an application for leave to appeal as a pauper may be made to be extended until he is in a position to pay for the copies [490] of the decree and the judgment? He might not be in a position to do so for five, ten, or twenty years. To make such an allowance in the computation of time would be to extend the period of limitation. Such could not have been the intention of the Legislature, although the poverty of the pauper and his consequent inability to pay the charges for the copies and to obtain them, might be owing to excusable and unavoidable circumstances in his case. The case which I have put might be a hard one upon the pauper, but it would be equally hard upon his opponent who had obtained his decree, if he were to be left in uncertainty as to his rights and liabilities until such time as the pauper might be in a position to obtain leave to appeal as a pauper.

To take another illustration, from the case of a pauper.

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In computing the time requisite for obtaining copies of the decree and the judgment, could a Court make allowance for a delay by a pauper in obtaining such copies resulting from an unavoidable accident to the pauper? If it could, why should the Court not also make allowance in such computation for the delay resulting from the unavoidable circumstance of the pauper being too poor to pay for such copies? If the Court could not do so in the one case, I can see no principle upon which it could do so in the other. It appears to me that the Indian Limitation Act, 1877, so far as pecuniary means are concerned, contemplates two classes of litigants, and two classes only, namely, those who are paupers, and those who are not, and that, so far as s. 12 of that Act is concerned, we must apply the same principles of construction to that section in the case of a litigant who is not a pauper as in the case of a litigant who is a pauper.

In my opinion a Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who [491] has applied for them. If a decree had not been drawn up and signed at the time when an application for a copy of it was made, and the making of the copy was thereby delayed, such period of delay must be allowed for in computing the time which was requisite for obtaining the copy. Copies of decrees and judgments are not made for the use of parties until the estimated charges for making them have been paid. Sometimes delay might be caused in the receipt by the office of the estimated charges owing to the stamps not being procurable, or to the office not being open to receive payment of those charges when the estimate should have been complied with. Such period of delay, and periods of delay arising from similar causes beyond the control of the applicant, and not being the result of any action or want of action on his part, should, I think, be allowed in making the computation. Sometimes, owing to pressure of work in the copying department, a copy of a decree or judgment cannot be made for some days after the charges for making the copy have been paid. The period of such delay would also be allowed for in computing the time which was requisite for obtaining the copy. If the party applying for a copy of a decree or judgment failed to inform himself of the time when such copy would be ready and thereby did not obtain it when it was ready to be delivered to him, it appears to me that the period of such delay could not be allowed in computing the time which was requisite for obtaining the copy.

A question as to whether an appellant or an applicant for review of judgment had "sufficient cause" within the meaning of the second paragraph of s. 5 of the Indian Limitation Act, 1877, does not arise until the computation of time has been made.

There may be many a cause for delay in obtaining a copy of a decree or judgment, which, although it could not be considered in the making of the computation to be made under s. 12, might be a sufficient cause within the meaning of the second paragraph of s. 5 for the appellant or the applicant for a review of judgment not having presented his appeal or his application within the period prescribed. In my opinion, negligence, carelessness, or want of means at the time on the part of the applicant would not be

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suffi[492]cient cause, within the meaning of s. 5. A litigant who applies for a copy without taking the precaution to have in his pocket sufficient money to pay the charges for the copy, or who delays so long in making his application for the copy, or in paying the estimated charges for it, as to leave him insufficient time to present his appeal or application for review of judgment within the period prescribed, cannot on such grounds in my opinion be held to have had sufficient cause for not presenting his appeal or application within such period.

It is for the appellant or the applicant for a review of judgment whose appeal or application has not been presented within the period prescribed, to satisfy the Judge of the Court that he had sufficient cause for not presenting the appeal or making the application within such period. In this case that has not been done.

As to the case of *Fatima Begam* v. *Hansi* (1), I need only say that I am now, and have long been satisfied, that, on the facts of that case Mr. Justice Oldfield and I ought to have given effect to the objection that the appeal, when it was admitted by the District Judge of Allahabad, was improperly admitted, no sufficient cause having been made out for the delay.

I concur in the order proposed by my brother Mahmood.

BRODHURST, J.—The facts of this case have been most fully stated by my brother Mahmood, and to repeat them would be useless.

I concur in the exposition of the law by the learned Chief Justice, and in the order proposed by my brother Mahmood.

YOUNG, J.—In this case, when the arguments on each side had been fully heard before the Chief Justice and myself, the appellant's Counsel raised a new point not taken in the pleas of appeal to this Court, *viz.*, that the lower appellate Court had improperly admitted the present respondent's appeal inasmuch as the said appeal to the lower appellate Court was barred by limitation. An inspection of the file below showed that the lower appellate Court, having been apprised by the officer of the Court that the said appeal ought not [493] to have been admitted, as it was one day beyond time, at first ordered that the appellant before it be informed that his appeal was struck off as being time-barred, but subsequently decided the appeal on the merits and gave respondent a decree in his favour.

The objection now raised ought to have been stated in the memo. of appeal to this Court. As the point however is one of limitation and involves some questions of much importance, it was deemed proper that it should be referred to a Full Bench, and this the more, as conflicting rulings exist in regard to some of the matters herein involved.

I do not think it necessary to recapitulate the facts of this case in detail, and it is sufficient for me here to say that I fully concur in the ruling in *Parbati* v. *Bhola*(2) that the words "time requisite for obtaining a copy" in s. 12 of Act XV of 1877, only refer to the time occupied by the Court or its officer in furnishing the copy, and has no reference to any time required by the applicant owing to his own apathy or ignorance.

Thus the non-signature of the decree by the Judge would be no cause for indulgence to the applicant for copy, unless the latter had applied prior to signature of the decree, and had been delayed by the fact of non-signature.

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(1) 9 A. 244.

(2) 12 A. 79.

So again if an applicant, after being informed of the probable cost of the copy, takes time to go and procure his money, he would not be entitled to any deduction of time on that account. So again, if, after receiving intimation that the copy is ready, or is to be ready on a certain date, the applicant delays to take it on such date, he would not be entitled to any deduction for such days, seeing that such time cannot properly be called "time requisite," as it would not have been needed but for the applicant's own laches.

I am also of opinion that any indulgence by way of extension of the period of limitation can only be granted, not under s. 12, but under s. 5 of the Limitation Act, and subject to the provisions of that section, that is, "when the appellant or applicant satisfies [494] the Court that he had sufficient cause for not applying within the prescribed period of limitation."

There has been no attempt so to satisfy the Court here, as far as I am aware.

For these reasons, I consider the objection valid, and I concur in the order proposed by my brother Mahmood.

On the case being brought up before the Division Bench, the following order was passed on the 14th June 1890, by Edge, C. J. and Young, J.

JUDGMENT OF THE DIVISION BENCH.

"Having regard to the opinion of the Full Bench expressed in the reference in the case, we allow this appeal with costs, dismiss with costs the appeal and objection filed in the lower appellate Court, and restore the decree of the first Court."　　*Appeal allowed.*

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12 A. 494 (F.B.) = 10 A.W.N. (1890) 179.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

ATA-ULLAH AND ANOTHER (*Plaintiffs*) v. AZIM-ULLAH AND ANOTHER (*Defendants*). [5th November, 1889.]

Muhammadan Law—Mosque not capable of dedication or exclusive appropriation to particular sect—Muhammadans—Muhammadi or Wahabi sect—Disturbing a religious assembly—Right to say "Amin" loudly during worship.

According to the Muhammadan Law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of Sunni Muhammadans. It is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience. No one sect or portion of the Muhammadan community can restrain any other from the exercise of this right.

Members of the Muhammadi or Wahabi sect are Muhammadans, and as such entitled to perform their devotions in a mosque, though they may differ from the majority of Sunni Muhammadans on particular points.

But any Muhammadan would commit a criminal offence who, not in the *bona fide* performance of his duties, but *mala fide*, for the purpose of disturbing others engaged in their devotions, made any demonstration, oral or otherwise, in a mosque, and disturbance was the result.

So *held* by the Full Bench. *Queen-Empress* v. *Ramzan* (1) referred to.

Per Mahmood, J.—According to the Muhammadan ecclesiastical law, the word "*Amin*" must be said and should be pronounced at the end of the prayer ending with [495] *Sura-i Fateha*; but there is no authority for holding that it

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(1) 7 A. 461.

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should be pronounced in a loud or in a low tone of voice; and (provided no disturbance of the public peace is caused) a Muhammadan pronouncing the word loudly, in the honest exercise of conscience, commits no offence or civil wrong.

[Rel.on. 35 C.294=12 C.W.N 289=7 C.L.J. 433=3 M.L.T. 191; R., 18 C. 448 (P.C.) =18 I. A. 59; 35 M. 681 (683); 1 C.W.N. 76; 18 Ind. Cas. 195 (196); 15 P.R. (1902) Cr.=104 P.L.R. 1902.]

THE plaintiffs in this case sued for a declaration that a certain mosque situate in Jalalipura, Benares, was a place of public worship in which they, as Muhammadans, were entitled to pray and perform other religious devotions. It appeared that there had, for a considerable period, been differences of opinion between the plaintiffs and the defendants in connection with the conduct of worship at the mosque. The plaintiffs described themselves as "Muhammadis," and the name applied to them (though they objected to it) by their opponents, was "Wahabis." The defendants belong to the Hanafi sect of Muhammadans. The differences between the parties led to proceedings being taken in the Court of the District Magistrate of Benares, who, by an order dated the 15th December, 1884, found that the Hanafi party, to which the defendants belonged, were in possession of the mosque, and directed that they should be entitled to retain such possession until a competent Court should otherwise determine. This order was passed under Chapter XII of the Criminal Procedure Code, and the present suit was instituted for the purpose of setting it aside.

The suit was resisted principally on the ground that the mosque was built by the Hanafi sect of Muhammadans, and used by them ever since as their place of worship; that the plaintiffs were not members of that sect, and were not orthodox Muhammadans at all, and had consequently no right to use the mosque as a place of worship. The chief differences of opinion between the Muhammadi or Wahabi sect, to which the plaintiffs belonged, and the Hanafi persuasion, of which the defendants were members, appeared to be the following. According to the lower appellate Court, "the Muhammadis do not look upon *Ijmaa*, or the consensus of opinion of what we may call the fathers of the Church, or *Kiyas*, analogical deductions by certain expounders of the law, as of obligatory authority, while, on the other hand, the Hanafis consider the authority of *Ijmaa* and *Kiyas* as beyond question or dispute." Again, "the [496] Muhammadis reject the principle of *taklid*, *i.e.*, refuse to addict themselves to the doctrines of any of the four Imam Mujtahids, while the Hanafis follow Abu Hanifa and his disciples." Further, "the Muhammadis believe that the *mimbars* or pulpits in mosques should be of wood, and not of masonry or stone." The difference, however, which excited most animosity between the two parties was that while the Muhammadis when at prayer pronounced the word "*Amin*" in a loud voice, and raised their hands every time when bending or, as it was termed, making the *Rafaulyadain*, the Hanafis pronounced the "*Amin*" in a low voice, and did not raise their hands in bending. The nature of the controversy to which this difference of opinion has given rise between the Muhammadis and their opponents is discussed at length in the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* (1).

The main issue framed by the Court of first instance (Subordinate Judge of Benares) was:—"Are the Hanafi Sunnis alone entitled to read the *namaz* or offer prayers? Can such restrictions be imposed?" Upon this issue, the Subordinate Judge observed:—

(1) 7 A. 461.

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"As to the question of the plaintiffs' right to offer prayers and perform religious duties in the mosque, I think the claim cannot be based, as the plaintiffs seem to think from the wording of their plaint, on the ground either of contribution to the building, or of prescription. But they have taken also a higher ground and that ground is, I think, incontrovertible. They belong undoubtedly to the orthodox class of Muhammadans, and as such, they have a right, as much as the defendants, to use the mosque for public worship and for other religious purposes for which a mosque, can be used. The defendants have no right to close its door against every other class except their own, the Hanafis. It is immaterial whether the plaintiffs have seceded from the sect of Hanafis or they have been from the first Muhammadis, *Ahl Hadis*, Mohdassins, or if as the defendants prefer to call them, Wahabis. Call them by whatever name you please, they are and must be regarded as Sunni Muhammadans, and whether they are seceders from the Hanafis or not, [497] their true orthodoxy, or the fact of their being Sunnis or those "who maintain the most obvious interpretation of the Kuran" and the obligatory force of the traditions in opposition to the innovations of the sectaries, cannot for a moment be doubted. The only differences of opinion which exist between the plaintiffs as Muhammadis, and the defendants as Hanafis are, that in prayers the former pronounce the word '*Amin*' aloud, and raise their hands every time before they bend or make what is called the *Rafaulyadain*, and the latter pronounce '*Amin*' in a low voice, and do not raise their hands in bending. These are pure matters of detail as to the minor points of ritual, and make no difference in principle involving the very essence of their religious beliefs. As shown by Mr. Justice Mahmood in his learned exposition of the Muhammadan Law, reported in I. L. R., 7 All., 465-467, three out of four schools founded by the four orthodox *Imams*, *viz*., Shafi, Malik and Hanbal, evolve the doctrine of pronouncing '*Amin*' aloud from the same traditions from which the fourth or that founded by Abu Hanafidraw that the word should be pronounced in a low voice. One of the highest authorities of the Hanafi School, to which the defendants belong, is the Durri Mukhtar, "in which the strongest text is to be found against saying '*Amin*' aloud; but the text itself falls far short of substantiating any rule of the ecclesiastical law by which alone the defendants can claim the exclusion of the plaintiffs on the ground of apostacy or breach of the essential principles of religion." The rule is as follows:—"it is in accord with the practice of the Prophet to say '*Amin*' in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment." As very justly remarked by Mr. Justice Mahmood, "Even this passage only relates to the efficacy or validity of the prayer of the person who says '*Amin*' aloud or in a low tone. There is absolutely no authority in the Hanafia School of Muhammadan Ecclesiastical Law which goes to maintain the proposition that if any person in the congregation says the word '*Amin*' aloud at the end of the 'Sura-i-Fateha' the utterance of the word causes the smallest injury, in the religious sense, to the prayers of another person in the congregation, who, [498] according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries, like Turkey, Egypt and Arabia itself, Hanafis and Shafias go to the same mosque and form members of the same congregation, and whilst the Hanafis say the word '*Amin*' in a low voice, the Shafias pronounce it aloud." In this case there is evidence to prove, and it has not been rebutted, and I believe

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cannot be rebutted, that the same practice was followed in this very Musjid till a quarrel ensued between the parties about some family matter or matters connected with their brotherhood.

"Then again as to the *Rafaulyadain*, or the raising of hands, it appears to me to be expressly (to quote again from the words of Mr. Justice Mahmood) sanctioned by "the celebrated collections of traditions (*Shia*) of Bukhari and Muslim, both equally acknowledged as accurate traditionists by all the Schools of Sunni Muhammadans," *Vide* Sahil-ul Bukhari, page 102, and Sahi Muslim, page 168.

"I conclude with another quotation from the decision of Mr. Justice Mahmood. "A mosque once so consecrated (*i. e.*, by public worship) cannot in any case revert to the founder, and every Muhammadan has a legal right to enter it, and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognized rules of Muhammadan Ecclesiastical law." Nothing has been shown on the part of those who resist the legal claim of the plaintiffs, that the form of worship adopted by the plaintiffs is contrary to or inconsistent with the recognized rules of the orthodox Sunnis. I therefore decree that the mosque is a public place of worship, and open to all Sunnis, and that the plaintiffs have full liberty to exercise their religious rites and offer prayers in the mosque. Costs in full."

The defendants appealed from this decision to the District Judge of Benares. The Judge came to the conclusion that the mosque was originally intended for and had been long used as a "place for Hanafi worship," and held that it was "most undesirable that Muhammadis should be held entitled to enter into a congregation [499] of Hanafis in a mosque constructed for public worship according to the Hanafi ritual and long used for such worship, unless they choose to conform so far to Hanafi feelings as to make their presence tolerable. If a minority has rights, so has a majority, and the Hanafis' ideas of religious liberty may well be hurt if they cannot say their prayers in their mosque as they have been accustomed and desire to say them, without the risk of annoyance or disturbance."

The Judge proceeded to discuss the following questions as "the main issues to be considered":—

"1. Do the Muhammadis or Wahabis belong to any of the four principal divisions of Sunnis? Are they Sunnis at all?

"2. Do they so far differ from the Hanfis in religious opinions and observances that the Court should hold them not entitled to what they claim in connection with the mosque concerned?

Upon the first of these issues, the Judge held that the plaintiffs did not follow any of the four Imams, but that there were apparently "classes of Sunnis outside the followers of the four Imams," and that the plaintiffs were Sunnis of this kind. Upon the second issue, the Judge referred to the differences of opinion already mentioned, and drew from them the inference that "the Muhammadis regard as of no intrinsic value what the Hanafis regard as of supreme authority;" and he decided this issue in the affirmative. He described the Muhammadi or Wahabi sect as seceders from the orthodox body of Sunnis, and concluded that the plaintiffs "should not be regarded as competent to use the mosque as of right against the wishes of the defendants and the Hanafi party they represent."

He accordingly decreed the appeal and dismissed the suit.

The plaintiffs appealed to the High Court, the principal grounds of appeal being as follows:—

"1. The theory that the "mosque was constructed for public worship according to the Hanafi ritual" is opposed to the Ecclesiastical law of the Muhammadan community. 1889 NOV. 5. FULL BENCH. 12 A. 494 (F.B.) = 10 A.W.N. (1890) 179.

[500] "2. The plaintiffs-appellants have the right to use the mosque as a place for worship, whether or not they acknowledge the spiritual authority of the four principal disciples of their prophet.

"3. A man does not cease to be a Muhammadan by reason of his refusal to recognize the spiritual authority of the four *Imams*.

"4. The lower appellate Court records a distinct finding that the plaintiffs-appellants are Sunnis, and yet the Court refuses to recognize their right to go to the mosque for the purpose of performing worship in the form binding upon the conscience of the Sunnis.

"5. The observances of saying the word *Amin* aloud and raising the hands in prayer are not ceremonies exclusively in fashion among the Muhammadans of the class to which the plaintiffs-appellants belong, and they cannot, therefore, be regarded as out of place and improper in any place of Muhammadan worship.

"6. The Muhammadan Ecclesiastical law recognises no such division of the Muhammadan Church as is referred to by the lower appellate Court, and the defendants-respondents themselves repudiate the idea of such a division.

"7. The defendants-respondents admit that the mosque in question was never designed to be exclusively used for the worship of the Hanafis."

The appeal was referred to the Full Bench for disposal.

Mr. *Amiruddin*, for the appellants.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal* and Munshi *Ram Prasad*, for the respondents.

JUDGMENTS.

EDGE, C. J.—This suit was instituted in order to determine whether the plaintiffs were or were not entitled to perform their devotions in the mosque at Jalalipura in Benares according to their view of the ritual. Their case was that, when the first chapter of the Kuran was repeated, they were entitled at the conclusion of the chapter to say the word '*Amin*' aloud and that they were also entitled to raise up their hands at certain periods of the service. The defend-[501] ants contended that the plaintiffs were not Muhammadans, strictly speaking, and that they so essentially differed from the followers of the School of Imam Abu Hanafi that they, the defendants, were entitled to exclude the plaintiffs from the mosque in question. The learned Subordinate Judge of Benares tried the suit. He came to the conclusion that the plaintiffs were Muhammadans, and as Muhammadans they were entitled to use the mosque in question for devotional purposes. On appeal the learned District Judge of Benares, although finding that the plaintiffs were Sunni Muhammadans, dismissed their suit mainly upon two grounds, one being that the mosque in question had been, as found by him, used exclusively by the school of Muhammadans who followed Imam Hanafi. The other ground being that the plaintiffs, although Sunnis, were, by reason of some peculiarity in their tenets, not strictly in his opinion the followers of any one of the four Imams. It appears to me that the case raises two questions, the first being whether a mosque which is dedicated to God can be limited in its dedication to any particular school or sect of the Sunni persuasion of the Muhammadans. The second question being whether it is

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shown here that the plaintiffs are not in fact Muhammadans of the Sunni persuasion, although they may have some peculiar views as to the ritual. That they are belivers in one God and believe that Muhammad is his prophet, there is no question.

Now as to the first question, no authority has been brought to our notice to show that a mosque which has been dedicated to God can be appropriated exclusively to or by any particular sect or denomination of the Sunni Muhammadans, and without very strong authority for such a proposition, I for one could not find as a matter of law that there could be any such exclusive appropriation. As I understand, a mosque to be a mosque at all must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual. As I understand it, a mosque is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience.

[502] Now on the second point I have said that it has been found as a fact that the plaintiffs are Sunni Muhammadans, and in fact in some interlocutory proceedings before the case was heard, the point was not seriously contested. There is, as far as I can ascertain, no evidence that these persons are not strictly Muhammadans, although they may differ from the majority of the Sunni Muhammadans on particular points. No authority has been brought before us to show that these persons by reason of any views which they may entertain as to ritual, could be treated by any orthodox Muhammadans as persons other than followers of the prophet. For these reasons I think the appeal must succeed and the judgment and decree of the first Court must be restored.

I have only further to say that, although I have expressed my view of the law, I think it better that persons who differ in matters of ritual should have separate mosques, but this is not the question we have got to decide. It must be distinctly understood that I entertain no doubt that a Muhammadan would bring himself within the grasp of the criminal law who, not in the *bona fide* performance of his devotions, but *mala fide* for purposes of disturbing others engaged in their devotions, makes any demonstration, oral or otherwise, in a mosque, and disturbance is the result. I am of opinion that the appeal must be allowed with costs and the decree of the first Court restored.

STRAIGHT, J.—I am of the same opinion as the learned Chief Justice with regard to the particular case that is now before us. I think it is unfortunate that the learned Judge of Benares disturbed the extremely sensible judgment which had been passed by the Subordinate Judge, Mr. Kashi Nath Biswas, and with which I entirely concur. It represents exactly the view that I take of the litigation. But I think it my duty, having been one of the Judges who took part in the Full Bench case of *Queen-Empress* v. *Ramzan* (1), to which my brother Mahmood has referred, to make one or two observations in reference to that ruling in order that there may be no misunderstanding, so far as I am concerned, as to what my view [503] in that case was and what I held to be the law in such matters. The learned Chief Justice has expressed with no uncertain sound what his view is upon the question, and the view that he has enunciated is precisely the view that the Full Bench took in that case. In *Queen-Empress* v. *Ramzan* (1), the matter came before this Court as a case of criminal revision,

(1) 7 A. 461.

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and it was our duty, unless there were no facts found to justify the conclusions, to accept the findings of fact recorded by the lower Court. Whether the view that I took with regard to those findings was right or wrong, I need not discuss, but I held then, and I hold now, that, if a Muhammadan goes to a mosque, not with the object of honestly performing his own religious duties, but with the deliberate purpose and intention of disturbing the quiet devotions of others who are engaged in prayers in that mosque, and he acts in such a way that the necessary consequence is that the congregation is disturbed, he has brought himself within the meaning of s. 296 of the Indian Penal Code. As I have said, whether I was right or wrong in the view I took of the findings in the *Queen-Empress* v. *Ramzan* (1), I am not going to enquire. But I may say this much, that what I understood was found in that case was that Ramzan having gone into the mosque with the deliberate purpose and intention, not of performing his devotions as a Muhammadan, but for the purpose of creating disturbance and preventing other people from performing their prayers, bawled out the word "*Amin*" in a noisy and disorderly fashion, and a disturbance was the result of his conduct. I believe that subsequently when the case came back from the Magistrate, this was the conclusion at which the majority arrived. I agree that this appeal should be allowed with costs, and that, the learned Judge's decree being reversed, that of the Subordinate Judge should be restored.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur.

MAHMOOD, J.—I should myself have been perfectly willing to say not more than two words in delivering my judgment in the case, [504] namely, that I also concur in the judgment of the learned Chief Justice and the order which is to be made in the case. But, as my brother Straight has said that some of the questions which we have been called upon to consider yesterday and to-day are questions that do not require adjudication by a tribunal of law, I think it is necessary for me to state my reasons why the order passed by the learned Chief Justice and concurred in by my learned brethren is the only one which can be passed in the case.

In the present case the exact state of the pleadings and the defence to the action have been put very clearly by the learned Chief Justice in his statement of the case, and I wholly concur with him. In the case of *Queen-Empress* v. *Ramzan* (1), there is of course, as the report shows, enough indication that my judgment was not present before the Court, and that these very points not only of the Muhammadan ecclesiastical law but also the points of the criminal law were not before the Full Bench. Speaking of the case, I do not wish to refer to it further than by saying that, even as a question of criminal law, I stated the view held by Field, J., as to cases where the lawful act of any person may cause a breach of the peace. "It amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition" (2).

I am far from being able to concede what Pandit *Sundar Lal* endeavoured to represent, that the present plaintiffs are not Muhammadans at all. I should have expected that, considering the expression of my views in *Queen-Empress* v. *Ramzan* (1), and considering also the importance of the question, the learned gentlemen at the Bar would

(1) 7 A. 461. (2) 7 A. 477.

1889 Nov. 5. — Full Bench. — 12 A. 494 (F.B.) = 10 A.W.N. (1890) 179.

produce stronger authorities to shake the authority of the dissentient judgment in that case. But no such attempt was made. For the purposes of the case it is not necessary for me to consider the exact definition of the word Muhammadan. But I said enough in *Queen-Empress* v. *Ramzan* (1), to show that so long as a mosque, is a mosque that so long as the plaintiffs are persons who call [505] themselves Muhammadans and entitled to worship, there is absolutely no authority to say that any sect or any creed or any portion of the community can restrain others who claim to have the right which, to use the language of Muhammadan law, God and his Prophet gave them from putting such right into exercise.

It is clear then that Pandit *Sundar Lal*, in his able argument and in the manner in which he has considered the case, has frankly given up the proposition that the plaintiffs are not Muhammadans, and that he no longer maintains the argument that the mosque to which the litigation relates is not a mosque in the full sense of the Muhammadan Ecclesiastical Law, which law this Bench is bound by the express terms of the statute to administer in such cases. And if it is true that the plaintiffs are Muhammadans, then there is no authority for saying that, because of the circumstance that those persons happen to annoy or disturb the peace of mind of the assembly, they are not to be entitled to worship in the mosque.

As to the question of pronouncing the word "*Amin*." I hold that the word "*Amin*" must be said at the end of the prayer ending with *Sura-i-Fateha*. I hold also that it should be pronounced. I hold also that there is a difference as to the exact note in which it should be pronounced, and I hold that there is no authority to say at what note of the vocal octave the voice should emanate. There is no authority to say that the word "*Amin*" should be pronounced in one note or in another. Pandit *Sundar Lal* did not undertake to show that it was so. I can imagine the case of a man going to a mosque for the purpose of worshipping God, and in the honest exercise of his conscience pronouncing the word "*Amin*" in a voice which appears to one ear as loud and to another ear as low. There are some who think that the speaking of the word "*Amin*" aloud is required by devotional feeling and is necessary for their prayers. I hold therefore that there is no authority in the Muhammadan Ecclesiastical Law to limit the tone of voice in which the word "*Amin*" is to be pronounced; that so long as the plaintiff appellants are Muhammadans, as we have found they are, so long [506] they are entitled to enter a mosque and perform the worship and say the word "*Amin*" without anything to restrain their tone or note of the octave. But if the pronouncing of the word "*Amin*" results in the disturbance of peace, that of course will have to be dealt with under the criminal law. But the matter remains that where the word "*Amin*" is pronounced aloud in the honest exercise of conscience that it should be so pronounced, there can be neither any offence under the criminal law nor any wrong in the civil law.

Appeal allowed.

(1) 7 A. 461.

12 A. 506 = 10 A.W.N. (1890) 128.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

HIKMAT ALI (*Defendant*) v. WALI-UN-NISSA AND OTHERS (*Plaintiffs*).*
[18th December, 1889.]

Partition, suit for—Claim for partition of share less than Rs. 1,000 in family property exceeding Rs. 1,000—Act VI of 1871 (Bengal Civil Courts Act), s. 20—"Subject matter in dispute"—Jurisdiction of Munsif—Decree for partition of defendants' shares inter se

In a suit instituted in the Court of a Munsif by a member a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs 1,000 and the value of the whole family property exceeded Rs. 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se*, though such partition was not asked for.

Held that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871) was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vydinatha* v. *Subramanya* (1), *Kirty Churn Mitter* v. *Aunath Nath Deb* (2), *Shaikh Khoorshed Hossein* v. *Nubbee Fatima* (3), and *Ram Chandra Narayan* v. *Narayan Mahdeav* (4) distinguished.

Held also that the lower appellate Court had no jurisdiction to partition as amongst the defendants the residue of the property left after the partitioning off of the plaintiff's share.

[**Appl.**, 22 B. 315; **R.**, 15 C.P.L.R. 81; 4 L.B.R. 279; **D.**, 23 B.R. (1905) = 13 P.L.R. (1905).]

[507] THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid*, the Hon. Pandit *Ajudhia Nath*, Mr. J. *Simeon*, Babu *Gobind Prasad* and Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

EDGE, C. J. and TYRRELL, J.—The plaintiff, who is member of a Muhammadan family, brought her suit to have her share of the family property partitioned. The suit was brought in the Munsif's Court. The value of the whole family property exceeded Rs. 1,000. The value of her share as ascertained by the Court below was less than Rs. 1000. The case went on appeal to the Subordinate Judge, who decreed partition not only of the plaintiff's share but of the shares of the defendants *inter se*. One of the defendants has brought this appeal from that decree. We are informed that all the defendants in the suit are not parties to this appeal; consequently, the decree which we shall pass will not affect the rights of any defendant who is not a party to this appeal. We can only deal with the rights of those who are parties to this appeal. The first objection taken by the appellant was that this suit could not be maintained in the Munsif's Court. At the time when the suit was filed, Act VI of 1871

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* Second Appeal No. 1120 of 1887, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 2nd May 1887, modifying a decree of Babu Baij Nath Munsif of Agra, dated the 8th August 1885.

(1) 8 M. 235. (2) 8 C. 757. (3) 3 C. 551. (4) 11 B. 216.

1889 DEC. 18. — APPELLATE CIVIL. — 12 A. 506 = 10 A.W.N. (1890) 128.

was in force. By s. 20 of that Act it was enacted that—"The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed one thousand rupees." Pandit *Sundar Lal* for the appellant contends that the subject-matter in dispute within the meaning of that section was the whole family property and not merely the share which the plaintiffs claimed to have partitioned off. Act VI of 1871 repeated and took the place of Act XVI of 1868. The thirteenth section of the earlier Act was as follows:—

"Munsifs are empowered to try all original suits cognizable by the Civil Courts of which the subject-matter does not exceed in amount or value rupees one thousand."

[508] Pandit *Sundar Lal* relied on four authorities. The first of those is the case of *Vydinatha* v. *Subramanya* (1). The question there turned on the construction of s. 12 of Act III of 1873. The material words of that section were:—

"The jurisdiction of a District Munsif extends to all like suits and proceedings not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed two thousand five hundred rupees.

That section does not limit the subject-matter to the subject-matter in dispute as was done by s. 20 of Act VI of 1871. The Madras Act in this respect, although subsequent to Act VI of 1871, was, for some reasons into which we need not enquire, worded differently from Act VI of 1871, and followed the wording of Act XVI of 1868; consequently we cannot regard the Madras case as an authority on the construction of Act VI of 1871. The next case to which we were referred was that of *Kirty Churn Mitter* v. *Aunath Nath Deb* (2). The attention of Sir Richard Garth, Chief Justice, in that case apparently was more directed to the question as to what was the fee to be paid under the Court Fees Act. He does not apparently seem to have considered the construction of s. 20 of Act VI of 1871. If the latter portion of his judgment bears the construction put on it, it appears to us to have been *obiter*.

The third case is that of *Shaikh Khoorshed Hossein* v. *Nubbee Fatima* (3). We may say with regard to that case that, should the question in that case arise, we would not be prepared to follow that decision. But the question here before us did not arise in that case. There is another case to which Pandit *Sundar Lal* referred in support of his argument that the whole property of the Muhammadan family must have been deemed to have been the subject-matter in dispute under the plaintiff's claim. That is the case of *Ramchandra Narayan* v. *Narayan Mahadev* (4). It is not necessary for us to consider whether, in a suit for partition framed differently to that before us, a decree could be passed partitioning the [509] shares of the defendants *inter se* which might operate as *res judicata* in a subsequent suit. In this suit as we understand it, no partition amongst the defendants *inter se* was prayed for. In our opinion there is clearly a distinction between the subject-matter of the suit and the subject-matter in dispute. Such a distinction is to be seen in s 596 of the Code of Civil Procedure. We are quite satisfied that the subject-matter in dispute in this suit was the share which the plaintiff asked to have partitioned, and that share, as we have said, did not exceed in value Rs. 1,000 In our opinion it makes no matter that the share in question was at the date of the suit a portion of a family property, which family

(1) 8 M. 235. (2) 8 C. 757. (3) 3 C. 551. (4) 11 B. 216.

property exceeded Rs. 1,000 in value. We are consequently of opinion that the Munsif had jurisdiction to hear this suit. The next objection taken to the decree was that in the suit the Subordinate Judge had decreed specification and partition of the defendants' shares, which was not asked for in the suit. The parties did not consent to any such partition being made. We know of no authority which in such a case would give a Judge jurisdiction to partition, as amongst the defendants, the residue of the property left after the partitioning off of the plaintiff's share. We must vary the decree below so far as it affects the parties to this appeal, by setting aside that portion of the decree which decreed specification and partition of the shares amongst the defendants. The plaintiff has filed an objection as to the disallowing of her costs by the lower appellate Court. We see no reason to interfere with the discretion that was exercised in the lower appellate Court in that respect. As to the respondent Jaffar Husain, he was needlessly made a respondent to the appeal. The appellant must pay his costs of the appeal. As to costs as between the other parties, the parties respectively will bear their own costs. The decree is modified to the extent mentioned above. *Appeal allowed in part.*

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[510] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

RAMESHUR SINGH AND ANOTHER (*Plaintiffs*) v. SHEODIN SINGH AND ANOTHER (*Defendants*). [19th December, 1889.]

Civil Procedure Code, ss. 562, 564, 588, (28) 591—*Remand in contravention of s. 564—Remand and all subsequent proceedings illegal—Omission to appeal from remand order—Objection to order allowed on appeal from final decree—Construction of statutes—Distinction between affirmative commands and negative prohibitions—Irregularities and illegalities.*

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed,—*held* by the Full Bench that, with reference to ss. 562, 564 of the Civil Procedure Code, the lower appellate Court had no jurisdiction to remand the case under the former section, and that both the remand order and all proceedings subsequent thereto were *ultra vires* and illegal.

Held further that the legality of the remand order and the subsequent proceedings could, under s. 591 of the Code, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under s. 588 (28).

As a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done, and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction.

[**Diss.**, 28 C. 324 = 5 C.W.N. 509; **F.**, 18 A. 19 = 15 A.W.N. 134; 23 C. 335; 28 C. 324 = 5 C.W.N. 509; A.W.N. (1906), 28 = 3 A.L.J. 40; **Rel. on**, 15 Ind. Cas. 181 (182) = 15 O. C. 33; **Appl.**, 18 C. 496; **R.**, 14 A. 348; 30 A. 479 = 5 A.L.J. 447 = A.W.N. (1908), 195 = 4 M.L.T. 162; 18 M. 421; 11 A.W.N. 105; 5 C.P.L.R. 116; 12 C.P.L.R. 119; 9 O. C. 80; 14 Ind. Cas. 673 = 8 N.L.R. 42; **D.**, 23 A. 167 = 21 A.W.N. 39; 29 A. 659 = A.W.N. (1907), 234 = 4 A.L.J. 569; 30 M. 54 = 16 M.L.J. 479 = 1 M.L.T. 268; 6 C.L.J. 547 = 12 C.W.N. 590.]

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THIS appeal originally came before Mahmood, J., who ordered it to be laid before the Chief Justice with a view to the selection of a Bench for its disposal. A Bench consisting of Edge, C.J., Straight and Mahmood, JJ., was constituted accordingly, and they in turn ordered that the case should come before a Full Bench of five Judges.

The facts of the case are sufficiently stated in the judgment of Edge, C.J.

Munshi *Juala Prasad*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

JUDGMENTS.

EDGE, C. J.—The plaintiffs-appellants here brought the suit out of which this second appeal has arisen, to have their right to [511] remain in possession of certain bighas of land declared, and alleged that their title had been obtained by a *sulehnama*. The defendants pleaded denying the right of the plaintiffs, and alleging that the *sulehnama* never took effect as against them and was not admissible in evidence, and that the plaintiffs had never been in possession of the land in dispute, and that their claim was barred by limitation. The Munsiff framed the following issues:—

"(1) Are plaintiffs in possession of the land in dispute? Can they sue to be maintained in possession of the land in suit? (2) Can the *sulehnama* take effect as against the defendants? (3) Can the *sulehnama* be admitted in evidence? (4) Is the claim barred by limitation?"

Babu Nilmadhub, the then Munsif of Ghazipur, took all the evidence which was tendered before him, and, on the evidence, found in favour of the plaintiffs on all the four issues, and gave them a decree.

On appeal, the then Subordinate Judge of Ghazipur, on the 30th July 1884, being of opinion that the evidence was defective, and not agreeing with the Munsif in his conclusions as to some of the evidence which had been taken, set aside the decree of the Munsif and remanded the case under s. 562 of the Code of Civil Procedure, and directed that the following issues should be tried, namely, "(1) Were the appellants majors or minors at the time of the execution of the deed of compromise, in other words, how old were they actually at the time of the execution of the deed of compromise, and when the petition of plaint in the suit in which the compromise was effected was filed?"

"(2) Was that decree executed after the deed of compromise, and was possession taken of the numbers in suit in this case under the deed of compromise or not?"

Under that order of remand Babu Bipin Bihari Mukerji, who was then the Munsif of Ghazipur, took further evidence and found as a fact that the defendants were minors at the date of the compromise, but notwithstanding that finding, he, taking much the same view [512] of the other facts as had been taken by his predecessor, decreed the claim of the plaintiffs.

I may mention that his predecessor, Munsif Babu Nilmadhub, had not overlooked the question raised as to the minority of the defendants, but, having regard to the other facts found by him, had considered that the minority of the defendants at the time of the compromise did not afford a defence to the suit. The defendants again appealed, and the appeal came to be heard before the same Subordinate Judge who had made the order of remand. He, on the 15th July 1886, having considered the fresh evidence which was taken on the remand, allowed the appeal and

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passed a decree dismissing the plaintiffs' suit with costs. From that decree of the 15th July 1886, the plaintiffs have brought this appeal.

Mr. *Juala Prasad* for the appellants has contended that the Munsif Babu Nilmadhub had disposed of the suit upon the evidence which the parties had tendered before him, and had not "disposed of the suit upon a preliminary point so as to exclude any evidence of fact;" that under such circumstances the order of remand was, by reason of s. 564 of the Code of Civil Procedure, *ultra vires* and illegal; that the proceedings taken under that order of remand must be treated as null and void; that the further evidence taken on the remand should not have been considered by the Subordinate Judge; and that these points were under s. 591 of the Code of Civil Procedure open to the appellants in this appeal. He relied upon *Chheda Lal* v. *Badullah* (1), *Har Prasad* v. *Jafar Ali* (2), *Dhan Singh* v. *Basant Singh* (3), *Har Narain Singh* v. *Kharag Singh* (4), *Goodall* v. *The Mussoorie Bank, Limited* (5), my judgment in *Ganga Prasad* v. *Jag Lal Rai* (6), *Banwari Lal* v. *Samman Lal* (7), *Mahesh Chandra Das* v. *Madhub Chandra Sirdar* (8), *Jatinga Valley Tea Company, Ld.* v. *Chera Tea Company, Ld.* (9), *Jarbhandan Singh* v. *Nakchhed Singh* (10), *Reasut Husain* v. *Hadjee Abdoollah* (11).

[513] On the other hand, Mr. *Madho Prasad* for the respondents contended that s. 591 did not apply; that the plaintiffs, not having appealed from the order of remand, and having taken part in the proceedings held under that order, were precluded from now questioning the validity of that order or the proceedings held thereunder; that the order of remand was properly made and was not *ultra vires*; and that, in any event, the case came within s. 578 of the Code.

Mr. *Madho Prasad* was unable to show that the Munsif, Babu Nilmadhub, had disposed of the suit upon any preliminary point, much less upon a preliminary point so as to exclude any evidence of fact, or even that the Munsif had excluded any evidence, oral or documentary, which had been tendered before him. Without expressing any opinion as to whether or not the Munsif, Babu Nilmadhub, drew the correct conclusions from the evidence before him, or correctly applied the law to the facts which he found, it appears to me that he did not omit to try any issue, or to determine any question, which was essential to the case as presented to him.

It is quite clear to my mind that the Munsif, Babu Nilmadhub, did not dispose of the case upon a preliminary point so as to exclude any evidence of fact.

If any material evidence was omitted to be taken, the omission was caused, not by any act of the Munsif, but by the neglect of the parties to tender such evidence when the case was before the Munsif. In fact the Munsif tried and decreed the suit on the merits. If the Subordinate Judge had no jurisdiction in this particular case to make the order of remand, or to consider the evidence taken upon the remand, the cases of *Jarbhandan Singh* v. *Nakchhed Singh* (10) and *Chheda Lal* v. *Badullah* (1), are direct authorities in this Court to show that the validity of the order of remand can be questioned in this appeal, and that the proceedings under such an order are null and void. I adhere to what I said in my judgment in *Chheda Lal* v. *Badullah* (1). In *Goodall* v. *The Mussoorie Bank, Ld.* (5),

(1) 11 A. 35. (2) 7 A. 345. (3) 8 A. 519. (4) 9 A. 447. (5) 10 A. 97. (6) 11 A. 333. (7) 11 A. 488. (8) 2 B.L.R.S.N. 13. (9) 12 C. 45. (10) 7 A.W.N. (1887), 224. (11) 3 I. A. 221.

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my brother Straight and my brother Brodhurst held that it was competent [514] to a party aggrieved by an order made in execution proceedings to object in an appeal from a subsequent order enforcing execution against him, to the validity of the prior order on the ground that the Court had no jurisdiction to make such prior order. In that case the prior order was appealable and had not been appealed. At page 105 of the report, my brother Straight is reported to have said "I have no hesitation in holding that in an appeal of the kind before me, where the objection goes to the very root of the matter and to the authority of the Court to make the order, in the sense that it had no jurisdiction at all, I am entitled to entertain it, and if it has force to give effect to it."

In *Har Narain Singh* v. *Kharag Singh* (1), my brother Brodhurst and I held that an order adding a party as a respondent, which had not been appealed from, could be objected to on the appeal from the decree of the Court which had made the order.

Now as to the question whether or not the order of remand was *ultra vires*.

This was not a case coming within s. 562 of the Code. That in my opinion is beyond question. By s. 564 of the Code it is enacted that the appellate Court shall not remand a case for a second decision, except as provided in s. 562."

S. 562 gives the jurisdiction to remand a case for a second decision, only if the Court whose decree is under appeal disposed of the suit upon a preliminary point and then only if the disposal of the suit upon the preliminary point, excluded evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties, and if the the decree upon such preliminary point is reversed in appeal.

Looking at s. 562 by itself, that is apart from s. 564, the Subordinate Judge had no jurisdiction to make an order of remand in this case under that section, as the suit had not been disposed of upon a preliminary point so as to exclude any evidence of fact within the meaning of that section. In other words, on the case [515] before him, his jurisdiction to make an order under s. 562 did not arise.

S. 564 deprived him of jurisdiction to remand the case for a second decision under any section except s. 562, and indeed there is no other section in the Code which gave him jurisdiction to remand the case for a second decision. In *Banwari Lal* v. *Samman Lal* (2), my brother Straight and my brother Tyrrell held, and I think rightly, that an appellate Court has no power to remand a case under s. 562 of the Code unless the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point. In the case of *Jatinga Valley Tea Company, Ld.* v. *Chera Tea Company Ld.*, (3), the Munsif, under an order of remand under s. 562 of the Code, pending an appeal against the remand order, obeyed the order, reheard the case and passed a decree dismissing the suit. In delivering the judgment of the Court in that case Field, J., said: —

"It has been contended before us that this appeal ought not to be heard. It is said that after the remand order, the Munsif proceeded to make a final decree; and the existance of that decree is a bar to the hearing of this appeal against the order of remand. We are unable to concur in this contention. The law, sub-s. 28 of s. 588 of the Code of Civil Procedure, expressly gives an appeal against an order under s. 562

(1) 9 A. 447. (2) 11 A. 488. (3) 12 C. 45.

remanding a case. That provision is not in anyway qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order was badly made, the decree, and indeed all the proceedings taken under that remand order, are null and void."

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I agree with every word in the passage which I have just quoted. In that case the Calcutta High Court directed the lower appellate Court to determine the appeal from the first decree of the Munsif [516] upon the evidence on the record at the time when the appeal was preferred. In *Mahesh Chandra Das* v. *Madhab Chundar Sirdar* (1), which was a case of a remand under the corresponding section of Act VIII of 1859, Phear and Hobhouse, JJ., in their judgment after referring to ss. 352 and 354 of that Code, said :—

"Indeed, there does not seem to be the slightest ground for suggesting that the lower Court omitted to try any issue, or to determine any question of fact, which was essential to the merits of the suit. Again, had the lower (appellate) Court, for good reason, thought it necessary to have before it additional evidence, it might have taken the necessary steps under s. 355 of the Civil Procedure Code, for the purpose of procuring that evidence, provided that it, at the same time, recorded its reasons for requiring it. This again did not occur, and under no other circumstances than those to which I have referred, as we understand the Civil Procedure Code, could the lower appellate Court rightly direct that the parties to the suit should furnish evidence in addition to that which was already on the record. It seems to us, therefore, perfectly clear that the remand order of the lower appellate Court was not made in accordance with any of the provisions of the Civil Procedure Code, and indeed that it is one directly in opposition to the express terms of s. 352. It was therefore illegal and we are bound to direct that it be set aside. It follows that, inasmuch as the decision of the lower appellate Court, which has come to us on special appeal, was mainly founded upon the evidence which was produced under the remand order, the judgment of the lower appellate Court is bad and must be reversed."

I my opinion, the case of *Reasut Husain* v. *Hadjee Abdullah* (2) has no bearing upon the question before us. That case turned upon the construction of the sections in Act VIII of 1859 relating to review.

The cases of *Har Prasad* v. *Jafar Ali* (3) and *Dhan Singh* v. *Basant Singh* (4) mainly related to the construction of s. 622 of the [517] Code of Civil Procedure. In those cases my brother Mahmood expounded his views as to the meaning of the term "jurisdiction."

In my opinion, there is a difference between a case in which a Court or an officer of a Court omits to do something which by a statute it is enacted shall be done, and cases in which a Court or an officer of a Court does something which by a statute, it is enacted, shall not be done. In the one case the omission to do an act which by the statute it is enacted shall be done, may not amount to more than an irregularity in procedure, whilst in the other case, in which the prohibition is enacted, the doing of the prohibited thing by the Court or the official is *ultra vires* and illegal,

(1) 2 B. L. R. N. S. 13. (2) 3 I. A. 221. (3) 7 A. 345. (4) 8 A. 519.

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and if *ultra vires* or illegal, it must follow that it was done without jurisdiction.

In Mr. Leake's excellent Digest of the Law of Contracts, he, in discussing the effect of statutory prohibitions so far as contracts are concerned, says at pages 723-4:—

"The statute law expresses commands and prohibitions in written terms, upon the construction of which it is to be determined in each case whether a matter is so far illegal that it cannot be made the subject of an agreement. Acts of Parliament sometimes impose a penalty upon an act without an express prohibition; it is then held, as a general rule, that the penalty implies a prohibition, and an agreement involving such matter would be void for illegality. But Acts of Parliament sometimes impose a penalty or prohibition for a special or limited purpose only, as for the protection of the revenue or other immediate object, without intending any further or general prohibition, and an agreement may then be held valid, although a party to it may incur a penalty or commit an offence against the statute. In such cases the question whether the agreement be illegal depends upon the construction of the statute, as to the restricted or general operation of the prohibition; but if upon the true construction of the words of the statute the agreement be held to be illegal, the purpose of the Legislature, whether it be the protection of the revenue or any other subject, is immaterial. On the other hand, a matter may be declared unlawful by statute and therefore vitiate an agreement respect-[518]ing it, although not attended with any penalty or specific punishment.

"A distinction has been sometimes attempted between *malum prohibitum* and *malum in se* in the effect of illegality upon an agreement, but it is said that no such distinction can be allowed in a Court of law; the Court is bound in the administration of the law to consider every act to be unlawful, which the law has prohibited to be done."

In *Bakhshi Nand Kishore* v. *Malak Chand* (1), Mr. Justice Oldfield and my brother Mahmood held that the selling of immoveable property in execution of a decree in contravention of the provisions of s. 290 of the Code, was an illegality which vitiated the sale, and that was the view which I held in *Ganga Prasad* v. *Jag Lal Rai* (2). It is true that my brother Brodhurst, in the case which I have last referred to, did not attach the same importance to the word of prohibition in s. 290 which I did, and treated the sale as not prohibited, and therefore illegal, but merely as irregular.

As I understand the judgment of my brother Mahmood, in *Jasoda* v. *Mathura Das* (3), he there receded somewhat from the construction of s. 290 of the Code which could alone have justified the judgment to which he was a party in *Bakhshi Nand Kishore* v. *Malak Chand* (1).

To refer to another section, now rejected, of the Code, which, in my opinion, contained a distinct prohibition namely, s. 563, it could hardly be contended that a Court which in contravention of the prohibition in that section had taken evidence, was not acting *ultra vires*, or that evidence so taken, which the statute enacted should not be taken, could be treated by the Court of first instance or by a Court of appeal as evidence in the suit.

The jurisdiction of the subordinate Courts is created by statute and the power of those Courts to act in any particular case or manner cannot

(1) 7 A. 289. (2) 11 A. 333. (3) 9 A. 511.

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exist if the statute either does not confer on the Court jurisdiction to act in the matter, or says that the Court shall [519] not act in the matter, or in the matter in a particular manner. I would not have gone at such length into the question before us, if it had not appeared to me that sometimes the distinction between words of prohibition and words of direction in statutes is lost sight of.

On authority and also on general principles, I am of opinion that on the true construction of ss. 562 and 564 of the Code of Civil Procedure, as those sections stood at the time when the order of remand was made, the Subordinate Judge in making the order of remand, assumed a jurisdiction which he did not possess, and acted *ultra vires* and illegally, and that this appeal should be allowed and the order of remand, all proceedings thereunder, and the decree of the Subordinate Judge should be set aside, and that the present Subordinate Judge of Ghazipur be directed to restore the original appeal to his list of pending appeals, and dispose of it according to law. I am also of opinion that the costs here and hitherto below should abide the event.

STRAIGHT, J.—I concur.

BRODHURST, J. —I concur.

TYRRELL, J.—I concur.

MAHMOOD, J.—The facts of the case have already been stated by the learned Chief Justice, as also the arguments which have been addressed to us on behalf of the parties. They seem to me to raise only three points for determination.

First: Whether, if the lower appellate Court's order of remand dated the 30th July 1884, purporting to have been passed under s. 562 of the Civil Procedure Code, was erroneous, the validity of such order can be questioned in this appeal, notwithstanding the circumstance that the order might have been appealed from under cl. 28 of s. 588 of the Code, but was not so appealed.

Secondly: Whether the order in question was justified by s. 562 read with s. 564, of the Code.

Thirdly; Whether in view of the circumstance that the order was carried out by the first Court, which took further evidence, and [520] passed a fresh decree on the 30th March 1885, and the case again came up for adjudication by the lower appellate Court, which dealt with the case upon the merits by its judgment of the 15th July 1886, dismissing the suit, such error as may have existed in the order of remand of the 30th July 1884, is cured by the provisions of s. 578 read with s. 587 of the Code of Civil Procedure.

I think these are the points which require decision by the Full Bench, and upon the first of them I entirely agree in what the learned Chief Justice has said with reference to the provisions of s. 591 of the Code and the case-law upon the subject, that there can be no doubt that the validity of the lower appellate Court's remand order of the 30th July 1884, can be called into question even at this stage of an appeal from the final decree of that Court dated the 15th July 1886. This indeed is the effect not only of the statute itself, but of some anterior decisions of the Lords of the Privy Council on the subject. I also agree fully with the learned Chief Justice in holding, with reference to the proceedings of the parties and the circumstances of the case as to the existence and production of the evidence on the record when the remand order of the 30th July 1884, was made by the lower appellate Court, that that order was not required by

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s. 562 of the Code of Civil Procedure and was therefore made in contravention of the provisions of s. 564 of the Code, and this view answers the second question also.

Upon the third question I confess I entertained doubts at the hearing as to whether or not a distinction was to be drawn between erroneous orders of remand under s. 562, which orders go to the very root of the litigation, and erroneous orders which only involve practically the remand being made under s. 562 instead of s. 566 ending in the reception of further evidence which might either under remand made under s. 566 be received by the first Court or by the appellate Court under s. 568. The doubt was superinduced by the circumstance that in some cases this Court has declined to try an appeal from a remand order made under s. 562 and appealed from under cl. 28 of s. 588 of the Code, upon the ground that the [521] remand order appealed from had in the meantime already been carried into effect and its validity might be questioned in the second appeal from the final decree of the lower appellate Court.

I think I must say, after what the learned Chief Justice has said in his judgment in this case, that such a practice was erroneous ; and this leads me to the real difficulty in the case, namely, whether an infringement of the provisions of s. 564 of the Civil Procedure Code can be covered by s. 578 of that Code. I call it the real difficulty in the case, because it was argued that notwithstanding the negative terms in which that section has been framed, an infraction of the provisions of that section was not an illegality divesting jurisdiction or affecting the merits of the case, but a mere defect or irregularity of procedure such as would be covered and cured by s. 578 of the Code read with s. 587 of that enactment.

Upon this point also I agree with the learned Chief Justice. The recognized rules of interpreting statutes draw a distinction between affirmative terms however mandatory, whether such mandate is conveyed by the word "may" or by the word "shall," and negative terms prohibiting any particular thing to be done. As I understand the rules of interpretation, I hold that a vast distinction exists between these two classes of enacting clauses in statutes, and that whilst in cases of affirmative words even the word "shall" might be taken to be only directory as distinguished from imperative, in cases of negative words such as those which occur in s. 564 of the Code, the proper rule of interpretation is to take them as prohibitory, and as such, rendering illegal that which is done in contravention of such prohibition. I therefore agree with the learned Chief Justice in the interpretation which he has placed upon the prohibitive terms of s. 564 of the Code, occurring as the word "shall" occurs there with the negative word "not." I also agree with him in holding that by reason of the prohibitory character of the terms of the section the remand order passed by the learned Subordinate Judge of the lower appellate Court on the 30th July 1884, was illegal, and therefore the [522] proceedings taken by the first Court in pursuance of the aforesaid illegal order were taken without jurisdiction within the broad interpretation which I placed upon that technical expression of law in *Dhan Singh* v. *Basan Singh* (1), and that therefore such proceedings necessitate the re-trial of the case by the learned Judge of the lower appellate Court, which is the order made by the learned Chief Justice in this case, as they are not covered by s. 578 of the Code of Civil Procedure.

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(1) 8 A. 519.

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What I wish to add to what I have said consists of two propositions. The first of them is that with reference to the case to which the learned Chief Justice has referred in connection with the prohibitory terms of s. 290 of the Civil Procedure Code as to the limited time within which sales in execution of decrees would not take place, my difficulty really rested, not so much with the terms of the section itself, as with the question whether a sale, which under the section would be illegal *ipso facto* by reason of the prohibitiveness of the terms of the section, could be made the subject-matter of such an objection as that contemplated by the application mentioned in s. 311 of the Code; but since the question does not arise here I need say nothing further. I wish also to say that, as to the prohibitiveness of negative words in the statute, I am so fully in concurrence with the view taken by the learned Chief Justice, that after having considered the case, I feel that if I had held otherwise, I should in dealing with the statute have been constrained to hold that negative terms of s. 13 of the Civil Procedure Code (which is only one of the many other sections with negative words implying prohibition), were only directory and their infringement covered by s. 578, where the suit having been tried notwithstanding the application of the rule of *res judicata*, the lower Court had arrived at conclusions upon the merits. I mention this section as only an illustration of how a statute, such as the Civil Procedure Code, where it employs negative terms of prohibition should be interpreted, and I have mentioned this as fully supporting what the learned Chief Justice has said as to the interpretation of such clauses.

[523] The other thing which I wish to mention, and I do so with the permission of the learned Chief Justice, is that I do not interpret the order which he has made in the case to preclude the learned Judge of the lower appellate Court, after the remand which we are making to him, from exercising such powers as he may possess and legally exercise under ss. 566 and 568 of the Civil Procedure Code.

For these reasons I agree fully in the order that has been made.

Cause remanded.

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12 A. 523 = 10 A.W.N. (1890) 56.

APPELLATE CIVIL.

Before Mr. Justice Straight, and Mr. Justice Mahmood.

MANNU SINGH (*Plaintiff*) v. UMADAT PANDE AND OTHERS (*Defendants*).* [10th January, 1890.]

Suit for cancellation of instrument—Act I of 1877 (*Specific Relief Act*), s. 39—*Fiduciary relation—Gift to spiritual adviser—Undue influence—Burden of proof—Act I of* 1872 (*Evidence Act*), s. 111.

In a suit under s. 39 of the Specific Relief Act. (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *Chatri* by caste, well advanced in years, and the defendant, was his *guru* or spiritual adviser, a Brahman held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book

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* First appeal No. 34 of 1889, from an order of Munshi Kulwant Prasad, Subordinate Judge of Azamgarh, dated the 30th January, 1889.

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called Bhagwat. Almost immediately after execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud.

Held, that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principle recognized by s. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed. *Sital Prasad* v. *Parbbhu Lal* (1) referred to.

[R., 39 C. 933 (937) = 16 C.W.N. 649.]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Juala Prasad* and Babu *Rajendro Nath Mukerji* for the appellant.

[524] Babu *Bishan Chandra Moitro*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This first appeal relates to a suit instituted on the 23rd August, 1888, in the Court of the Subordinate Judge of Azamgarh by the plaintiff, who is the appellant before us, against the defendants, five in number, the principal of whom is one Umadat Pande, a Brahman, the donee under an alleged deed of gift of 26th April, 1888. The suit is not an ejectment suit, but is one to obtain the specific form of relief contemplated by s. 39 of the Specific Relief Act, and what the plaintiff asked was that an alleged deed of gift of 26th April, 1888, should be set side; in other words, that the Court should order the document to be delivered up and cancelled in the way contemplated by the section of the Act to which I have referred. The grounds upon which the plaintiff asked this relief I need not more particularly mention except to say that at the outset he questioned whether he had ever executed the alleged deed of gift at all, and next he went on to say that if he had, the document was "spurious and fictitious and it was not executed by him willingly and voluntarily." Now I am not dealing with the plaint as a Court of first instance, or possibly I might, if it had been first presented to me at the outset of the suit, have had something to say as to the form in which it was drawn up, and I might have thought greater particularity in the allegations of fraud necessary, but no objection was taken by the defendants to the form of the plaint, and the suit proceeded to trial upon as it stood. Both the parties have given evidence in the cause, and upon that evidence the decision of the learned Subordinate Judge has been passed in favour of the defendants and against the plaintiff, which decision is the subject-matter of the appeal. The only plea that I think it necessary to consider for the purpose of deciding this case is the second plea, which is in the following terms: the decision is bad upon the ground that "the transaction set up by the respondent cannot be enforced and recognized by a Court."

Now what is the case, taking the facts as put forward on the part of the plaintiff on the one side and the defendants on the other? The plaintiff is a *Chatri* by caste. He is a man well advan- [525] ced in years; one who not unnaturally would be contemplating that death could not be very far distant. As with most Hindus, he necessarily attached great importance to and held in high reverence the ministrations of Brahmans, to which caste the principal defendant Umadat belongs. Umadat is a man

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of some 43 years of age, and it is obvious from the remarks of the learned Subordinate Judge that he is a person held in high consideration amongst the people of the locality in which he resides. Now the sole property of which the plaintiff was possessed in the month of April 1888, whether in the shape of unencumbered proprietorship or in the shape of an equity of redemption, was a two-annas-eight-pies share in mauza Sidhanna Raghoram pargana Deogaon, valued, according to the plaintiff, at Rs. 6,000 or, according to the defendant, Rs. 2,999, but subject to certain mortgage charges the precise amount of which is not clear. The document, cancelment of which is sought by the plaintiff, purports to have been executed by him upon the 26th April, 1888, and having had an opportunity of examining the terms of the instrument, I do not think I can do better than to state them as they have been translated to us by the Reader of the Court.

"I, Mannu Singh, son of Sheozor Singh, deceased, caste *Chatri*, by occupation zemindar, and being resident and zemindar of mauza Sidhanna Raghoram, do hereby declare that, as I have become old and have no issue, nor is there any hope that I shall, therefore, with a view of securing benefit to my soul in the next world, having a month ago heard the recital, from Sri Bhagwat by Umadat Pandit, caste Brahman, who is my *guru* or spiritual guide, I have given a two-annas share and out of two annas *gultansi* right of Saran Singh, an eight-pies share, in all, two-annas eight-pies share in mauza Sidanna Raghoram of which I, declarant, am in possession, and have made a present and a gift by *danpattr* to the aforesaid *guru* of the share aforesaid, and he will remain in possession and pay Government revenue, and defraying all usual expenses, derive benefit therefrom generation after generation. Now I have no kind of concern, and I will cause mutation of names and will bring forward no excuse. If on behalf of me there is any evasion, then [526] the *guru* may himself by application make mutation of names on the document."

Now in this document, which has been found by the learned Subordinate Judge to have been in fact executed by the plaintiff, he states that the defendant is his spiritual guide or *guru*, and in the defendant's own statement of defence in the suit, he also has declared that he was the plaintiff's spiritual guide or *guru*, and according to the fourth paragraph of the statement of defence, the circumstances under which the deed of gift was made were as follows:—

"The plaintiff has heard him reciting the holy book called Bhagwat, and with the view of deriving benefit in the next world, the plaintiff having made eleemosynary gift (*shankalp*) of the property, willingly and voluntarily executed a deed of gift (*danpattr*), and had it registered, and since the time of the execution of the deed of gift, the defendant holds possession of the property by payment of the Government revenue."

So that taking the deed of gift itself and the terms used in it in conjunction with the statements made by the defendant himself, I have no doubt that the defendant was the *guru* or spiritual guide of the plaintiff, and that such was the relation held by him in regard to the plaintiff; moreover, I take the defendant's own statements as showing what were the circumstances under which the document was executed by the plaintiff in favour of defendant. Now it is upon these materials that in my opinion the appeal ought to be decided, and I do not think it is necessary to diverge into other matters which are mentioned in the decision of the learned Subordinate Judge, though I have to make a few remarks as to the contention which has been raised before us to-day in regard to what appears in the learned Subordinate Judge's judgment upon the point as to

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how far possession is necessary to constitute a valid and binding gift under the Hindu law and how far, if it is, the principle or the rule of Hindu law has been abrogated by s. 123 of the Transfer of Property Act, or in other words, whether assuming in this case that there has been, as found by the learned Subordinate [527] Judge, no possession on the part of the defendant of the property the subject of gift, the defect would be cured by the provisions of s. 123 of the Transfer of Property Act. Our attention was called to the ruling of the Calcutta Court in *Dharmodas Das* v. *Nistarini Dasi* (1) also to *Harjivan Anandaram* v. *Naran Haribhai* (2), *Vasudev Bhat* v. *Narayan Daji Damle* (3), *Dagai Dabee* v. *Mathura Nath Chattopadhya* (4), and last but not the least, to the decision of their Lordships of the Privy Council in *Kali Das Mullick* v. *Kanhya Lal Pandit* (5). Now from the view in which I am disposed to deal with the case, I do not consider it necessary to enter into what is a complicated and difficult question, and upon which at this moment I am not altogether satisfied as to what is the correct view, whether for the purpose of making a good title in the donee under the terms of a gift, actual possession must be given to the donee in order to satisfy the requirements of the Hindu law. There is, of course, direct authority in the ruling in *Dharmodas Das* v. *Nistarini Dasi* (1) for the view that s. 123 of the Transfer of Property Act has so far overridden the Hindu law, and there are also expressions of opinion of their Lordships of the Privy Council in *Kali Das Mullick* v. *Kanhya Lal Pandit* (5) at page 232 which raise considerable doubt and difficulty as to the soundness of the principle that possession is absolutely necessary, but the exigencies of the case do not require that I should determine the question. It must therefore be understood that any conclusion at which I arrive in this case is not based on any determination of that question.

Reverting to the position occupied towards one another by the plaintiff and the defendant as they appear upon the materials before me, I have to say that I in no way depart from the principles that I very fully discussed, considered and adopted in *Sital Prasad* v. *Parbhu Lal* (6). My judgment in that case was one I took some pains to consider, and I endeavoured therein to state in as explicit language as I could what I believe to be the true rule that should [528] govern cases of this description. At page 545 of the report I said :—" But what the Courts in this country will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise."

Then at a later stage I said :—

" Where a fiduciary or *quasi* fiduciary relation had existed, Courts of equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb."

Now this principle is recognized in the law of evidence in this county which declares that " where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position

(1) 14 C. 446. (2) 4 B.H.C. R.A.C. 31. (3) 7 B. 131.
(4) 9 C. 854. (5) 11 I. A. 218. 11 C. 121. (6) 10 A. 535.

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of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence." [S. 111, Evidence Act, I of 1872]. Now applying this rule to the present case, what is the reasonable inference? The defendant was, as I have found him to be, upon the statement of the plaintiff himself in his deed of gift, and upon the defendant's statement, the *guru* or spiritual guide of the plaintiff, and without any other than the absurd reason given by the defendant, upon the 26th April, 1888, the plaintiff was led to strip himself of all the property of which he was possessed and to hand it over to the defendant. Would any reasonable man in full possession of his senses and not under unusual influence of some kind or other do such a thing? If, instead of having been able to go about at the time when he made the deed of gift the plaintiff had been confined to his bed by illness, what would have been the inference, or if that sickness had ended in death, what would have been the inference? I have no doubt that the rule I have indicated is a **[529]** sound one, for the purpose of protecting people who from their religious fanaticism or old age and infirmities are under the influence and control of others when they have been influenced into doing what they would not otherwise have done, by requiring that the person seeking to sustain the transaction should show that it was carried through in perfect good faith and in such a way as to show that it was the voluntary and spontaneous act of the party to be affected. Now it does not appear to me, reading the learned Subordinate Judge's judgment and giving full effect to the argument addressed on behalf of the respondent and to the evidence, that there was any proof before the Court below nor is there before us to show us that the transaction of the 26th April, 1888, was one that by our decree we ought to sustain, and speaking for myself I am quite unable to uphold it, taking as I do the defendant's own evidence, which leaves on my mind the irresistible impression that the defendant did take advantage of his relation towards the plaintiff to lead him to do this most improvident act and one which he almost immediately after repudiated. But even if I do not put it so high, it seems to me that the defendant has wholly failed to discharge the burden of showing that the transaction was made without undue influence and in good faith. I hold that in the absence of proof of this kind, the gift to the defendant must be treated as invalid, and that the plaintiff is entitled to the relief he seeks. I therefore am of opinion that the learned Subordinate Judge was wrong in the view, he took, and reversing his decree, I decree the appeal and the claim of the plaintiff, and I direct that a decree be prepared in favour of the plaintiff for the purpose of giving effect to his claim in accordance with s. 39 of the Specific Relief Act. The plaintiff will get his costs in all the Courts.

MAHMOOD, J.—I am of the same opinion and wish to add nothing beyond saying that I concur in the doctrine laid down by my brother Straight in *Sital Prasad* v. *Parbhu Lal* (1), so far as the ruling applies to the existence of fiduciary relationship between a priest or spiritual guide of persons in transactions with the latter, **[530]** so that all the presumptions would be against the defendant in the case, and the decree passed by my learned brother is the only one that could be passed in the case.

Appeal allowed.

(1) 10 A. 535.

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Before Mr. Justice Straight and Mr. Justice Mahmood.

SURTI (*Plaintiff*) v. NARAIN DAS (*Defendant*).* [27th January, 1890.]

Hindu Law—Exclusion from inheritance—Idiocy—Madness.

The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied.

The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endued with the business capacity to manage their affairs properly. *Tirumamagal Ammal* v. *Ramaswami Ayyangar* (1) distinguished.

THE facts of this case are stated in the judgment of Straight, J.

Pandit *Sundar Lal*, for the appellant.

Mr. *Dwarka Nath Banerji* and Maulvi *Zahur Husain*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This first appeal relates to a suit brought by the plaintiff-appellant before us against the defendant-respondent under the following circumstances. It appears that prior to the year 1879 a man of the name of Salig Ram carried on a very considerable business in the Agra district as a contractor. He had one son Mathu Lal, a wife of the name of Bibia, and a daughter of the name of Surti, the plaintiff-appellant before us. Mathu at an early age was married according to the ordinary course of things prevailing among Hindus, but his first wife died, and when he was entering upon early manhood he was married a second time to Musammat Narain Dai, the daughter of a respectable person of position in the Agra district, and she is the defendant to the present suit. Musammat Surti, the daughter of Salig Ram, was married to one Mallu Mal. On the 10th September, 1879, Salig Ram died leaving [531] behind him a large quantity of immoveable and moveable property, the nature of which is set out in the details attached to the plaint. In the ordinary course, upon the death of Salig Ram, he being a separated Hindu and the sole owner of his property, his son Mathu Lal would have inherited, and there is no doubt that as a matter of fact, upon his father's death he was treated by his mother, Musammat Bibia, as his father's heir, as the proceedings in a certain certificate application made under Act XXXV of 1858, which was taken at the end 1879 by Musammat Bibia, show.

It is also noticeable that Mallu Mal, the husband of Musammat Surti, the present plaintiff-appellant, was well aware of that proceeding that was so being taken; and I think the learned Subordinate Judge was right in adopting the view he did, that both Musammat Bibia, the mother, and Mallu Mal, the brother-in-law of Mathu Lal, must be regarded as having looked upon him as not at that time disqualified from his father's inheritance, because in that proceeding he was treated as, and upon the footing of being his father's heir, and it was in the capacity of guardian for him

* First Appeal, No. 111 of 1888, from a decree of Maulvi Saiyad Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 31st March, 1888.

(1) 1 M.H.C.R. 214.

as his father's heir, that a certificate of a guardianship was granted to Musammat Bibia. In the present case Musammat Surti comes in, and in her plaint she makes the following allegations, namely, that Mathu Lal her brother was a lunatic and insane and was born deaf and dumb and was so at the time of his father's death also, and that he could not therefore have inherited the estate of his deceased father Salig Ram. The plaint further says that Musammat Bibia owned and held the whole of the estate of the deceased Salig Ram so long as she lived. Upon this allegation that Musammat Bibia took the whole estate upon the death of Salig Ram, and that Mathu Lal never inherited at all, the plaintiff claims possession of the estate as the daughter of Salig Ram in preference to the defendant, the widow of her deceased brother. It is common ground that, if Mathu Lal was disqualified under the Hindu Law from inheritance, Musammat Bibia would upon the death of her husband Salig Ram take the estate; and that in succession to her the plaintiff would be entitled thereto. But if Mathu Lal was not disqualified, then he took as the heir of [532] his father, and after him the defendant would take the estate of a widow of a separated Hindu. Consequently the whole of the plaintiff's case rested upon the allegation, supported by such proof as she was in a position to bring, that Mathu Lal in fact never did take and never could have taken the inheritance of his deceased father Salig Ram, because he was disqualified by reason of being a lunatic and insane, or born deaf and dumb. The allegations contained in the plaint were contradicted on the part of the defendant, and the first question that had to be determined was, and that was one of fact, was Mathu Lal, by reason of insanity or lunacy or being born deaf and dumb, disqualified from inheriting from his father according to Hindu Law? No doubt there are many passages in various works of authority on the Hindu law and in the sources of those authorities, namely the Hindu Law itself, which declare that certain persons are to be disqualified from inheritance. As has been pointed out by Dr. Jolly in his Lectures upon the Law of Partition, Inheritance and Adoption, at pages 271 *et seq*, there is much controversy and question as to what is the binding category of the disqualifications, some of which are mentioned by some authors and others by others, but only a few by all. This case, however, does not render it necessary for me to enter into those controverted views; and it is enough to say that the plaintiff must be tied down to the terms of her plaint, by which she in fact alleged that Mathu Lal was a "lunatic and insane and that he was born deaf and dumb" and that by reason of those circumstances he was disqualified. The question then raised is a pure question of fact, and the learned Subordinate Judge, who has very fully considered and discussed all the evidence produced in the case, came to the conclusion that it failed to establish either that Mathu Lal was a lunatic or insane from his birth or at the date of the death of his father Salig Ram, or that he was born deaf and dumb. In the course of the argument I put it to Mr. *Sundar Lal*, who appeared on the part of the plaintiff, whether the statements of Dr. Hilson, the Civil Surgeon of Agra, given in Court upon the 2nd August, 1887, did not put his case in its strongest shape, and he very frankly [533] said that they did, and that they represented what the case of lunacy or insanity was that was set up on the part of the plaintiff, as showing that Mathu Lal was a disqualified person. It is clear to my mind upon reading Dr. Hilson's deposition that it affords material wholly inadequate for the purpose of throwing Mathu Lal into any category of persons who according to the Hindu Law would be disqualified from

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taking their inheritance. Apart from the unsatisfactory nature of Dr. Hilson's statements in the present suit, and I say unsatisfactory, because his deposition was only given from what he found in the certificate granted by him on the 27th November, 1879, his statements themselves do not appear to me to show that Mathu Lal was other than a person not quite up to the ordinary standard of intelligence, and possibly not one in whose hands it would be quite safe or advantageous for his interests to leave the management of his own affairs. But that is not enough in my opinion, and it does not seem to me, when we are dealing with a rule of Hindu Law the enforcement of which is to exclude a person from inheritance, that we should adopt and enforce that rule of Hindu Law except upon the clearest and most satisfactory proof that the true requirements of the Hindu Law are satisfied. I do not think myself that when the Hindu Law speaks of "idiots and madmen" or "lunatics" that it contemplates persons merely of weak intellect, in the sense that they are not up to the ordinary standard of human intelligence or endued with the business capacity to manage their affairs properly or that it intended such persons to be cut out of the list of heirs and deprived of their inheritance. Mr. *Sundar Lal* referred us to a case reported in the Madras High Court Reports, Vol. I, page 214 (*Tirumamagal Ammal* v. *Ramaswami Ayyangar*) ; and he says that that ruling establishes the position that the reason for disqualifying is "the unfitness of a person for the ordinary intercourse of life." But the learned Pandit overlooked the fact that in that case the person was an admitted idiot, and all that the Court said was that the reason for disqualifying an idiot was his unfitness for the ordinary intercourse of life. But there is nothing in the evidence before us to show that this man Mathu Lal was insane and thereby unfit for the ordinary intercourse [534] of life. On the contrary Lala Sakhan Lal, vakil, High Court, and Government Pleader, who was instructed on behalf of Musammat Bibia in the certificate proceeding of 1879, distinctly said that in his opinion Mathu Lal was *not insane*, though "his powers of reasoning were somewhat weaker than those of an ordinary man." Mr. Sakhan Lal further entirely disposes of the allegation in the plaint that Mathu Lal was deaf and dumb from his birth, for he says that he "conversed with Mathu Lal on their way to Dr. Hilson's house;" and that Dr. Hilson asked questions and Mathu Lal replied to the remarks and questions that he made to him. I do not propose, because it does not appear to me necessary to do so, to travel through the evidence upon the one side and the other. I have carefully read the judgment of the learned Subordinate Judge and I think he has satisfactorily and properly dealt with that evidence. I may, however, remark as a striking proof that Mathu Lal was not what the plaintiff says he was, that there are the facts that he was married toone lady of respectable family and that upon her death,he was married to another lady of similar position, a state of things most unlikely to have happened in the Hindu community had he been an idiot or lunatic, a fact sure to be well known, the fathers of those girls being well aware as they must have been of the consequence of his mental condition on his right by inheritance. It is also proved by the evidence that, down to the death of his father, Salig Ram, Mathu Lal was constantly associated with him in his business, and documents were produced which showed that he took an intelligent part in that business. Further, and there seems to be no contradiction of the fact asserted by the defendant, that he performed the thirteen days' ceremony connected with his father's obsequies.

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I have very little doubt whatever that this suit originated with, and was promoted by Mathu Lal, the husband of the plaintiff, Surti, for the purpose of unfairly ousting the defendant, the widow of Mathu Lal, from the property to which at least she is entitled so long as she lives. I repeat that I agree with the view expressed as to the value of the evidence by the learned Subordinate Judge, and [535] I fully adopt his conclusions with regard to that evidence, and am satisfied that there was no proof before the Court below, nor before us, which would warrant us in holding that Mathu Lal was an "idiot" or "insane" or born deaf and dumb, or that he was an "idiot" or "insane" at the date of his father's death, and as such was disqualified from taking the inheritance. I dismiss the appeal with costs.

MAHMOOD, J.—I agree so completely with all that has fallen from my brother that I should not have desired to deliver a separate judgment except for the fact that Pandit *Sundar Lal*, in arguing the case for the appellant, insisted strongly upon the original Sanskrit words which are to be found in Mitaksbara, chap. II, s. 1, verse 1, as words implying circumstances under which disinhersion may take place under that system of law. One of these words was, as the learned pleader pointed out, the word *unmattaka*, which in the English translation before me is rendered as" mad one." The other was the word *jad*, which has been translated as meaning an "idiot."

My brother Straight has described how these terms "mad one" and "idiot," whether taken in the original Sanskrit or in the Enlgish language or in any other language, would if taken in their general and vague sense, produce disastrous results in the shape of bringing about the disinhersion of persons whose birthright it is to inherit from their father. These two words, which the learned Pandit has himself pointed out, are the very best illustration of what my brother has said in his judgment, namely, that every presumption is to be taken against disinhersion: and before doing so the greatest care should be taken in ascertaining what the real views of the framers of the law were, and what they intended should be done for the purpose of taking away the property from the son or any other person, as in this case the widow, who is *prima facie* entitled to inherit, from him. This word *unmattaka* occurs in Sir Monier Williams' Dictionary at page 159, and there the meaning given is 'insane,' 'mad,' 'drunk.' Now that word is connected with the earlier word *unmatta*, which means 'insane,' 'drunk,' 'mad,' 'intoxicated,' &c., and has many other significations. The [536] word *unmattaka* must have therefore all the meanings which the word *unmatta* has, of which it is a derivative.

The other *jad* which occurs in the same work at page 336 has the following meanings: 'Cold,' 'frigid,' 'chilly,' 'stiff,' 'stunted,' 'paralysed,' 'motionless,' 'frantic,' 'senseless,' 'stupid,' 'idiotic,' 'irrational,' 'dumb,' 'stunning,' 'stupefying'; with many other significations besides. It is not my desire in delivering my judgment in this case to enter into any philological disquisition; but as the case was argued on the basis of the Sanskrit etymology of those words themselves, I have thought it desirable to show that these words are not to be taken in their literal sense in the law. Otherwise a man who takes a cold bath in the morning may get a 'chill,' and thus find himself suddenly prevented from inheriting from his father.

Consequently, in dealing with these general and vague phrases and terms such as *unmattaka* and *jad*, one must not be guided merely by their

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philological signification, but must be satisfied as to what the lawgivers who used those terms themselves understood.

In this case the strongest evidence in favour of the plaintiff is that of Dr. Hilson whose opinion proceeds upon a certificate of his own granted in the year 1879 and who perhaps had only a very few minutes' leisure on two different occasions to judge as to the mental capacity of Mathu Lal; and therefore his whole evidence proves nothing more than a mere *suspicion* that there may have been a congenital idiocy or weakness of mind. But that is not sufficient in my opinion to prove that it was so either at the birth of Mathu Lal or the death of Saligram on the 10th September 1879. The views therefore expressed by my brother represent not only sound common sense, but also the views of those who made those laws relating to the exclusion from inheritance of a Hindu.

I therefore entirely agree in the whole judgment which my brother has given and also in the decree which he has made.

Appeal dismissed.

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12 A. 537 = 10 A.W.N. (1890) 90.

[537] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

BALLAM DAS (*Judgment-Debtor*) *v.* AMAR RAJ AND ANOTHER (*Decree-holders.*)* [29th January, 1890.]

Mortgage—Second mortgage of the same property to the same person—Sale in execution of decree on first mortgage—Purchase by mortgagee decree-holder.

A decree-holder holding two decrees of different Courts on separate bonds hypothecating the same property, in execution of the first decree purchased the property himself. The surplus of the sale-proceeds was distributed by the Court among other persons who held money-decrees against the same judgment-debtor.

Held that the decree-holder could not afterwards execute the second decree against property of the judgment-debtor not included in the hypothecation-bond. *Ahmad Wali* v. *Bakar Husain* (1), *Khwajah Baksh* v. *Imaman* (2), and *Bapu Ravji* v. *Romji Savrupji* (3), referred to.

[R., 18 A. 31 = 15 A.W.N. 144; 19 A. 196 = 17 A.W.N. 18; 20 A. 23; 24 M. 96].

THE facts of this case were as follows. One Ballam Das was a simple mortgagee under two bonds relating to the same property. He brought two suits for enforcement of the bonds, one suit being instituted in the Court of the Subordinate Judge and the other in the Court of the Munsif of Benares. He obtained a decree in each suit, and in execution of each decree the mortgaged property was attached. On the 9th June, 1885, the property was sold in execution of the decree passed by the Subordinate Judge, and was purchased by the decree-holder himself. The amount realized by the sale was Rs. 4,500, the decree of the Subordinate Judge being for Rs. 3,585-14. The decree-holder then applied to the Munsif, in whose Court execution of the other decree (which was for Rs. 82-6) was pending to have the surplus of the sale-proceeds applied in satisfaction

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* Second Appeal, No. 1385 of 1888, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 4th August, 1888, reversing a decree of Pandit Raj Nath, Munsif of Benares, dated the 24th April, 1888.

(1) 3 A.W.N. (1883) 61. (2) 5 A.W.N. (1885) 210. (3) 11 B. 112.

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of that decree, and the Munsif forwarded the application to the Subordinate Judge, who, however, distributed the surplus among the holders of other decrees (for money only) against the judgment-debtor.

[538] The decree-holder then applied for execution of the Munsif's decree by sale of property belonging to the judgment-debtor other than that hypothecated.

The Munsif dismissed the application, on the authority of *Babu Ravji* v. *Ramji Svarupji* (1).

On appeal by the decree-holder, the District Judge of Benares reversed the Munsif's decree, and allowed the application. The judgment-debtor appealed to the High Court, and the appeal came for hearing before Mahmood, J., who referred it to a Division Bench. His Lordship described the case as raising the following question:—

"Whether a person holding two incumbrances against one and the same property, and by bringing to sale the incumbered property in enforcement of the first incumbrance, and purchasing it himself, can, subsequent to such purchase, either claim enforcement of the later lien, or sue for recovery of money due upon such later lien by enforcement against some property of the judgment-debtor other than that which the incumbrancer has already purchased in execution of the decree which enforced his prior deed."

Pandit *Sundar Lal*, for the appellant.

Munshi *Nawal Behari Bajpai*, for the respondent.

JUDGMENT.

EDGE, C. J. and BRODHURST, J.—The respondent here held two bonds in which the same property was hypothecated. In the Court of the Subordinate Judge he obtained a decree on one bond, in the Court of the Munsif he obtained a decree on the other. Each decree decreed the sale of the same property. The respondent attached the property under each decree, and, having done so, put it up to sale under the decree of the Subordinate Judge and himself purchased it at the sale. The proceeds of that sale satisfied the decree under which the property was sold, and left a surplus which the Judge directed to be made over to other parties. The respondent now seeks to execute the decree of the Munsif against the other property of his debtor which was not hypothecated. It [539] appears to us that this case comes within the principle of *Ahmad Wali* v. *Baker Husain* (2), and also within that of *Khwaja Bakhsh* v. *Imaman* (3), and within that of *Babu Ravji* v. *Ramji Svarupji* (1). The lower appellate Court in appeal made the order which the respondent sought. Applying the cases which we have cited, we must allow this appeal with costs, and reinstate the decree of the Munsif.

Appeal allowed.

(1) 11 B. 112. (2) 3 A.W.N. (1883) 61. (3) 5 A.W.N. (1885) 210.

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12 A. 539=
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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAM LAL AND ANOTHER (*Decree-holders*) *v.* NARAIN AND OTHERS (*Judgment-debtors*).* [30th January, 1890.]

Mortgage—Execution of decree—Conditional decree for sale not made absolute—Act IV of 1882 (*Transfer of Property*), *ss.* 88, 89—*Res judicata.*

A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882) cannot be executed unless and until it is made absolute by an order passed under s. 89.

Where on a previous application being made for execution of such a conditional decree, the judgment-debtor did not appear to oppose the decree-holder's application for attachment and sale, but the application was dismissed for want of prosecution,—*held*, that as the question whether the conditional decree was capable of execution before it was made absolute was never before in issue, and was not judicially treated on the occasion of the former application, there was no *res judicata* on the point.

[Overruled, 13 A. 278=11 A.W.N. 63; F., 22 C. 931; 25 M. 244=12 M.L.J. 279; 8 O.C. 75; R., 5 O.C. 251; D., 2 S.L.R. 90.]

THE appellants in this case held a decree against the respondent passed on the 24th November 1885, upon a bond dated the 15th June, 1869. The decree was a conditional decree for sale of property mortgaged in the bond; it was passed under s. 88 of the Transfer of Property Act (IV of 1882), and it was in the form prescribed by sch. iv, No. 128 of the Civil Procedure Code. No order absolute for sale under s. 89 of the Transfer of Property Act was ever made or applied for. On the 26th April 1887, the decree-holders applied for execution of the conditional decree of the 24th November, 1885, and the mortgaged property was attached, but the application was, on the 9th June 1887, struck off for want of prosecution. The pre-[540]sent application for execution of the same decree was made on the 7th January, 1888. Objection was taken on behalf of the judgment-debtors to the effect that the conditional decree of the 24th November 1885, was incapable of execution, and that the property could not be sold except under an order absolute for sale under s. 89 of the Transfer of Property Act, which had never been passed.

The Court of first instance (Munsif of Agra) disallowed the objection and granted the application for execution. The Munsif observed :—"As the property was attached before, and notice issued, but the judgment-debtors took no objection, and as I also find that according to the practice prevailing in the Civil Courts of this district a final decree was not prepared before, therefore the objection of the judgment-debtors as to the correctness of the decree is untenable."

The judgment-debtors appealed to the District Judge of Agra. The Judge decreed the appeal, observing as follows :—

"The Munsif in his judgment has apparently laid stress on the fact that a wholly irregular course of practice was prevalent here, until stopped by an order, omitting to make conditional decree absolute, and taking out execution on the conditional decrees, which were no decrees at all. He finds that the practice is deserving of indulgence. In this I cannot

* Second Appeal No. 512 of 1889, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 27th February, 1889, reversing a decree of Munshi Prag Das, Munsif of Agra, dated 29th September, 1889.

agree with him. Nor do I think it necessary to go at length into the question of whether it was necessary that objection should be taken to the first application, and whether *res judicata* applies. I simply find that, there never having been any decree in existence capable of execution, execution naturally cannot be taken out, and, holding this, I decree the appeal with costs against the respondents."

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The decree-holders appealed to the High Court.

Babu *Dwarka Nath Banerji*, for the appellants.

Babu *Durga Charan Banerji* and Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

BRODHURST and TYRRELL, JJ.—This is an appeal in the execution department. The appellants obtained a decree under s. 88 of the Transfer of Property Act on the 24th November, 1888. They [541] never made any application under s. 89 to have that decree made absolute, and they have now in January 1888, taken out execution of the original decree. The Court below has held that the present decree is not capable of execution, and that an application on the part of the decree-holders to have the decree made absolute would now be barred by time. In second appeal two pleas are urged on behalf of the decree-holders. First that the order made by the Court executing the decree in April 1887, was equivalent to an order making the decree absolute. But looking at the proceeding, it is obvious that this is not so. Secondly, it was contended that this question is *res judicata* between the parties, because when notice was issued to the judgment-debtors in April 1887, they did not appear to oppose the decree-holder's application for attachment and sale, but as the question was never before in issue, and was not judicially treated in 1887, or subsequently till the present application was made, it is plain that there has been no adjudication on the point which can bar the decision of the objection now taken. The appeal is dismissed with costs.

Appeal dismissed.

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12 A. 541 = 10 A.W.N. (1890) 99.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BABU RAM AND ANOTHER (*Plaintiffs*) v. RAM DAYAL AND ANOTHER (*Defendants*)* [30th January, 1890.]

Principal and agent—Suit by principal against agent to recover money received and not accounted for—Act XV of 1877 (*Limitation Act*) *sch.* ii, *No.* 89—*Termination of agency—Act IX of* 1872 (*Contract Act*), ss. 201, 218.

Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to ss. 201 and 218 of the Contract Act (IX of 1872) until he has paid the price to the principal; and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch. ii, art. 89 of the Limitation Act (XV of 1877; and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not

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* Second Appeal, No. 400 of 1888, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 15th December, 1887, confirming a decree of Munshi Prag Das, Munsif of Agra, dated the 10th September, 1887.

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terminate immediately on the sale of the goods. It does terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty.

[F., 26 C. 715 (725) = 3 C.W.N. 524.]

[542] THE facts of this case were as follows:—The plaintiffs were merchants trading at Agra, and they consigned, at different dates in 1881, 152 bags of *jeera* or cummin seed to the defendants, who were the plaintiffs' agents in Calcutta, on commission sale. On the 8th December, 1881, the defendants sent to the plaintiffs an account of 119 out of the 152 bags. No account was ever rendered of the remaining 33 bags, which were sold in January 1882, and the plaintiffs made no inquiry and took no action regarding these bags until the 27th December 1886, when they demanded from the defendants the price realised on sale of the 33 bags; the demand being refused, the present suit was instituted in March, 1887. The plaintiffs alleged in their plaint that the defendants had neither returned the *jeera* seed nor remitted the value thereof, and they claimed Rs. 543-3-9 as the price realized on the sale of the 33 bags. The defendants pleaded, *inter alia*, that the suit was barred by limitation.

The Court of first instance (Munsif of Agra) dealing with this plea, observed:—" I find that this suit is governed by articles 88 and 89 of Act XV of 1877. It is admitted by the parties that no account was ever demanded and refused. It remains to be determined whether the agency has terminated, and if so, whether the suit was filed within three years from the date of termination of the agency. Under s. 201 of the Indian Contract Act of 1872, " agency is terminated by the principal revoking his authority or the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind, or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors." In this case the authority of the principal was never revoked, the principal and agents are alive and of sound mind, and the principal has not been declared an insolvent under any such Act as referred to in this section. It is to be seen whether the business for which the agency was created has been completed. In this case the agency was created for the sale of merchandize or goods sent to the agent [543] by the principal. The principal, that is, the plaintiffs, as would appear from the petition of plaint, consigned some 152 bags of *jeera* to the agents, the defendants, in Calcutta, to be sold by them between Chait Sudi 15th Sambat 1938 and Baisakh Badi 15th Sambat 1938. The agents sold 119 bags and credited the value to the plaintiffs' account. The remaining 33 bags were not accounted for. After the said consignment of 152 bags, no other goods were sent to the defendants for sale. The defendants sent an account to the plaintiffs on the 15th Baisakh Sudi Sambat, 1938, *i.e.*, 8th December, 1881. After this, the plaintiffs never demanded any account whatever of the remaining 33 bags. The defendants sold their 33 bags of *jeera* somewhere in January, 1882, but they neither informed the plaintiffs of the sale nor submitted any account, nor paid the value thereof to them. The plaintiffs also remained silent up to the 27th December, 1886, when they demanded the price of the said 33 bags of *jeera*, and the defendants refused to pay them. From the circumstances stated above, it is clear that the business of the agency terminated or was completed when the goods for the sale whereof it was created were sold, namely, Magh Sudi 2nd Sambat 1938.

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In my opinion it is not necessary for the completion of the business of the agency for such purposes that the price of the goods sold be paid to the principal. The contention of the learned Counsel for the plaintiffs that, as the plaintiffs were not informed of the sale of the goods, in other words, had no knowledge of the sale, no cause of action accrued to them, and therefore limitation could not run from the date of sale, has no force. This is not the case in which, according to the Indian Limitation Act, a plaintiff's ignorance of the occurrence of the breach affects the starting point of limitation. I may add here that there is no allegation of fraud in the petition of plaint, or anywhere in the records of this case. Had there been such an allegation, the case might have been different. The present suit has not been brought within three years from the date of termination of the agency; *i.e.*, Magh Sudi 2nd Sambat 1938, when the goods were sold. The suit is therefore barred by limitation."

[544] The plaintiffs appealed to the District Judge of Agra, the material portion of whose judgment was as follows:—

"The appellants contend that it is not the duty of a principal to look after his agent, but for the agent to submit accounts to his principal, and that the cause of action does not accrue from the date of sale, but from the date when the plaintiffs became aware of it. In 1882 the respondents obtained a decree against the appellants in Calcutta for Rs. 600. This was executed in 1884, and the plaintiffs (appellants) admit that they then became aware that the 33 bags had been sold, in spite of which they admit they never called for any accounts or took any action till 1887. For the respondents it is urged that s. 213 of the Contract Act applies, *viz.*, that the agent is bound to render proper accounts to his principal on demand. In the Court's opinion, the appellants showed wilful and incomprehensible carelessness in not demanding the account of these 33 bags for six years, and are not entitled to plead ignorance when they took none of the legitimate means open to them to learn, by applying for accounts, what had become of these bags. The Court holds that art. 89, sch. ii, Limitation Act, XV of 1877, fully applies to this case, and that the plaintiffs are time-barred. The Court therefore dismisses the appeal with costs against the appellants."

The plaintiffs presented a second appeal to the High Court.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal*, and Munshi *Nawal Behari*, *Bajpai*, for the appellants.

Mr. *C. Dillon* and Mr. *R. Malcomson*, for the respondent.

JUDGMENT.

BRODHURST and TYRRELL, JJ.—This suit has been erroneously dismissed as barred by limitation by both the Courts below. The plaintiffs are merchants who employed the defendants as brokers for the sale of certain goods, the defendants being bound on the sale of the goods to remit the prices realized to the plaintiffs. The plaintiffs alleged that the defendants furnished an account and sent certain moneys, but kept them out of the account, and did not remit the price of some *jeera* seed, which is claimed in this action. The defendants' main answer was that they had the plaintiffs' **[545]** authority for writing the debt off against debts due to them by the plaintiffs. The Court below has dismissed the suit under art. 89 of the Limitation Act; apparently the learned Judge's reasons were that the agency had determined within the meaning of s. 201 of the Contract Act more than three years before this suit was brought, and because the plaintiffs

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showed carelessness in not demanding the account of 33 bags for six years, and are not entitled to plead ignorance when they took none of the legitimate steps open to them. The learned Judge thought that the termination of the agency was to be ascertained and to run from the time of the plaintiff's knowledge of the defendants' breach of duty, but that has nothing to do with the termination of an agency under art. 89 of the Limitation Act. The *terminus a quo* of that article is "when the account is during the continuance of the agency demanded and refused, or where no such demand is made, when the agency terminates." There is no question of knowledge or carefulness involved in this article. Now the Court of first instance found that on or about December, 1886, the plaintiffs demanded an account of the price of these 33 bags and the defendant refused to pay, that was some six months before the suit was brought. Then arises the question whether these accounts were demanded and refused during the agency or not. It was argued with much ingenuity that under s. 201 of the Contract Act the agency had terminated immediately on the sale of the goods by the business of the agency being completed. But s. 218 of the same statute provides that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them. Moreover there was no allegation that their business relation had terminated when the action was brought in the Court below, and there was no justification in law or in fact for holding that the agency terminated as soon as the defendants sold the property. Applying therefore art. 89 of the Limitation Act, the suit is not barred, and the case must go back to the Court of first instance, and the costs will abide the result.

Cause Remanded.

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12 A. 546 = 10 A. W. N. (1890) 77.

[546] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.

MITTHU LAL AND OTHERS (*Defendants*) *v.* KISHAN LAL (*Plaintiff.*)* [4th February, 1890.]

Execution of decree—Distribution of proceeds of execution-sale—Sale in execution of decree enforcing mortgage—Priority of mortgages—Civil Procedure Code, s. 295 proviso (c)—Act IV of 1882 (Transfer of Property) Act, s. 80.

A mortgaged certain property to *B* in July 1874, to *C* in March, 1877, and again to *B* in November, 1877. *B* obtained a decree directing the sale of the property in satisfaction of his two mortgages, and it was sold accordingly. Subsequent to the sale, *C* obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale-proceeds after payment of *B*'s first mortgage of July 1874, brought a suit under the last paragraph but one of s. 295 of the Civil Procedure Code to recover the amount received by *B* in respect of *B's* mortgage of November 1877.

Held that to read the words "an incumbrance" in s. 295, proviso (*c*) of the Civil Procedure Code as "an incumbrance or incumbrances", so as to give priority to *B's* mortgagee of November 1877, over *C's* earlier mortgage of March 1877,

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* Second Appeal, No. 437 of 1888 from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th March, 1888, reversing a decree of Maulvi Muhammad Ezid Bakhsh, Munsiff of Kasganj, dated the 19th March, 1887.

would be to defeat the intention of the Legislature as expressed in that section and also in s. 80 of the Transfer of Property Act (IV of 1882); and that C was entitled to maintain the suit.

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APPELLATE CIVIL.

12 A. 546 = 10 A.W.N. (1890) 77.

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

Mr. *Dwarka Nath Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J. and BRODHURST, J.—There is no dispute about the facts in this case. One Narain Singh on the 8th July, 1874, mortgaged certain property to Ram Lal. On the 23rd November, 1877, he further mortgaged the same property to Ram Lal. On the 7th March 1877, he had mortgaged the same property to Kishan Lal, who is plaintiff in this suit. Ram Lal obtained a decree on the 31st August, 1883, for the amounts due under his mortgages of the 8th July, 1874, and the 23rd November, 1877. That decree directed a sale. On the 20th June, 1885, the property was sold in execution of that decree. That sale was confirmed on the 26th June, 1886. Kishan Lal had obtained a decree for sale of the same property on the 28th [547] September, 1885. Kishan Lal applied in his own suit to have his decree satisfied out of the proceeds of the sale under Ram Lal's decree after payment of Ram Lal's first incumbrance. The proceeds were handed over to Ram Lal in discharge of the mortgage of the 8th July, 1874, and that of the 23rd November, 1877. Of what remained there was not sufficient to discharge Kishan Lal's mortgage. Kishan Lal brought this suit against the representatives of Ram Lal to recover the amount which had been received in respect of the mortgage of the 23rd November, 1877, on the ground that as his mortgage had not been satisfied, they, the representatives, were persons not entitled within the meaning of s. 295 of the Code of Civil Procedure to receive that amount. The first Court dismissed the claim. The Subordinate Judge on appeal gave the plaintiff a decree. The defendants, representatives of Ram Lal, have appealed.

Pandit *Ajudhia Nath* contended that under s. 295, clause (*c*) the representatives of Ram Lal took priority in distribution of the proceeds not only in respect of the money under the mortgage of the 8th July, 1874, but in respect of the moneys due under the mortgage of the 23rd November, 1877, over Kishan Lal, plaintiff. That contention is based on what appears to us to be a misreading of clause (*c*). The Pandit contends that the words "when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon" mean either incumbrance or incumbrances, and that as the property was sold under a decree ordering its sale for discharge of those two incumbrances, they took priority over Kishan Lal's incumbrance. To so read that section and to so apply it to a case like this would be in our opinion to frustrate the object the Legislature had in view not only in s. 295 of the Code of Civil Procedure, but in s. 80 of the Transfer of Property Act, and would be to apply a principle to the distribution of proceeds which would give priority to a subsequent incumbrance. Indeed, if the Pandit is correct, Kishan Lal would not be a person entitled to share in any distribution in this case, because his incumbrance instead of being subject to that of the 23rd November, 1877, [548] was prior to it, and if we were to treat that incumbrance of the 23rd November, 1877, as in this case the incumbrance within the meaning of clause (*c*) for the discharge of which the sale was ordered,

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Kishan Lal would not come within the third category of distribution, nor would he come under the fourth, for his decree was a decree for enforcement of a lien and not a decree for money within the meaning of that clause. Under the circumstances of the case the Subordinate Judge was right, and the plaintiff is entitled to maintain the suit. We dismiss the appeal with costs.

Appeal dismissed.

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12 A. 548 = 10 A.W.N. (1890) 89.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst.

SALIG RAM AND ANOTHER (*Defendants*) *v.* HAR CHARAN LAL AND ANOTHER (*Plaintiffs*).* [13th March, 1890.]

Mortgage—First and second mortgages—Purchase of mortgaged property by first mortgagee—Suit by second mortgagee for sale—Plaint denying or ignoring title of first mortgagee—Suit to be dismissed.

Where a second mortgagee coming into Court and, denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. *Raghunath Prasad* v. *Jurawan Rai* (1) referred to.

[D., 17 A. 48 = 14 A.W.N. 199; 21 A. (272) 273 = 19 A.W.N. 62; 27 A. 75 = A.W.N. (1904) 166 = 1 A.L.J. 476; 21 A.W.N. 68.]

THE facts of this case are stated in the judgment of the Court.

Mr. *G. T. Spankie*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J. and BRODHURST, J.—In this case the plaintiffs brought a suit for enforcement of a hypothecation bond by sale of the property mentioned in the bond. In their plaint they alleged that the defendants 4 and 5 were in possession of a shop, portion of the property, under a sale-deed, subsequent to the plaintiff's mortgage, which sale-deed, the plaintiffs alleged, had been collusively obtained. They in fact denied that the defendants 4 and 5 had any right to resist their claim to bring the whole property to [549] sale. When the facts were investigated, it turned out that the defendants 4 and 5 stood in the position of mortgagees holding in priority to the plaintiffs, and that the sale to these mortgagees was a good sale. The defendants 4 and 5 were entitled to call in aid for their protection their prior mortgage. In the sale-deed that prior mortgage was referred to, so that the plaintiffs, who had ascertained in the registry the fact that the sale-deed had been executed, could, if they had chosen, have ascertained the facts as to the prior mortgage which was made in favour of the defendants 4 and 5. As we have said, the plaintiffs' suit ignored any right in the defendants 4 and 5, and in effect asked for a sale of the property free from any claim of the defendants 4 and 5. The plaintiffs obtained a decree for sale, that decree providing that, as to the shop, the auction-purchaser would take subject

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* Second Appeal No. 644 of 1888 from a decree of Munshi Lalta Prasad, Subordinate Judge of Ghazipur, dated the 30th January, 1888, confirming a decree of Babu Bepin Behari Mukerji, Munsif of Gazipur, dated the 27th July, 1887.

(1) 8 A. 105.

to the prior mortgage of the defendants 4 and 5. The defendants 4 and 5 have brought this second appeal. 1890 MARCH 13.

The first thing to be noticed is that the plaint does not contain a true statement of the circumstances constituting the cause of action; the next thing to be observed is that the circumstances stated in the claim did not entitle the plaintiffs to the limited decree which they got. What we mean is that if the circumstances stated in the claim were true and were all the circumstances affecting the rights of the parties in this case, the plaintiffs would have been entitled to a clean decree for the sale, and not to the limited decree which they got. Now, in our judgment, where a second mortgagee coming into Court, and denying or ignoring the title of a perior mortgagee, asks to have the property sold as if there were no prior incumbrance, the only way to deal with this suit is to dismiss it, for it is a suit brought, either on a false statement of facts, or upon a suppression of material facts. We have been referred to a Full Bench judgment of this Court in *Raghunath Prasad* v. *Jurawan Rai* (1). In that case the attention of the learned Judges does not appear to have been drawn to the nature of the statements which were made in the plaint, if the statements in the plaint in that case were similar to those in the plaint in this case. What the Judges [550] did there was to insert into the decree below words of limitation reserving the rights of the prior mortgagee; whether they were asked to do more than that we do not know. In this case the appeal of the defendants 4 and 5 is allowed with costs, and the suit so far as they and this property are concerned is dismissed with costs in all Courts. The costs will be in proportion to the interests of the defendants 4 and 5. *Decree modified.*

APPELLATE CIVIL.

12 A. 548 = 10 A.W.N. (1890) 89.

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12 A. 550 = 10 A.W.N. (1890) 176.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* PAYAG SINGH. [20th June, 1890.]

Act XLV of 1860, *Penal Code*, s. 154—*Liability of owner or occupier of land on which an unlawful assembly is held.*

It is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his karinda should have taken an active part in the riot is sufficient to warrant the conviction of the owner, under s. 154 of the Penal Code.

[F., 28 C. 501 = 5 C.W.N. 771 (778); R. 8 O.C. 418 (422); 12 Cr.L.J. 441 (443) = 11 Ind. Cas. 785 (787) = 7 N.L.R. 101 (105)]

THE facts of this case appear from the judgment of the Court.

Mr. *A. H. S. Reid*, for the Crown.

Mr. *J. E. Howard* and Munshi *Bishan Sahai*, for the respondent.

JUDGMENT.

EDGE, C. J. and BRODHURST, J.—This is an appeal on behalf of the Government. Payag Singh is a zemindar. His agent was Jai Mangal Singh. Payag Singh had a dispute with one of his tenants as to a clump of bamboos. His agent, Jai Mangal, not being content to allow the civil Court to settle the dispute, went to the field accompanied by a lot of men. He in fact fomented the riot in which Pir Khan, the

(1) 8 A. 105.

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man with whom the dispute was as to the clump of bamboos, was killed. Payag Singh was fined Rs. 1,000, under s. 154 of the Indian Penal Code. The late Sessions Judge of Benares set aside that order, being of opinion, that the section did not apply, as it was not proved that Payag Singh knew or had reason to believe that a riot was about to be committed. The knowledge of the owner or occupier in cases of this kind is immaterial. He is liable for the acts of his commission [551] and the acts of omission not only of himself but of his agent or manager. Payag Singh's karinda, so far from using all lawful means in his power to suppress the riot and the unlawful assembly, took all unlawful means in his power to encourage it. In our opinion that Judge ought not to have interfered in this case. We allow the appeal and set aside the order of the Sessions Judge. We convict Payag Singh, under s. 154 of the Indian Penal Code, and sentence him to a fine of Rs. 1,000, which is to be realized according to law. *Appeal allowed.*

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12 A 551 = 10 A.W N. (1890) 178.

REVISIONAL CRIMINAL.

Before Mr. Justice Young.

DWARKA LAL (*Applicant*) *v.* MAHADEO RAI AND OTHERS (*Opposite parties*). [4th July, 1890.]

Criminal Procedure Code, ss 226, 227—Power of Sessions Judge to withdraw a charge framed by him.

The word "alter" in s. 227 of the Criminal Procedure Code includes withdrawal by a Sessions Judge of a charge added by him to the charge on which the commitment has been made.

[R., 10 Bom. L.R. 848 (864); 10 C.P.L.R. 13 (14) Cr.]

THE facts of this case sufficiently appear from the judgment of Young, J.

Mr. *G. T. Spankie*, for the applicant.

Mr. *J. E. Howard*, for the opposite party.

JUDGMENT.

YOUNG, J.—In this case the accused were originally charged by the Magistrate and committed for trial under s. 395, Indian Penal Code. When the trial commenced in the Court of Session, the Judge of his own motion added additional charges under ss. 147, 149 and 452, Indian Penal Code. Prior to the conclusion of the trial, the Judge withdrew the charges which he had himself added, and tried the prisoners on the original charge only, without putting the case on the additional charges to the assessors at all. Finally, the accused persons were acquitted of the original charge of dacoity.

[552] This Court is moved to set aside the proceedings of the lower Court and to direct that the case be tried out on the charges framed by the Judge himself and which were withdrawn by him.

Ss. 226 and 227 of the Criminal Procedure Code deal with the powers of a Court as to framing a charge, or adding to, or otherwise altering a charge when a person has been committed for trial, either without a charge at all, or with an imperfect, or erroneous charge, and Mr. *Spankie*

invited the Court's attention to *Queen-Empress* v. *Appa Subhana Mendre* (1) and also *Empress* v. *Poreshollah Sheik* (2). The learned Counsel for the applicant contended that although s. 227 expressly authorizes any Court to alter any charge, at any time before the opinions of the assessors are expressed, yet in that section the word" alter" ought not to be taken to be tantamount to " expunge," and that the word" charge," ought not to be read as meaning any head of the charge. No doubt s. 215, Criminal Procedure Code, declares that a commitment once made by a competent Magistrate can only be quashed by the High Court, but there is no express law as far as I am aware which prohibits a Court of Session to withdraw a charge framed by itself at the commencement of a trial and which such Court subsequently considers to have been an improper charge. To this extent I think the word " alter " in s. 227, Criminal Procedure Code, must be taken to include withdraw. The more usual procedure where a Court considers there is no evidence to lay before the assessors, is for the Court itself to record a finding under s. 289, Criminal Procedure Code, to that effect. But it should be observed that this section applies only where there is no evidence, and would not cover a case where the Court considers that the charge was in itself improper.

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12 A. 551 = 10 A.W.N. (1890) 178.

I am therefore not of opinion that any action on the part of this Court is required in the present instance. The application is dismissed.

Application rejected.

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12 A. 553 = 9 A.W.N. (1889) 185.

[553] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KISHORE SINGH (*Defendant*) *v.* SABDAL SINGH AND ANOTHER. (*Plaintiffs*).* [21st December, 1889.]

Plaint, rejection of—Civil Procedure Code, ss. 54, 56.

S. 54 of the Civil Procedure Code may be applied at any stage of a suit.

[F., 18 M. 338 (341); 1 C.W.N. 670 (671); Appr., 27 C. 376 (378); R., 34 C. 20 = 11 C.W.N. 28 = 1 M.L.T. 355 = 4 C.L.J. 421 (F.B); U.B.R. (1892—1896), Vol. II. 253; 1 N.L.R. 103; Cons., 15 A. 65 (68).]

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village, Lechura, in the district of Jhansi The plaintiffs had brought a previous suit against the defendants for the same purpose, and the plaint in that suit alleged that the sale in respect of which the suit was brought was illegal and void. the deed having been executed without consideration and for the purpose of defrauding the plaintiffs. The plaint was admitted and registered, and one of the issues recorded was :—" Are the plaintiffs barred from claiming pre-emption by their assertion that the deed is illegal ?" At the hearing of the suit, the Court of first instance (Assistant Commissioner of Jhansi) made an order rejecting the plaint on the ground that a right of pre-emption could not be claimed in respect of a sale impugned by the plaintiffs as illegal. In rejecting the plaint, the Court observed

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* First Appeal, No. 146 of 1888, from an order of G. E. Ward, Esq., Commissioner of Jhansi, dated the 4th August, 1888.

(1) 8 B. 200. (2) 7 C.L.R. 143.

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that the plaintiffs had "the remedy of instituting the suit afresh in proper form." No appeal was made by the plaintiffs from the order rejecting their plaint. They subsequently instituted the present suit.

The Court of first instance (Deputy Collector of Jhansi), after referring to the previous suit and to the order which terminated it, observed. "With all deference to the learned Judge, I think that a fresh suit cannot lie, on the general principle of *res judicata*. The plaintiffs were at perfect liberty to advance alternative claims, and if the Court found that the claim of pre-emption could not proceed in the face of the plaintiffs' allegations as to the deed being collusive, the case should have been thrown out for good." The Court accordingly dismissed the suit as barred by s. 13 of the Civil Procedure Code.

[554] The plaintiffs appealed to the Commissioner of Jhansi. who observed in his judgment :—"The question is whether this order [*i.e.*, the order in the previous suit rejecting the plaint] bars the institution of a suit for pre-emption in which the validity of the sale is not impugned. I hold that it does not. The sale-deed has not been proved to be invalid or illegal. The plaintiffs are now apparently content to accept it. I do not see why they should be barred from suing for pre-emption if they admit the validity of the deed. I reverse the order of the lower Court, and remand the suit for disposal on the merits.

The defendants appealed to the High Court from the order of remand. It was contended on their behalf that the order rejecting the plaint in the former suit must be treated, not as such rejection, but as a decree dismissing the suit, inasmuch as the Court was not competent to reject a plaint, under s. 54 of the Code of Civil Procedure, after the plaint had been registered.

Pandit *Sundar Lal* for the appellant.

Munshi *Ram Prasad* for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This is a suit for pre-emption. The first Court dismissed the suit on the single ground that it was barred under s. 13 of the Code of Civil Procedure by what had taken place in a previous pre-emption suit between the parties. The Commissioner of Jhansi held on appeal that there was no bar, and remanded the case under s. 562. From that order this appeal has been brought. The plaint in the previous pre-emption suit had, after the issues had been framed, been rejected on the ground that, on the plaint, the plaintiff had not shown any cause of action, that is, that having alleged the sale to be fraudulent, illegal, and void as against him, he could dot claim pre-emption. We are of opinion that the order of remand was properly made. It has been contended that s. 54 of the Code of Civil Procedure could only be applied before registration of the plaint, and that the order in the pre-emption suit of rejection of the plaint, having been made after registration, must be treated as an order of dismissal of the suit, and not as an order of rejection of the plaint. In support of this con-[555]tention, that s. 54 can only be applied prior to the registration of the plaint, Pandit *Sundar Lal* cited a judgment of the Madras High Court in the case of *Valiya Kesava Vadhyar* v. *Suppan Nair* (1) and the judgment of the Calcutta High Court in the case of *Hibibul Hossein* v. *Mahomed Reza* (2). With regard to the judgment it is to be observed that the learned Judges gave no reason for the conclusion at which they

(1) 2 M. 308. (2) 8 C. 192.

had arrived. It was contended that s. 54, being found in Chapter V which bears the heading "of the institution of suits," must be deemed to relate only to the procedure prior to registration. That this argument could not apply to all the sections included in Chapter V is obvious by a reference to s. 53, under which, on the grounds therein mentioned, the Court may reject a plaint at or before the first hearing. The first hearing must necessarily follow the registration. In s. 53 there is provided a limitation as to time. S. 54 provides no such limitation, and apparently s. 54 is applicable at any stage of the suit. Our brother Mahmood, at page 101 of the report of his judgment in the case of *Damodar Das* v. *Gokal Chand* (1), is reported to have said, "What I have said does not, of course, apply to rejection of plaints under s. 54, wherein no words importing a limitation of time occur." We think that our brother Mahmood took a proper view of s. 54. A similar view was taken of a somewhat corresponding section in the previous Code of Civil Procedure. The Madras High Court in the case of *Chetti Gaundan* v. *Sundaram Pillai* (2) decided that the Court had power to reject a plaint as barred by limitation after the plaint had been registered. The Calcutta High Court in the case of *Ram Gutty* v. *Goonomonee Dabee* (3) held that the Munsif in that case could reject and need not dismiss a plaint which was under-valued, after the evidence had been received. The Calcutta Court also in the case of *Musammat Edoo* v. *Shaikh Hefazut Hossein* (4) held that a plaint might be rejected even in the High Court on the ground of stamp after the suit had come up from the lower Court. It appears to us that we cannot look on s. 54 as being limited in **[556]** time by the mere fact that it is included in Chapter V or that it precedes in the Code the sections relating to rejection, fixing of issues and other sections of that kind. The section appears to us to be one which is capable of being and is intended to be applied at any stage of the suit. If it was intended to limit s. 54, we should have expected to have found in it some words creating limitation, when we find there are such words in s. 53, which immediately precedes it. This order rejecting the plaint was one within the meaning of s. 56; it therefore creates no bar to the present suit. Pandit *Sundar Lal* also raised the question of limitation, but as this subject has not been dealt with by either of the Courts below, he has not pressed that contention. That is one of the subjects which must be dealt with during the suit.

The order below is confirmed and the appeal is dismissed with costs.

Appeal dismissed.

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APPEL-LATE CIVIL.

12 A. 553 = 9 A.W.N. (1889) 185.

(1) 7 A. 79. (2) 2 M.H.C R. 51. (3) 11 W.R. 177. (4) 13 W.R 358.

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APPELLATE CIVIL
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12 A. 556=10 A.W.N. (1890) 130

12 A. 556=10 A.W.N. (1890) 130.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

WAHID ALAM (*Defendant*) v. SAFAT ALAM AND ANOTHER (*Plaintiffs*).*
[8th February, 1890.]

Practice—Suit for exclusive possession of property—Court competent in such suit to decree join possession.

Where the plaintiff claimed exclusive possession of immoveable property to which the defendant also claimed to be exclusively entitled.—*held* that the Court was competent, upon the finding that the property belonged to the parties jointly, to give the plaintiff a decree for joint possession. *Wali-ullah Khan* v. *Muhammad Israr-ullah Khan* (1) distinguished.

[R., 20 B. 569 (570); 8 Bom. L R. 99 (106.).]

THE facts of this case were as follows. The plaintiff alleged in his plaint that between his house and that of the defendant there was a courtyard which belonged exclusively to the plaintiff; that there was a door in his house opening upon the courtyard; and that the defendant, by closing this door, had deprived the plaintiff of the use of the courtyard. The object of the suit was to recover possession of the courtyard, to have the door opened, and to restrain the [557] defendant from interfering with the plaintiff's use of the door and the courtyard.

The defendant resisted the suit upon the allegation that the courtyard belonged exclusively to him and not to the plaintiff, and that the door had been closed in pursuance of an arbitration award under which the property of the parties had been partitioned.

The Court of first instance (Munsif of Ghazipur) found that the courtyard was not the exclusive property of either of the parties, and that the door had for more than twenty years been used by the plaintiff, and its closing was not justified by the terms of the award. Its order was, "the plaintiff's claim is accordingly decreed for the recovery of joint possession of the courtyard, and also to have the door in dispute re-opened."

The defendant appealed to the Subordinate Judge of Ghazipur, who dismissed the appeal, agreeing with the findings of the Court of first instance. In his judgment the Subordinate Judge observed:—"It is now argued that the plaintiffs sued for their exclusive possession of the courtyard, and the defendant declared the same to be in his exclusive possession, and therefore the lower Court was wrong to pass a decree for joint possession. This argument to my mind has no force. If the courtyard was proved to be the joint property of the parties, there was nothing to bar the passing of a decree for joint possession."

The defendant appealed to the High Court, his principal ground of appeal being that "the lower Courts have erred in law in passing a decree in favour of the respondent contrary to the relief sought for in the plaint."

Mr. *Howard* and Mr. *Amir-uddin*, for the appellant.

Pandit *Bishambhar Nath*, Pandit *Sundar Lal*, and Munshi *Ram Prasad*, for the respondents.

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* Second Appeal No. 486 of 1888, from a decree of Babu Lalta Prasad, Subordinate Judge of Ghazipur dated the 20th February, 1888, confiming a decree of Babu Bepin Behari Mukerjee, Munsif of Ghazipur, dated the 9th September, 1887.

(1) 10 A. 627.

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12 A. 556 = 10 A.W.N. (1890) 130.

JUDGMENT.

BRODHURST and TYRRELL, JJ.—The point in controversy in this second appeal is whether the Court below has rightly decided that the respondents are entitled to the use of a certain door which the appellant says should be shut up, and that the compound upon [558] which the door opens is the common property of the parties. The respondents came into Court alleging that the compound is their exclusive property; the defendant replied that it was his exclusive property. The Court below, after local inspection has found, for reasons which seem to us to be sound, that both parties have exaggerated their interest in the courtyard, which in fact remains now as it has always been, common to the parties. The Court below also has given reasons which we see no reason for discrediting for holding that the door now in controversy is not the door which was closed in the compromise which took place between the parties a great many years ago. These are findings of fact. But the learned Counsel for the appellant urges that in respect of the decision that the courtyard is common, the Court below has erred in law, inasmuch as it should not have granted to the respondents a relief other than that claimed by them and based on grounds not avowed by them. The learned Counsel relied, amongst other cases, on a ruling at page 627 of I. L. R. 10 All.

That case seems essentially distinguishable from the present, in which the parties have on both sides overstated their interest in the courtyard but have not made allegations inconsistent with the use of the courtyard which the Court has awarded to them. The appeal fails and is dismissed with costs. *Appeal dismissed.*

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12 A. 558 = 10 A.W.N. (1890) 112.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BAISNI (*Plaintiff*) *v.* RUP SINGH (*Defendant*).*
[20th February, 1890.]

Hindu Law—Hindu widow—Maintenance.

In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and the status of the widow, and the expenses involved by the religious and other duties which she has to discharge. *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick* (1) and *Narhar Singh* v. *Dirgnath Kuar* (2) referred to.

[559] *Per* Mahmood, J.—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance." The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction, and cannot be enforced by Courts of justice. The Courts should bear in mind that Hindu widows are by ancient custom debarred from re-marriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality.

[R., 24 B. 386 (392); 22 C. 410 (418); 1 N.L.R. 33 (38.)]

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* First Appeal, No. 125 of 1888, from a decree of Maulvi, Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 23rd December, 1885.

(1) 5 I. A. 55. (2) 2 A. 407.

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THE facts of this case are stated in the judgment of Straight, J.

Pandit *Bishambhar Nath* for the appellant.

Badu *Sital Prasad Chatterji* and Munshi *Sukhnandan Lal*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit for maintenance brought by the plaintiff-appellant before us against the defendant-respondent, her uncle by marriage. The defendant is the present Raja of Bhara, which is an impartible Raj, and he succeeded in obtaining possession of that Raj under a decree of their Lordships of the Privy Council in the year 1884. The deceased Raja Mahendra Singh was the nephew of the defendant, and the plaintiff is his childless widow.

The parties are Chhattris and of high caste, and for the purpose of determining the question, and the only question before us in appeal, we must take it that the income of the defendant derived from the property to which he has succeeded, is approximately Rs. 22,000 per annum. It may be more at times, or it may be less.

The plaintiff in her plaint asserted that from the date when she was removed from possession on the 2nd August 1884, down to the institution of the present suit, which was on the 18th August, 1887, the defendant had not paid any maintenance to her, and she asked for a decree declaring that she was entitled to Rs. 6,000 per annum, as maintenance allowance, that the unpaid maintenance of Rs, 18,000 from November 1885, to November 1887, be allowed her, and that she be put in possession of a house in mauza Amana, pargana Auraiya, zila Etawah, as a place of residence. The defendant pleaded a number of pleas, among others **[560]** that the plaintiff had no claim to maintenance, that any claim she had to maintenance was against her mother-in-law and not against him, and that the amount of Rs. 500 monthly claimed by her was an absurd sum, as also other matters to which it is not necessary for me to refer.

The learned Subordinate Judge who tried this case as a Court of first instance, came to the conclusion that the plaintiff was entitled to maintenance, and he declared that maintenance to be at the rate of Rs. 375 per quarter, the same to be a charge on the immoveable property of the defendant, and he further gave her a decree for Rs. 4,500 representing the arrears of maintenance due upon this calculation, for the three years preceding the date of the suit.

From this decree the plaintiff has appealed. There is no cross-appeal by the defendant. The plaintiff's ground of complaint is that the allowance made by the lower Court is inadequate and insufficient, having regard to all the circumstances of the case, and that is the sole and single point to which the learned pleader on behalf of the appellant has addressed himself, and in respect of which we have heard the reply on the part of the respondent.

The only question therefore for us to determine is, is the amount fixed by the Subordinate Judge, *viz.*, Rs. 375 per quarter or Rs. 125 per mensem, a sufficient allowance for the plaintiff ?

In the case of *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick* (1), their Lordships of the Privy Council have expressed themselves in the following way :—" Another question arises, however, in the suit, namely, the maintenance to which the defendant is entitled as a widow, upon the assumption that the plaintiff was the adopted son of her husband,

(1) 5 I. A. 55.

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Their Lordships would be extremley reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court, [561] for the Court to refer to the Master the question of maintenance and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them upon the general case. An ordinary form of reference appears to have been this : Refer it to the Master to settle the amount, regard being had to the value of the estate. Their Lordships think that another element to be considered is the position and status of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate ; and the question for the Master, and ultimately for the Court, to consider, would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy."

In the case of *Narhar Singh* v. *Dirgnath* (1), I expressed myself much to the same effect. I there said, " No precedents were quoted to us fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case."

I may remark in passing that there, as here, the widow was a childless widow, but I said that in my opinion the circumstance that she was a childless widow in no degree altered her right to maintenance, or differentiated the principles upon which maintenance should be calculated, and it seems to me that is the correct view.

The points therefore for consideration are, looking to the value of the defendant's estate which may be gauged by the annual income derivable therefrom, the position and status of the late Raja Mahendra Singh, the husband of the plaintiff, and to her position and status, what is a reasonable sum to allow for her maintenance ? There is evidence upon the record to show that she has many [562] expenses which, as the widow of the last Raja, she must incur in order to maintain her position in a suitable and proper manner. She also has certain religious and other ceremonial duties to discharge which involve expenditure, and I think I shall be making a low estimate if I calculate that expenditure at Rs. 250 per mensem. That will make in all a sum of Rs. 3,000 per annum, which, with the Rs. 1,500 that has been already given in the former decree to Musammat Chandelji, will render the defendant as the Raja in the present occupation of the gaddi subject to the payment of an annual sum of Rs. 4,500 to these two ladies, which certainly does not seem to be an unreasonable or excessive amount. For these reasons therefore I would decree this appeal in part, and modify the decree of the Subordinate Judge to this extent; that the plaintiff will be declared entitled to a maintenance allowance of Rs. 250 per mensem, such maintenance allowance to be a charge upon the Raj estate. I would further order that the plaintiff do

(1) 2 A. 407.

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recover from the defendant the sum of Rs. 9,000 representing the arrears for the three years antecedent to the date of the institution of the suit. I give the plaintiff her costs of the litigation in both Courts in proportion to her success.

MAHMOOD, J.—I am also of the same opinon, and agree entirely in all that has fallen from my learned brother as to the legal aspect of the duties which devolve upon us as Judges to discharge functions analogous to those of assessing damages as in cases of tort. In this case my brother has, relying upon the Privy Council ruling and also upon an earlier judgment of his own to which he has referred, explained how the main element for the purpose of deciding the exact *quantum* of maintenance allowance should be determined. Mr. *Chatterji* who has appeared on behalf of the respondent could not resist the argument which was addressed on behalf of the appellant otherwise than by contending that because under the Hindu law, the life of a widow lady, no matter of what rank or position she may be, is to be one of a peculiarly ascetic character, therefore a widow under conditions such as those of the plaintiff should not be allowed more than what would be called a starving allowance, and upon this ground the learned pleader suggested that we should [563] hold that Rs. 20 or 35 per mensem would be adequate to enable her to do what is called in English keeping the body and soul together. In support of this view the learned pleader has referred us to certain observations in the case of *Raja Pirthee Singh* v. *Ranee Raj Koor* (1) and the Calcutta ruling in *Hurry Mohun Roy* v. *Sreemutty Nyantara* (2) and also to a ruling of the Privy Council in the same case of *Raja Pirthee Singh* v. *Ranee Raj Kooer* (3). Without entering into any minute discussion or consideration of the effect of these rulings, I have no doubt that whatever austerities or stringencies or ascetic rules may be provided by the Hindu law for widows, they are not legal obligations but simply moral injunctions, such as a Court of justice cannot enforce, and are not required by the mandate under which we administer justice. What we have to consider is the condition and rank of the deceased husband, which would give an indicationas to the social cirumstances and status which his widow should possess and uphold by means of the pecuniary maintenance to be allowed to her, with due regard to the extent and value of the estate from which the maintenance is to be derived.

In this case if this lady, Rani Baisniji, the plaintiff-appellant, had only been fortunate enough not to become a widow, and if her husband had been alive, she would be the owner of what my brother has described as an income of Rs. 22,000 per annum.

There is much in what my learned brother has pointed out to show that even now there are expenses devolving upon her which are represented here in the evidence of Pandit Nirajan Nath to be at least Rs. 400 or 500 per mensem.

In considering this question of the assessment of maintenance we should not allow ourselves to be influenced either by sentimental considerations on the one hand or by any rigid notion of our own on the other, but to proceed entirely upon a fair and equitable estimate of the ordinary requirements of a lady in the position of the present plaintiff. What my brother has awarded is in my opinion by no means a sum higher than would be required by this [564] lady to maintain herself in

(1) N.W.P.H.C.R. 1870, p. 170. (2) 25 W.R. 474. (3) 12 B.L.R. 238 (P.C.).

the rank in life in which she was born and in which she is entitled to live as the widow of her husband.

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Another observation which I wish to make is that, in dealing out a mediæval system of jurisprudence to a population such as that to which the parties to the present suit belong, we sitting here, as Her Majesty's Judges, cannot forego the consideration that, unlike other countries, the widow in this case has no chance of a respectable marriage under the ancient custom which undoubtedly by reason of her caste governs her. I made observations very similar to these in the case of *Janki* v. *Nand Ram* (1) and I repeat similar observations now, because if this lady the plaintiff-appellant is to be doomed, as she must according to the custom in her caste be doomed, to eternal widowhood, a Court of justice should bear this in mind in fixing the amount of maintenance which should be sufficient to make her life as far as possible one of comfort, and not such as might drive her to circumstances throwing blame upon her of immorality.

I have added these observations in order to show that I sitting here as a native of India look upon the assessment made by my learned brother as one which is by no means such as the defendant-respondent should complain of.

Appeal allowed.

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12 A. 564 = 10 A.W.N. (1890) 185.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

TAKADDUS FATIMA AND ANOTHER (*Plaintiffs*) v. BALDEO DAS AND OTHERS (*Defendants*)* [26th February, 1890.]

Execution of decree—Transmission of decree to Collector for execution—Civil Procedure Code, s. 320—Power of Local Government to make rules for regulating procedure of Collector—Rule providing for appeal from Collector to Commissioner not ultra vires—*Rule No. 17, cl. XIX of 12th November* 1883—*Act VII of* 1888 *(Civil Procedure Code Amendment Act)*, s. 30—*Act XIV of* 1873 *(N.W.P. Land Revenue Act)*, s. 243.

The authority conferred upon the Local Government by s. 320 of the Civil Procedure Code prior to the amendment of that section by s. 30 of the Civil Proce-[565]dure Code Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decrees transmitted to him, included power to make a rule providing for an appeal from the Collector's orders.

Clause XIX of Rule 17 which was added to the Rules (No. 671 of 30th August, 1880) published in the *N.W.P. and Oudh Gazette* of the 4th September, 1880, by a notification in the Gazette of the 17th November, 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division, was therefore not *ultra vires* of the Local Government. *Madho Prasad* v *Honsa Kuar* (2) referred to.

S. 243 of the N.W.P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector.

THE principal question raised in this case was whether clause XIX of Rule No. 17 of the rules made by the Local Government under s. 320 of the Civil Procedure Code on the 30th August, 1880, which were published in the *N.W.P.and Oudh Gazette* of the 17th November, 1883,

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* Second Appeal, No. 558 of 1888, from a decree of A. Sells, Esq., District Judge of Meerut, dated the 11th January, 1888, confirming a decree of Munshi Ahmad Ali, Munsif of Bulandshahr, dated the 16th September, 1887.

(1) 11 A. 194.

(2) 5 A. 314.

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12 A. 564=
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was a valid rule under s. 320, or was *ultra vires* of the Local Government. That rule is as follows :—

"All orders under clause XIII passed by a Collector shall be subject to appeal to the Commissioner of the Division, whose order shall be final."

The facts of the case were as follows. On the 20th August, 1885, the immoveable property of certain judgment-debtors was sold in execution of the decree, and on the 21st August, 1885, the auction-purchasers sold the same property to the plaintiffs in this suit, who obtained possession. On the 9th September, 1885, the decree-holders applied for cancelment of the sale of the 20th August, on the ground of certain irregularities, but their objections were overruled and the sale confirmed by the Deputy Collector exercising the powers of a Collector under the rules made by the Local Government under s. 320 of the Civil Procedure Code.

The decree-holders then appealed to the Collector, who set aside the Deputy Collector's order confirming the sale, and ordered the property to be re-sold, and it was re-sold accordingly on the 20th June, 1886, the decree-holders being the purchasers.

[566] The plaintiffs then appealed from the order of the Collector to the Commissioner of the Division, who rejected the appeal, observing, however—"At the same time I would draw the attention of the Collector to the fact that if the Deputy Collector has been invested with the powers of a Collector for conducting these sales, then the sole appeal lies to the Commissioner." The plaintiffs applied to the Board of Revenue for revision of the Commisioner's order, but the application was rejected.

They then instituted the present suit against the decree-holders, purchasers under the sale of the 20th June 1886, and prayed for a declaration that they might be declared entitled to the property as purchasers under the sale of the 21st August, 1885, and that that sale was validly confirmed, and that the orders of the Collector, the Commissioner and the Board of Revenue were null and void.

The Court of first instance (Munsif of Bulandshahr) dismissed the suit. In the course of his judgment the Munsif observed—" Assuming that the Deputy Collector had been invested with the powers of a Collector, still the jurisdiction of the Commissioner, who eventually upheld the Collector's order setting aside the sale, cannot be questioned. Hence it cannot be correctly contended that the order setting aside the sale was passed by a Court having no jurisdiction. The irregularity, if any, *in limine*, was subsequently rectified on the Commissioner setting aside the sale. It is to be observed that it was the plaintiffs themselves who appealed to the Commissioner against the Collector's order, and then not content went to the Board of Revenue and applied for revision of the Commissioner's order. It has been held that the principle is that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. Here the Commissioner has jurisdiction, but when the plaintiffs themselves invited him to exercise it in a wrong manner, by filing an appeal against the Collector's order, who is alleged to have no jurisdiction, they cannot now question the [567] legality of the Commissioner's order. The irregularity was therefore covered by the assent of the plaintiffs. It appears that the plaintiffs did not raise the plea of the Collector's want of jurisdiction before the Commissioner. It was the Commissioner himself who remarked about it, but

he did not consider the irregularity so material as sufficient to vitiate the Collector's proceedings. For the above reason I dismiss the suit with costs."

The plaintiffs appealed to the District Judge of Meerut, who dismissed the appeal, holding that "under the circumstances the Commissioner's intention must be taken as simply to make the Collector's order his own, to pass an order in uniform terms with those of the Collector's order, as if the appeal had come to him direct from the Deputy Collector, and I am not prepared to say that he could not do this.... The Commissioner was the right appellate Court, and it appears to me that in such a case the appellate Court would have full power to decide the case upon its merits without putting the parties to the costs and delay of *de novo* proceedings, and were this Court also to declare the Commissioner's order invalid the result would simply be that the parties would be put to still further delay and expence, and, I may add, without the slightest chance of any different result in the end. There can be no question that the Commissioner was fully justified in setting aside the sale when it was shown by the record that incumbrances were notified to the extent of over Rs. 35,000, while they really existed only to the extent of Rs. 8,000."

The plaintiffs appealed to the High Court. One of the grounds set forth in their memorandum of appeal was that "the Commissioner had no authority to hear the appeal from the Collector's order."

Mr. *Amir-ud-din*, for the appellants.

Munshi *Juala Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.—The only question involved in this appeal is as to whether the Local Government had on the 12th [568] November, 1883, power to pass a rule No. 17, clause XIX, which made the order of a Collector confirming a sale, appealable to the Commissioner of the Division. It was indeed also contended that such an order was appealable to the Commissioner under s. 243 of Act XIX of 1873, but that contention is, in our opinion, unsound. The preamble and the whole scope of that Act show that we could not apply s. 243 to a case like this. This was not a case falling within clauses 2, 3 or 4 of s. 323 of the Code of Civil Procedure. Here the whole property had been sold. So far as is necessary, the facts of this case are that, prior to the passing of Act VII of 1888, and subsequent to the 17th November, 1883, when the rule referred to was published in the Gazette of these Provinces, a Deputy Collector, exercing the powers of a Collector, made an order confirming a sale in a case in which the execution of the decree had been transferred to the Collector under s. 320 of the Code of Civil Procedure. Now the simple point we have to decide is, did an appeal lie from that order? As s. 243 of Act XIX of 1873 does not apply, that point has to be determined on the answer to be given to the first question we have mentioned, namely, was the rule which appeared in the Gazette of the 17th November, 1883, *ultra vires* or not? Under s. 320 of the Code of Civil Procedure, the Local Government was given powers to prescribe rules for, amongst other things, regulating the procedure of the Collector and his subordinates in executing decrees transmitted under s. 320. Now the wording of that section is not very clear, and whether the amendment of the section which was effected by Act VII of 1888, was intended merely to make clearer the intention of the section, or to give to the Local

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Government a power which it did not possess under s. 320, as it stood prior to Act VII of 1888, does not appear. This Court on the 24th February, 1883, in the case of *Madho Prasad* v. *Hansa Kuar* (1) decided that there was no appeal to this Court from the order of a Collector confirming a sale. The judgment in that case indicated generally that the Collector was subject to the chief controlling revenue authority in the exercise of his duties in the matter of Civil Court decrees transferred to him for execution. It is true that [569] that case is not an authority on the question before us, but we cannot conceive that it was the intention of the Legislature that the Local Government should provide no means of appeal from an order of a Collector confirming a sale. The Legislature itself had not Provided a means of appeal in such a case as the present, unless it did so by deputing its powers in that respect to the Local Government under s. 320 of the Code of Civil Procedure. Now, as we have pointed out, the Local Government under that section was authorized to prescribe rules for regulating the procedure of the Collector. We do not think it would be unduly straining language to hold that rules regulating the procedure of the Collector would include rules providing for an appeal from his orders. The point is not by any means a clear one, but we feel that, if possible, we ought to hold that the rule which was published in the Gazette of the 17th November, 1883, was within the powers of the Local Government. We consequently dismiss this appeal with costs.

Appeal dismissed.

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12 A. 569=10 A.W.N. (1890) 79.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell.

MITHU LAL AND OTHERS (*Decree-holders*) v. KHAIRATI LAL *Judgment-debtor.** [4th March, 1890.]

Execution of decree—Decree payable by instalments—Limitation—Waiver by decree-holder—Payment out of Court—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (6) *—Civil Procedure Code*, *s.* 258.

An application for execution of a decree payable by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards, and that the application was in time, having been made within three years from the date when the second instalment was due.

Held, that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 258 of the Civil Procedure Code, be recognized. *Sham Lal* v. *Kanahia Lal* (2) and *Zahur Husain Bakhtawar* (3) not followed.

[Overruled., 26 A. 36=A.W.N. (1903) 179 ; Diss., 21 C. 542 ; Not F., 21 B. 122 (125).]

[570] THE facts of this case are sufficiently stated in the judgment of TYRRELL, J.

Babu *Durga Charan Banerji* and Munshi *Ram Prasad*, for the appellants.

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* Second Appeal No. 43 of 1890, from a decree of A. M. Markham, Esq., District Judge of Aligarh, dated the 23rd September, 1889, reversing a decree of Babu Sheo Sahai, Munsif of Kasganj, dated the 29th January, 1889.

(1) 5 A. 314. (2) 4 A. 316. (3) 7 A. 317.

Babu *Dwarka Nath Banerji*, for the respondent.

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APPELLATE CIVIL.

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JUDGMENT.

TYRRELL, J.—In this second appeal the appellants are the decree-holders, the respondent being the judgment-debtor. The appellants got their decree on the 19th July, 1884. It provided that the debt should be paid in instalments of Rs. 100 payable on *nisf Aghan* 1941, a similar sum to be paid on *nisf Aghan* 1942, and the last instalment of Rs. 75 being payable in Sambat 1945. *Nisf Aghan* 1941 is equivalent to the 17th November, 1884. The appellants are met in their attempt to execute the decree by a plea that nothing has been paid under the decree and therefore the execution is barred. The decree-holders on the contrary contend that the judgment-debtor paid Rs. 100 on the 19th November, 1884, that is to say, two days after the decretal date, and that they, having accepted the payment, had waived the unpunctuality of the judgment-debtor, and that the present application is within time, being made less than three years from the date of the second instalment of November, 1885. Now the lower appellate Court has held that the plea of waiver cannot be entertained under art. 179, sch. ii of the Limitation Act. Conflicting rulings of this Court upon the point have been cited on both sides to-day, and I would on that account, although I have myself no doubt upon the question, have referred the hearing of the appeal to a Bench of two Judges if it had not been for one circumstance, that is, that in my judgment it is not competent to the decree-holders to raise the plea of waiver at all, inasmuch as the payment of 19th November, 1884, alleged by them, is not a payment which can be recognized by any Civil Court under s. 258 of the Civil Procedure Code. Mr. *Durga Charan* for the appellants relied upon two judgments of this Court, one being *ShamLal* v. *KanahiaLal*(1) in which it was held that the decree-holder is entitled to give proof of payment made out of [571] Court and not certified to the Court in order to defeat the judgment-debtor's plea of limitation. That judgment was given in conformity with the Full Bench ruling of the Calcutta Court in *Fakir Chand Bose* v. *Madun Mohun Ghose* (2) and no doubt under the terms of s. 258 of the Civil Procedure Code as it stood before the Statute of 1882 was passed, the ruling was passed in conformity with the terms of the law. But a very marked change was introduced in the year 1882 in s. 258 of the Civil Procedure Code, and under the section as it now stands I have no doubt whatever that I am precluded from taking any recognition whatsoever of the alleged payment of the 19th November, 1884, and if I cannot recognize the payment I must hold that there was no waiver whatever on the appellants' part, and that the execution of their decree is barred. But Mr. *Durga Charan* relied upon another judgment of this Court made under the Civil Procedure Code of 1882 in *Zahur Husain* v. *Bakhtawar* (3). That judgment is in Mr. *Durga Charan's* favour, but it was passed with exclusive reference to the ruling in *Sham Lal* v. *Kanahia Lal* (1) which I have referred to above, and without reference to the circumstance that the law had since entirely changed upon the point since the last-mentioned ruling had been made. I cannot follow this authority, and I must hold that there is no evidence of any waiver on the part of the decree-holders appellants, and that the Court below has rightly held that the execution of their decree is barred. The appeal is dismissed with costs.

Appeal dismissed.

(1) 4 A. 316. (2) 4 B.L.R. 130. (3) 7 A. 317.

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12 A. 571 = 10 A.W.N. (1890) 197.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

GANDHARAP SINGH (*Decree-holder*) *v.* SHEODARSHAN SINGH (*Judgment-debtor*).* [5th May, 1890.]

Execution of decree—Transfer of decree for execution—Agreement for satisfaction of judgment-debt by instalments—Civil Procedure Code, ss. 210, 230, 257-*A—Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 179.

A simple money-decree was passed in 1871, and was transferred to another Court for execution, and in June 1882 an application was made for execution; and, [572] shortly afterwards, the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1888.

Held, by EDGE, C.J., that the Court to which the decree was transferred had no power in 1882, to sanction the agreement under s. 257-A of the Civil Procedure Code; that if the order in June 1885, of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under s. 210 altering the decree; that if any decree in the case were capable of execution it was the decree of 1871, which had never been altered by a Court; and that inasmuch as a previous application for execution had been made in June 1882, that decree was dead, as well under s. 230 of the Code as under art. 179, sch. ii of the Limitation Act (XV of 1877).

Held by STRAIGHT, J., that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under s. 230 of the Code.

Per EDGE, C.J.—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257-A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by or the Court which passed the decree.

An agreement sanctioned under s. 257-A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under s. 210, though an order under s. 210 would operate as a sanction under s. 257-A.

The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as, *e.g.*, by an order under s. 210.

[F., 26 P.R. 1894; R., 15 A.W.N. 149; D., 96 P.R. 1900.]

THIS was an application for execution of a decree. The original decree was passed on the 5th June, 1871 by a Court at Mainpuri, and was transferred for execution to the Court of the Deputy Commissioner of Jalaun. On the 9th June, 1882, the decree being then alive, the decree-holder applied to the Court of the Deputy Commissioner for execution of the decree by payment to him of certain money which had been paid into the treasury; and upon the same date the Court ordered the payment prayed for to be made, and also caused notice to be issued to the judgment-debtor to show cause why certain other applications connected with execution of the decree should not be granted. On the 12th June, 1882, the Court at [573] Jalaun gave its sanction to an agreement between the parties that the decree should be paid by instalments, *viz.*, Rs. 3,000 on the

* Appeal No. 11 of 1890, under s. 10 Letters Patent.

1st July, 1882, Rs. 3,000 on the 1st January, 1883, and Rs. 2,411-10-8 on the 1st July, 1883. The judgment-debtor paid into Court only Rs. 3,000 on the 1st August, 1882, and Rs. 2,500 in February, 1885. A further application was made for execution on the 11th June, 1885, when the matter again came before the Court at Mainpuri, to which application was made by the decree-holder for a fresh certificate and for a new transfer of the decree to the Court of the Deputy Commissioner at Jalaun for execution. The application for transfer recited the agreement arrived at by the parties and sanctioned by the Court at Jalaun in June 1882, and also recited the payments which had been made by the judgment-debtor. The Court at Mainpuri granted the certificate as prayed, and the decree-holder applied for execution to the Court at Jalaun, but the application was dismissed for want of prosecution. On the 26th April, 1888 the decree-holder made the present application in the Court of the Deputy Commissioner of Jalaun to execute the decree for the instalments which remained unpaid.

The application was dismissed by the Court of first instance as barred by limitation, and, on appeal by the decree-holder, the first Court's order was, on other grounds, confirmed by the Commissioner of Jhansi. The decree-holder made a second appeal to the High Court.

Mr. *G. T. Spankie* and Lala *Jokhu Lal*, for the appellant.

The Hon. Pandit *Ajudhia Nath*, Pandit *Sundar Lal* and Munshi *Sukhnandan Lal*, for the respondent.

TYRRELL, J.—Two objections were taken in the Court below to the execution of the appellant's decree. One was that the unfortunate decree-holder, who appears to have lost a large sum of money by reason of the indulgence he showed to his debtor, applied to the Court executing the decree for execution not of the decree but of a compromise. The Court of first instance very properly held that it was not a lawful application for execution of decree, but the Court of appeal for insufficient grounds differed on [574] the point, and its view is supported here in second appeal upon the theory that the compromise had really been an amended decree in the sense of s. 210 of the Civil Procedure Code. I have read the decree and I have read the compromise, and the order of the Court thereupon, and it is perfectly obvious that the decree was never altered in the sense of s. 210. It is the common case of a compromise made between the decree-holder and his judgment-debtor being reported to the Court, and nothing more. But the Court below has defeated the decree-holder on another ground, and I think a sound one. The decree-holder relies for protection against limitation upon the application which had been made on 11th June, 1885. The application was not made to the Court executing the decree or to the Court which could execute the decree at the time. The facts are that the decree had originally been made by the Mainpuri Court. It was transferred under s. 223 of the Civil Procedure Code to Jalaun for execution, and it has remained in that Court until the present time. The decree-holder, however, was ill-advised enough to apply on the 11th June, 1885 to the Mainpuri Court for a step in aid of execution. The decree-holder's Counsel in the Court below admitted that it was a blunder, and so it obviously was. In second appeal it is contended that it was not so, but that it was the duty of the Jalaun Court when the first instalment failed, without being moved by the decree-holder or any one else, to enter into correspondence with the Mainpuri Court, which would lead to the Mainpuri Court re-calling the record. I know of no authority either judicial or by way of practice or founded

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on common sense in support of such a contention. The Court below was right, and the appeal is dismissed with costs.

The decree-holder appealed under s. 10 of the Letters Patent from the judgment of Tyrrell, J.

The parties were represented as before.

JUDGMENT.

EDGE, C. J.—The decree-holder, appellant here, obtained a decree on the 5th June, 1871 in the Court at Mainpuri. On the 9th June, 1882 the appellant applied to the Court at Jalaun, to which the decree had been transferred, for execution of the decree, and to have [575] in execution of it some money, which had been deposited in the treasury, paid out to him. On the same day that Court ordered the money which was in the treasury to be paid out to the decree-holder, and also issued a notice to the judgment-debtor to show cause why other applications in connection with the execution of the decree should not be granted. Now in my opinion, on the 9th June, 1882, the judgment-debtor made an application to execute the decree within the meaning of s. 230 of the present Code of Civil Procedure under that section, and that application was granted. On that short ground I am of opinion that the decree was time-barred, when the decree-holder made his application of the 26th April, 1888, out of which this appeal arose, and on that ground I would dismiss this appeal. It has, however, been contended on behalf of the decree-holder that the decree which he was entitled to executewas not the decree of 1871, but was that decree as altered on 12thJune, 1882. We must see what it was that was done. After the decree of 1881 had been made, the parties agreed that the decretal money should be payable by instalments of amounts at certain fixed rates, and that, on default of payment of the instalments, the decree-holder should be entitled to execute the decree for the amount remaining unpaid, and for interest on the amounts specified. The Court at Jalaun on the 12th of June, 1882, if it had power to do so, did sanction that agreement within the meaning of s. 257-A of the Code of Civil Procedure. The Court at Jalaun, however, was not the Court which could sanction any agreement under that section in this case. In this case the Court at Jalaun was merely the Court executing the decree, and the Court which had power to sanction was the Court at Mainpuri, and not the Court at Jalaun. However, the matter having again come before the Court at Mainpuri in June 1885, and two instalments having in the interval been paid. the decree-holder in June 1885 applied to the Court at Mainpuri to transfer the decree again to the Court at Jalaun for execution, and in the application for transfer recited the agreement as to the satisfaction of the decree by instalments, and further recited that two of those instalments which were mentioned had been paid. The Court at Mainpuri granted the certificate of transfer which was [576] asked for, and on these facts it is contended, not only that the Court at Mainpuri sanctioned under s. 257-A the agreement as to instalments, but actually altered the decree of 1871 into a decree in accordance with that agreement. Now at that time the period within which the instalments were to be paid had expired, the decree was more than 12 years old, and it was further a decree in respect of which an application for execution had been made under s. 230 of the present Code, and granted. It was also a decree in respect of which no application for the execution of the decree or to take any step-in-aid of execution had been made within three

years of June 1885. Mr. *Spankie* on behalf of the decree-holder has cited several authorities of this Court, and has also contended on them, that what took place in June 1885 was a sanction under s. 257-A of the Code, and that execution might go in accordance with the terms which had been sanctioned. The cases which he relied on were :—*Sita Ram* v. *Dasrath Das* (1), *Sham Karan* v. *Piari* (2), *Champat Rai* v. *Pitamber Das* (3), *Makund Ram* v. *Makund Ram* (4), *Paraga Kuar* v. *Bhagwan Din* (5), *Ramadhar* v. *Ramdayal* (6), and *Muhammad Sulaiman* v. *Jhukki Lal* (7). There was another case to which Mr. Spankie's attention was drawn by my brother Straight, *Debi Rai* v. *Gokal Prasad* (8), and Mr. *Spankie* with the discretion of an able Counsel declined to pay any attention to that case, and contended that that case was at variance with the other cases he had cited. Now I paid very careful attention to the argument, as I always do to any argument of Mr. *Spankie* and to that argument as commented on by Pandit *Ajudhia Nath*, and I failed to see any conflict on any point material to this case between the decisions in any of the cases on which Mr. *Spankie* relied and that to which I have referred, when those decisions and the facts on which those cases were decided are carefully considered. My opinion is that none of those cases establish Mr. *Spankie's* proposition that an agreement sanctioned under s. 257-A of the Code can be treated without anything more than a decree of the [577] Court. A sanction under s. 257-A does not operate as an order under s. 210, although, undoudtedly, an order under s. 210 would operate as a sanction under s. 257-A. Now I would have very great difficulty in satisfying myself that in making the order for the certificate of transfer the Court at Mainpuri in June 1885 was sanctioning the agreement as to instalments. Whether it did sanction it or not, I am quite satisfied that the decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as *e.g.*, by an order under s. 210, and in this case there was in fact and in law no order under s. 210, and, so far as I can see, no intention to make an order under that section ; indeed no such order was even applied for. I have come therefore to this conclusion on the whole case, that if any decree was capable of execution in this case at all, it was the decree of 1871. That decree never has been altered by a Court, and it is a dead decree, as well under s. 230 of the Code of Civil Procedure as under art. 179 of the 2nd schedule of the Limitation Act. I express no opinion as to whether the agreement was within s. 257-A. I would dismiss appeal this with costs.

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STRAIGHT, J.—In my opinion the order of the Mainpuri Court of the 11th June, 1885, granting the application of the decree-holder was not, an order sanctioning the agreement of the 12th June, 1882. Consequently, I am of opinion that any alteration that could, under the law, have been introduced into the decree of the 5th June, 1871, by such an agreement as that upon which the decree-holder relies, was in fact never imported into the decree, and that it remained a decree for a specific sum of money executable in the ordinary way that such a decree should be executed. I think that the language of s. 257-A, especially the last paragraph, prohibits the notion that such an agreement as was said to have been entered into here between the decree-holder and the judgment-debtor can be sanctioned three years after the date when it is said to have commenced to have effect, and when money has been paid under it and a default

(1) 5 A. 492. (2) 5. A. 596. (3) 6 A. 16. (4) 6 A. 228.
(5) 8 A. 301. (6) 8 A. 536. (7) 11 A. 228. (8) 3 A. 585.

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is said to have taken place. If that be a correct view of the order of the 11th June, 1885 the decree of the 5th June, 1871 stands [578] untouched and unaltered. An application to execute it has been made since Act XIV of 1882 came into operation, and has been granted. Therefore that decree is now dead by the operation of s. 230 of the Code of Civil Procedure. I agree in dismissing the appeal with costs.

Appeal dismissed.

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12 A. 578 = 10 A.W.N. (1890) 183.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

RAM LAL AND OTHERS (*Defendants*) *v.* CHHAB NATH (*Plaintiff*).*
[7th May, 1890.]

Res judicata—*Civil Procedure Code, s.* 13—*Cross-appeals—Finding in appeal first heard barring trial of same issue in appeal subsequently heard.*

The plaintiff and defendant in a suit each appealed separately, and the defendant's appeal first came on for hearing and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court.

Held that although s. 13 of the Civil Procedure Code did not apply, still the principle of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. *Ram Kirpal v. Rup Kuari* (1), referred to.

[Appr., and F., 33 A. 51 (56) = 7 A.L.J. 861 = 7 Ind. Cas. 156; R., 16 A. 464 471, (472) = 41 A.W.N. 137; D., 19 B. 821, (826).]

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C. J. and BRODHURST, J.—In the lower appellate Court the plaintiff in the suit filed an appeal. The defendants filed another appeal. The defendants' appeal was heard by Munshi Kashi Prasad, who was Subordinate Judge of Cawnpore, on the 13th February, 1888. In that appeal the defendants raised the question as to the title of the plaintiff and as to their own title to the land in dispute. The issues in appeal as to the title were found on the facts against the defendants, that is, in that appeal the then Subordinate Judge found that the plaintiff had title and the defendants [579] none. The plaintiff's appeal came on to be heard subsequently before Munshi Piare Lal as Officiating Subordinate Judge of Cawnpore on the 8th March, 1888, and he, treating the findings in the other appeal as operating as *res judicata*, decreed the plaintiff's appeal with costs. The appeal now before us is an appeal from the decree of Munshi Piare Lal.

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* Second Appeal, No. 788 of 1888, from a decree of Munshi Piare Lal, Subordinate Judge of Cawnpore, dated the 8th March, 1888, reversing a decree of the Munsif of Fatehpur, dated the 4th September, 1886.

(1) 11 I.A. 37 = 6 A. 269.

It appears to us that he took a correct view of the law, and although s. 13 would not apply, still the principle of *res judicata* applied. S. 13 of the Code is not exhaustive, as was pointed by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1). We dismiss the appeal with costs.

Appeal dismissed.

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12 A. 579 = 10 A.W.N. (1890) 206.

APPELLATE CIVIL.

Before Mr. Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

HARAKH (*Decree-holder*) v. RAM SARUP (*Judgment-debtor*).*
[5th July, 1890.]

Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second Appeal—Transfer of decree—Civil Procedure Code, ss. 223, 228, 586.

Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution.

Nazar Husain v. *Kesri Mal* (2) approved.

[**Appl.**, 25 C. 872 (873); **Appr**, 18 A. 481 = 16 A.W.N. 160; **R.**, 23 M. 547 (F.B.); 8 O. C. 405 (407).]

THE facts of this case, so far as they are necessary, appear from the judgment of Edge, C.J.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J.—This is an appeal from an order passed in execution proceedings held under a decree which was made by the Court of Small Causes at Mirzapur. After the decree was made the execution proceedings were transferred to the Court of the Munsif of Mirzapur, and it was in those proceedings that an order was made which was appealed against to the District Judge of Mirzapur, against whose order in appeal this appeal has been brought. If this [580] appeal lies it is a second appeal within the meaning of Chapter XLII of the Code of Civil Procedure. Now the suit in question, as I have said, was brought in the Court of Small Causes, being of the nature cognizable by such a Court. The subject-matter of the suit did not exceed Rs. 500. Mr. *Kashi Prasad* for the respondents here has objected that s. 586 of the Code of Civil Procedure applies, and that the appeal does not lie. On the other hand, Pandit *Sundar Lal* for the appellant has contended that the decree having been transferred to the Munsif's Court, and the original order which has led to these appeals having been made by the Munsif, we must treat the case as if the original suit was not of the nature cognizable in a Court of Small Causes; that is the argument which he bases on s. 228 of the Code of Civil Procedure. My brother Mahmood only this morning delivered a judgment

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* Second Appeal, No. 380 of 1887, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 16th December, 1886, reversing a decree of Munshi Shankar Lal, Munsif of Mirzapur, dated the 13th September, 1886.

(1) 11 I.A. 37. (2) 12 A. 581.

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the principle of which is applicable to this case. We must see, in my opinion, whether the suit was of the nature cognizable by the Court of Small Causes, and whether the amount or value of the subject of that suit did or did not exceed Rs. 500. In my opinion my brother Mahmood was right. S. 586 prohibits a second appeal in the execution of a decree in a suit referred to in s. 586, just as much as it prohibits a second appeal from the decree in that suit. I cannot read s. 228 as Pandit *Sundar Lal* reads it. It would, in my opinion, be an absurdity to hold that the decree in a Small Cause Court suit passed by a Court of Small Causes must, after it has been transferred to a Munsif's Court for execution, be regarded as a decree in a suit which was not of the nature of suits cognizable in a Court of Small Causes. I am of opinion that this appeal does not lie, and that it should be dismissed with costs.

MAHMOOD, J.—I am entirely of the same opinion. The difficulties which arose in my mind were stated by me in my order of the 9th August, 1888, whereby this case was referred to a Bench of two Judges. The learned Chief Justice has already referred to the judgment which was delivered by me this morning in the case of *Nazar Husain* v. *Kesri Mal* (1), and the reasons which I gave **[581]** there are in full accordance with the view expressed by the learned Chief Justice in this case. The appeal, therefore, did not lie on account of the nature of the original suit falling within the purview of s. 586 of the Code of Civil Procedure. The transfer of a decree under s. 223 of the Code could not alter the nature of the suit, nor is there anything in s. 228 to render a decree or an order passed in execution thereof of a different nature to what it was before the transfer. The learned Chief Justice's order dismissing the appeal is therefore the only one which could be passed. *Appeal dismissed.*

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12 A. 581=10 A.W.N. (1890) 203.

REVISIONAL CIVIL.

Before Mr. Justice Mahmood.

NAZAR HUSAIN (*Petitioner*) *v.* KESRI MAL (*Opposite party*)*.
[5th July, 1890.]

Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second appeal—Civil Procedure Code, ss. 584, 586.

For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed.

Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 422-14-0 the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above Rs. 500, and, the Munsiff's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court :—

Held that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge.

[Appr., 12 A. 579.]

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

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* Miscellaneous application under s. 622 of the Civil Procedure Code.

(1) 12 A. 581.

Mr. *A. Strachey* and Maulvi *Ghulam Mujtaba*, for the petitioner. 1890
Pandit *Sundar Lal*, for the opposite party. JULY 5.

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JUDGMENT.

MAHMOOD, J.—This is an application for revision under s. 622 of the Code of Civil Procedure, and upon its being called on for hearing, Pandit *Sundar Lal*, for the opposite party, has taken a [582] preliminary objection to the effect that no such application is entertainable as an appeal lay in the case. The facts upon which this objection proceeds are the following:—

On the 14th July, 1885, Narotam Das, whom the opposite party, Kesri Mal, represents, obtained a simple money decree for Rs. 650 against the petitioner Nazar Husain, and in execution thereof on various occasions he obtained partial satisfaction of the decree in the Court of the Munsif executing the decree.

The present litigation began with an application made by the decree-holder to the Munsif's Court on the 24th November, 1887, for execution of the decree to realize the balance of Rs. 422-14-0. The judgment-debtor raised objections to the execution, but these were disallowed by the Munsif by his order of the 27th April, 1889, which was upheld in appeal by the District Judge on the 14th August, 1889.

The object of the present application for revision is to set aside the orders of both the lower Courts whereby the execution of the decree was allowed.

Pandit *Sundar Lal* for the decree-holder, opposite party, argues that inasmuch as the amount of the original suit in which the decree of the 14th July, 1885 was passed exceeded Rs. 500, it did not fall within the prohibition of s. 583 of the Civil Procedure Code and was capable of being made the subject of a second appeal under s. 584 of the Code, and that for the same reason the decree passed in the suit when put into execution would furnish the test as to the appealability of the orders passed in execution. In other words, the learned Pandit's contention is that a second appeal lay from the District Judge's order of 14th August, 1889 which forms the subject of this application for revision, and that therefore this application cannot be entertained under s. 622, which is limited to cases in which no appeal lies to the High Court.

On the other hand, Mr. *Ghulam Mujtaba*, for the judgment-debtor, petitioner, argues that the present being an execution case, s. 647 of the Civil Procedure Code applies, and must be read with [583] s. 586 for determining whether a second appeal lay in this case. The learned pleader contends that the effect of reading the two sections together, is, that in s. 586 the word " suit " must be taken to mean an " application for execution," and that, since in this case the nature of the application was of the Small Cause Court type, and the amount of the money sought to be realized by execution did not exceed Rs. 500, no second appeal could lie, and the only remedy of the petitioner lay in applying for revision under s. 622 of the Code.

I am of opinion that this contention is unsound. It is, no doubt, true that s. 647 of the Civil Procedure Code renders the procedure therein prescribed generally applicable to proceedings in execution of decrees, but such general application of the procedure is qualified by the important clause "as far as it can be made applicable," and there is enough in s. 586 to show that the word " suit " as it occurs there cannot be read to mean application for execution of decree. The suits contemplated there are

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described to be "of the nature cognizable in Courts of Small Causes." Now, neither the old Small Cause Courts Act (XI of 1865) nor the present Act (IX of 1887) contains any specification of the nature of "applications" cognizable by such Courts, and therefore the word suit" in s. 586 cannot be read as "application."

It has been suggested that the result of this view would be to hold that s. 586 of the Code is no bar to second appeals even in cases where the decree itself amounts to less than Rs. 500, and was passed in a suit of the Small Cause Court type of less than that value. But I do not think such is the result of my view of s. 586. In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1) the Lords of the Privy Council observed: "It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained." Bearing this general principle in mind, there is no necessity for reading the word "suit" in s. 586 of the Code as if it meant application for execution or indeed any other application. Such applications are [584] applications in the suit in which the decree was passed, and the provisions of s. 586 restricting the right of second appeal are as much applicable to such applications as they are applicable to the decrees passed in the class of suits mentioned in that section.

This being so, the turning point of the decision of this case is, what is the real test of appellate jurisdiction with reference to the amount or value of the appeal?

The matter was originally regulated by s. 4 of Act XXXV of 1867, which was replaced by s. 18 of Act XVI of 1868, which was re-enacted in s. 22 of Act VI of 1871 and has since been reproduced as s. 21 of the present Civil Courts Act (XII of 1887). The provisions of these various enactments need not be considered in detail, because upon the exact point now under consideration they do not seem to have altered the law, and I say so with especial reference to the principle of reported rulings.

In the case of *Duli Chand* v. *Nirban Singh* (2) a Full Bench of the Calcutta High Court held that where an original suit is brought for a sum exceeding Rs. 5,000 or for property exceeding that value, and the decree is for a less sum or for property of less than that value, the appeal according to s. 22, Act VI of 1871, will be to the High Court. That was a case of an appeal from a decree in a regular suit, and Couch, C. J., in delivering his judgment made observations which in principle are applicable to this case.

He said:—"The appeal is only a stage of the suit, it is not a fresh suit, but a part of the proceedings in the suit, and therefore, ordinarily, I should say that with regard to the jurisdiction in appeals from decrees and orders of the District and Subordinate Judges, the expression 'the subject-matter in dispute' would mean the subject-matter in dispute in the suit itself, unless, of course, a contrary intention appeared, as in appeals to the Privy Council, where the language is 'the subject-matter in dispute' in the appeal."

The rule thus laid down by the Calcutta High Court with reference to appeals from decrees in regular suits was extended by a [585] Full Bench of this Court to appeals from orders in execution of decrees. The case is *Mahomed Hossein Khan* v. *Shib Dyal* (3) where

(1) 8 I. A. 123. = 8 C. 51.
(2) 9 B. L. R. 190 = 18 W. R. 262.
(3) N. W. P. H. C. R. 1873 p. 108.

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it was laid down that when the matter in dispute in an original suit heard by a Subordinate Judge, exceeds Rs. 5,000 in value, the appeal against an order passed in execution of decree in which the matter in dispute is less than that amount, lies to the High Court and not to the District Court. The converse of this rule was laid down by a Division Bench of this Court in *Chanderbhan Singh* v. *Mahunt Jai Ram Geer* (1) where it was laid down that the appeal against an order of a Subordinate Judge passed in execution of decree where, although the value of the property in dispute exceeds Rs. 5,000, yet the matter in dispute in the original suit was below that amount, lies to the District Court and not to the High Court.

Upon the same principle the Calcutta High Court in *Roy Dhunput Singh Bahadur* v. *Modhoo Mote Dabia* (2) held that in determining the venue of appeal against an order passed in execution, the "subject-matter in dispute" used in s. 22, Act VI of 1871, must be taken to exclude the interest which accrued subsequently to the date of the decree. The question was more fully considered in *Musammat Ruttunjote Koer* v. *Ram Doss* (3) where the general principle was laid down that when the decree or order, which is the subject of appeal, is made in a suit, whether during the execution proceedings or previously, the subject-matter in dispute within the meaning of Act VI of 1871 s. 22, is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect. In delivering the judgment of the Court, Phear, J., observed: Babu *Romesh Chunder Mitter* has urged upon us with much force that the subject-matter in dispute between the parties to this appeal is the amount which is at this time due under the decree, and which will be levied against one of them if the order of the Subordinate Judge, now appealed against, is allowed to have force. It appears to us, however, that when the decree or order which is the subject of appeal is a decree or order made in a suit, **[586]** whether during the execution proceedings or previously thereto, the subject-matter in dispute within the meaning of this section is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect." The learned Judge then, after referring to the Full Bench ruling of the Court in 9 B.L.R., 190, went on to say:—" It appears to us that if we put any other construction than that which we have mentioned upon the words, we should make the section have an operation which could not have been contemplated by the Legislature, for it would cause the appeal to shift from one Court to the other, merely by such lapse of time as would suffice to make an amount which when decreed fell below Rs. 5,000, grow by the increment of the interest to a sum above Rs. 5,000."

I agree in these observations, and I think they are applicable in principle to this case. The broad principle expressed in these various rulings is that for purposes of determining the venue of an appeal, whether from a decree in a regular suit, or from an order passed in execution of such decree, the test of pecuniary jurisdiction is the valuation of the original suit in which the decree was passed—*vide Jag Lal* v. *Har Narain Singh* (4). If such were not the case, anomalies and inconveniences even more serious than those contemplated by Phear, J., would ensue in respect of the venue of appeals from orders other than those passed in execution of decrees, that is, orders appealable under s. 588 of the Code. The valuation of the original suit must therefore be the test for determining the

(1) N.W.P.H,C.R. 1873, p. 175.
(2) 18 W.R. 316.
(3) 19 W.R. 131.
(4) 10 A. 524.

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question of appellate jurisdiction, and the principle is clearly recognized by the present Civil Courts Acts (XII of 1887), s. 21 of which provides that "appeals from a decree or order of the Subordinate Judge shall lie to the District Judge, where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed four thousand rupees, and to the High Court in any other case."

Now, in the present case, it is true that the suit which ended in the simple money decree of 14th July, 1885, was of the nature [587] cognizable in the Court of Small Causes, but in point of value it exceeded Rs. 500. It was therefore not a suit within the restriction as to second appeals contained in s. 586 of the Civil Procedure Code. It is true that the application for execution, dated the 24th November, 1887, with which this litigation began, related only to Rs. 422-14-0, that is, an amount below Rs. 500, but, as I have already said, an execution proceeding must for purposes of jurisdiction as to appeals be taken to be regulated by the valuation of the original suit, and it follows that if a second appeal would lie from the decree in the original suit, a second appeal will lie also from an order passed in execution of such decree, whether such execution related to a sum above Rs. 500 or below that amount.

The result of this view is to hold that the order of the District Judge, dated the 14th August 1889, impugned by this application for revision, might have been made the subject of a second appeal, since it was passed in a suit to which the prohibition of s. 586 is not applicable. This being so, no application for revision is entertainable under s. 622 of the Code, as that section is limited to cases in which no appeal lies to the High Court.

For these reasons the preliminary objection taken by Pandit *Sundar Lal* on behalf of the decree-holder prevails, and I dismiss this application with costs.

Appeal dismissed.

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12 A. 587 (P.C.) = 17 I.A. 187 = 5 Sar. P.C.J. 624.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

MAINA AND OTHERS (*Defendants*) *v.* BRIJMOHUN AND OTHERS (*Plaintiffs*).
[9th July, 1890.]

Ac I of 1877 (*Specific Relief Act*), s. 42—*Refusal of declaratory decree, the case made for it being defective.*

Under the Specific Relief Act (I of 1877), s. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutawalis and managers of property from ancient times connected with religious observances, *viz*, a ghat upon the Jumna with temples adjoining; of their title also to receive a proportion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs.

[588] *Held*, that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property.

[Appl., 1 A.L.J. 44 ; R., 18 Ind. Cas. 241 (242).]

APPEAL from a decree (5th January, 1887) reversing a decree (30th June, 1885) of the Subordinate Judge of Agra.

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The respondents, who were plaintiffs, alleged themselves as representing the Sannadhia Brahmans in Mathra, while the defendants were at the head of the Mathuri (1) caste, to be entitled, together with the defendants, who were not solely entitled, to act as mutawalis and managers of the Bisram ghat upon the bank of the Jumna, and of the temples attached, receiving the offerings made by jattris or pilgrims, their shares being in the proportion of two-thirds to the defendants and one-third to the plaintiffs, with reference to the number of houses in Mathra occupied by the Sannadhias and Mathuris, respectively. This claim was valued at Rs. 17,000. They also claimed that a sum of Rs. 400 should be set apart by the defendants for the repairs of the ghat, this being the amount of a decree for money obtained on behalf of the institution.

The defendants, denying the claim, alleged that the plaintiffs and all Sannadhias, used another ghat, the Swami, not assembling at Bisram ghat. The plaintiffs were not Chaubes. This defence was, in effect, accepted by the Subordinate Judge, who inspected the locality, and observed that the differences between the castes were such that it was improbable that they would conduct their ceremonies in the same place.

This judgment was reversed by a Division Bench of the High Court (Straight and Tyrrell, JJ,) and a declaratory decree was made in favour of the plaintiffs.

The order referred to as supporting the assertions on behalf of the plaintiffs, purported to have been issued by "Muhammad Furrukh Shah, the King of the Ghazis, to the Darogha of the [589] nazul lands appointed by the Government at Agra." It, apparently, had no date upon it; and the translation of it on the record was:—

"On a petition being presented by Sobha Ram, Brahman, resident of Mathra, Islamabad, we have been informed that Bisram ghat, on the banks of the river Jumna, together with the thakurdwaras (temples) built by Rajas and Sahukars at the said Islamabad, have been the places of worship of the Hindus since ancient time, and the Mathuria and Sannadhia Brahmans receive alms at those places, whereby they support themselves: that we have ascertained this after inquiry, therefore you are hereby commanded not to interfere with the thakurdwara buildings, which are the places of pilgrimage, by the order of the Kings, but to leave the same in the enjoyment of the Brahmans. You are enjoined strictly in this matter."

The Judges held it clear "from the photograph which is before us and the accuracy of which is not questioned, that in order to enable the plaintiffs to use these temples which are ancient buildings, they must have constantly and uninterruptedly from time immemorial used the ghat and the steps adjacent thereto. But the plaintiffs claimed something more than a mere right to pass and repass over the ghat and the steps, and they say that as Sannadhia Brahmans and a section of the Chaube class, they are entitled to use and enjoy the ghat in the same way as the Mathuria Brahmans in connection with the jijmans, who, on sacred occasions, come there and use the ghat for religious ceremonies. In support of their case they produced a *firman* of the Emperor Furrukh Shah and oral evidence of witnesses which go to support their assertions, and it seems to be virtually

(1) As to these castes see Sir H. Elliott's "Races of the N.W.P" edited by J. Beames Esq., appendix, pp. 308, 319, 329.

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conceded that if they do belong to the Chaube sect, they are entitled in respond to the ghat to enjoy the privileges and rights of the respondents of the Chaube community concerned therein."

Mr. *C. W. Arathoon*, for the appellants, argued that the evidence had not supported the statements in the plaint; and the rights, if any were proved, were so indefinite that no decree declaring them should have been made.

[590] The respondents did not appear.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

JUDGMENT.

SIR BARNES PEACOCK.—This was a suit brought by the respondents and another for a decree declaratory of their right in a ghat, and also for certain relief specified in their plaint. The suit is governed by Act I of 1877, the 42nd section of which deals with declaratory decrees. By that section it is enacted that "any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right; and the Court may in its discretion make therein a declaration that he is so entitled; and the plaintiff need not in such suit ask for any further relief: Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The plaintiffs, representing the body of a sect called Sannadhias, set out in their plaint what they considered to be the rights of that sect, and they stated therein their grounds for asking for a declaratory decree. They say: "That Bindraban Das, when he was alive, laid out Rs. 100 in the repairs of the ghat. He died at Mathra on or about the 5th of October 1879. When he was alive he deposited Rs. 900 with Bhagwan Das, with instructions to use the money in the repairs of the Bisram ghat, and Bhagwan Das having failed to use the money in the repairs of the ghat, Panna, deceased, the father of Madan, defendant, and Chatraban, defendant, instituted a suit without joining plaintiffs, and with a view of depriving them of their right, in the Munsif's Court at Mathra for Rs. 1,000, on declaration that they alone were the mutawallis (managers), and under a fictitious deed of compromise obtained a collusive decree on 21st December, 1882. Through collusion they had it recorded in the deed of compromise that Rs. 600 had been laid out in the repairs, and with reference to the balance of Rs. 400 a payment by instalments of Rs. 80 a year had been agreed, and the application filed by the plaintiffs in the Munsif's Court at Mathra, paying to be joined as a party, was [591] disallowed on 14th September, 1883." That was one of their grounds for asking the Court to exercise its discretion in making a declaratory decree. The next ground was, "That a fictitious suit was instituted by Changaji and others, against Panna and others, defendants, in this Court, and plaintiffs filed an application in this Court, also praying to be joined as a party under s. 32 of the Civil Procedure Code; but the said application was disallowed on 3rd July, 1883, and plaintiffs were not joined as a party. That all the defendants to this suit have colluded with one another, and have taken collusive proceedings in the Munsif's Court at Mathra, and in this Court, with a view of depriving plaintiffs of their right. They declare themselves to be the owners and deny plaintiffs' right; hence the case of action arose on 11th August 1882, the date of the institution of the suit in the Munsif's Court at Mathra, and on 14th February, 1883, the date of the institution of the suit in this Court at Agra." They then stated what the relief was which they sought,

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and they prayed judgment for "a decree for the declaration of the plaintiffs' right as mutawall and manager of the Bisram ghat, and all the temples attached to the same, to the extent of one-third be passed in favour of the plaintiff as head of the Sannadhias against his brother Sannadhias" and that it might be likewise declared in the said decree that "defendants alone were not owners and mutawallis of the said ghat." It appears to their Lordships that the plaintiffs have made no case. They have not proved that they were entitled as mutawallis and managers of the Bisram ghat to one-third of the offerings made by their followers, and they could not be entitled to have a declaration that the defendants were not the sole owners, unless they could prove a right on their parts to be part owners. Having asked for a declaratory decree, they go on in pursuance of the Relief Act to allege that "the collusive decree obtained by the defendants from the Munsif's Court at Mathra against Bhagwan Das, for which defendants have declared themselves liable under the deed of compromise, having been set aside, its amount be recovered from the defendants, and it be used in the repairs of the Bisram ghat, either with the consent and management of the parties or through an official of the Court."

[592] There were many witnesses examined, and considerable discrepancies in the evidence given. The first Court laid down certain issues, the fourth issue being "Are the plaintiffs guardians of Bisram ghat, vested with a right to receive the offerings made in it, to superintend the repairs and erection of the buildings there, or are they priests of Swami ghat, plying their professional duty there?" It might be that they were priests of Swami ghat, and yet might also have an interest in Bisram ghat. The whole point of the issue is—were they guardians of Bisram ghat, with a right to receive the offerings made in it, and to superintend the repairs and erection of buildings there? The Subordinate Judge delivered judgment, in which he said: "The plaintiffs in this case have no connexion with the Bisram ghat; they are Sannadhia Brahmins, having no concern whatever with the property which was used by the Chaubes as the place of their worship. Bisram ghat is the worshipping place of the Chaubes, in the vicinity of which the plaintiffs, who are Sannadhias, have their temples. My inspection of the place has fully convinced me of this. The documentary and oral evidence abundantly establish this conclusion to my entire satisfaction. Both sects, the Sannadhias and the Chaubes, are bitter enemies to each other and could not be expected to have a common place for their worship." Having come to that conclusion he dismissed the plaintiffs' suit with costs.

It is not necessary for their Lordships in concurring in the judgment of the Subordinate Judge to agree in all his reasons. It is quite consistent with the decree which he passed dismissing the suit that the plaintiffs may have some right in Bisram ghat; but they have not proved any right to have it declared that they are entitled as mutawallis to have an interest to the extent of one-third of the offerings. The Subordinate Judge dealt with the evidence in the most general terms. He did not allude to any particular witness or any particular document, but he said: "I think the plaintiffs have not made out their case."

The High Court dealt with the case in the same general terms. The Subordinate Judge had heard the witnesses. He had better [593] opportunities of judging of the evidence, and of the several discrepancies, than the High Court who did not hear the witnesses or see their demeanour. The High Court did not decide whether the plaintiffs were the mutawalls entitled to one-third, but they said: "In support of their case they

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produced a *firman* of the Emperor Furrukh Shah." It appears to their Lordships that that *firman*, as it is called, did not vest any right in either party, and is not a document which can be held to support the case either of the one side or of the other, but the High Court attached some importance to it. The judgment continues: "The plaintiffs produced oral evidence of witnesses which go to support their assertions; and it seems to be virtually conceded that if they do belong to the Chaube sect they are entitled in respect to the ghat to enjoy the privileges and rights of the Chaube community concerned therein." The learned Judge who delivered the judgments then proceeds: "It seems to me to be established beyond question that they do belong to the Chaube class, and no evidence is shown to us on behalf of the respondents to contradict that produced by the appellants. This being so, and taking all the circumstances of the case into consideration, I think the plaintiffs-appellants are entitled to the same decree as that granted to the plaintiffs-appellants in F.A. No. 172 of 1885, decided this day,"—referring to another suit. Their Lordships see nothing on the record to show that there was any concession by the defendants of the kind indicated by the High Court. The decree which follows is not confined merely to the order expressed in the judgment. It proceeds: "It is ordered and decreed that this appeal be decreed; that the decree of the Subordinate Judge of Agra be set aside, and in lieu thereof it is hereby declared that the plaintiffs-appellants aforesaid are entitled to have, exercise, and enjoy, all rights of care, use, and management of the Bisram ghat, and the buildings appertaining thereto, situated on the bank of the river Jumna, in the city ol Mathra, and in connexion with the expenditure of the sum of Rs. 1,000 bequeathed by the late Brindaban Das Khettri for the repairs of the said ghat, so far as the same have not yet been expended as declared by the deceased Brindaban Das."

[594] If their Lordships considered that the judgment of the High Court ought to be affirmed, it would be necessary to state in what manner that decree should be altered; but their Lordships are of opinion that the judgment of the High Court has gone upon a wrong principle, it merely stating that if the plaintiffs belonged to the Chaube class they were entitled to all they claimed, and that they did belong to the Chaube class.

It appears to their Lordships that the learned Judges of the High Court have not sufficiently kept in view the only real question raised in this case, namely, whether the plaintiffs have proved that they, as mutawallis or managers of the Bisram ghat, are entitled to one-third of the donations given by the pilgrims to that ghat, and also that the suits referred to were fictitious? In their Lordships' opinion the plaintiffs have not made out a case for the declaratory decree which they claimed, and certainly they have not made out a right to have the decree obtained by the defendants from the Munsif's Court, at Mathra, against Bhagwan Das, set aside, and to have the amount recovered from the defendants in that suit used in the repairs of the Bisram ghat.

Their Lordships think, therefore, that the decree of the High Court ought to be reversed, and the decree of the Subordinate Judge affirmed; but holding that the plaintiffs are not entitled to the right claimed or to the relief sought, their Lordships wish it to be distinctly understood that they do not express any opinion with respect to any other rights, if any, which either of the parties to the suit may have or claim to have in the aforesaid Bisram ghat.

Their Lordships will therefore humbly advise Her Majesty to reverse

the decree of the High Court, and to affirm the decree of the Subordinate Judge, and to order the respondents to pay the costs in the High Court. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

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12 A. 595 = 10 A.W.N. (1890) 199.

[595] APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Young.

QUEEN-EMPRESS *v.* SUNDAR SINGH AND OTHERS. [26th July, 1890.]

Act I of 1872 (*Evidence Act*), ss. 74, 80—*Presumptions in respect of record of foreign Court—Confession made before, and attested by, a judicial officer in a Native State, how far admissible as evidence in the Courts of British India.*

Certain persons charged with a dacoity committed at Chawripura, a village on the borders of Gwalior, having gone over into Gwalior territory, were arrested and brought before the Magistrate of Bhind in Gwalior. That officer recorded their statements, attesting each statement in the following words:—

"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it, having heard it read out to him, stated it as correct. It contains a full and true account of the statement made by him."

Each statement also bore the mark (by way of signature) of the person by whom it purported to have been made.

Subsequently these persons were handed over to the British authorites and were tried by the Court of Session, who rejected the confessions above referred to as inadmissible in evidence. The accused having appealed to the High Court, it was held that each of the confessions recorded in the manner above described was admissible in evidence, certainly under s. 80 of the Evidence Act, and probably under s. 74 of that Act, as against the person by whom it was made.

[F., 22 B. 235 (238); 8 P.R. 1907 = 33 P.W.R. 1907, (Cr.) = 46 P.L.R. 1908 = 6 Cr. L.J. 377; R., Rat. Unrep. Crim. Cas. 855 (856).]

THE facts of this case are sufficiently stated in the head-note and in the judgment of the Court.

Mr. *J. Simeon*, for the appellants.

The *Public Prosecutor* (Mr. *C. Dillon*) for the Crown.

JUDGMENT.

EDGE, C.J., and YOUNG, J.—Sundar Singh, Bakhtawar Singh, Darwa and Umrao were convicted under s. 396 of the Indian Penal Code. Sundar Singh was sentenced to death, the other three to transportation for life. They have appealed. On the hearing of the appeals Mr. *Simeon* appeared for Sundar Singh and Bakhtawar Singh; the other two men were unrepresented. We have heard the appeals together, and, as it was really one case, we dispose of them by one judgment. There are some points which are beyond dispute. One is that a very daring dacoity was **[596]** perpetrated on the 25th November, 1889, at the village Chawripura. Chawripura is partly in Gwalior and partly in British territory. The offences of which these men have been convicted were committed within British territory. Another point which is beyond dispute is that on that occasion some of the dacoits were armed with guns, and shots were fired by some of the dacoits, the result being that one villager was killed and another severely wounded. The latter died subsequently from pneumonia.

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12 A. 595 = 10 A.W.N. (1890) 199.

The only question in this case is the question of identity. If these men were jointly committing the dacoity, there cannot be a question that they were properly convicted under s. 396. We shall deal with the case of each of these men separatly; but before doing so it is necessary that we should decide as to whether certain statements or confessions which were made by Bakhtawar Singh, Darwa and Umrao, respectively, before the Magistrate of Bhind, which is in Gwalior territory, are admissible in evidence in this case. There is no doubt that the Magistrate of Bhind was a judicial officer of the State of Gwalior. We have equally no doubt that he did in fact take down these confessions or statements with his own hand and that they were not, as the Sessions Judge appeared to think, mere reproductions of forms of confession prepared by the police. Each statement bears at the foot of it the following certificate with the hand of the Magistrate of Bhind:—"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it having heard it read out to him stated it as correct. It contains a full and true account of the statement made by him." We must presume till the contrary is shown that that certificate correctly states the facts; further, these statements bear internal evidence that they were the result, to some extent at any rate, of questions put by the Magistrate of Bhind to the person making each statement. They show that questions were put by the Magistrate of Bhind, and, judging by what was stated in answer to his questions, many of those questions were very pertinent. Further, those statements are in very considerable detail and are corroborated by the evidence in the case. Each of the men who made a confession put his mark by way of signature to his confes-[597]sion. We must presume that those confessions are the genuine records of the confessions actually made before the Magistrate of Bhind, and we are of opinion that they were made at the time when the police, in whose custody these men had been, were not actually present. It appears to us that they would be admissible certainly under s. 80 of the Evidence Act, probably under s. 74 of that Act, and that there is nothing in law to prevent a confession being proved, no matter when or where made, against the man who made it, provided it was not made under circumstances which by our Codes would render it inadmissible. We are of opinion that the record of each of the confessions, signed as it was by the person who made it, is admissible as against him. We do not propose to use the confession of one man as against another, so accordingly we need not decide whether the confession of one man would be admissible against the others.

[The Court proceeded to exmaine the evidence in the three cases, and in the result dismissed the appeals and confirmed the convictions and sentences.]

Appeals dismissed.

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Accomplice. PAGE

Tender of pardon, effect of—Subseqnent trial of accomplice for connected offences —Crim. Pro. Code, ss. 337, 339.—A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472 and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473 and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first mentioned had reference. Under s. 337 of the Crim. Pro. Code, the Magistrate at Calutta tendered a pardon to the prisoner upon the conditions specified in that section, and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently, the prisoner was committed by the Magistrate of Benares for trial before the Court of Sessions upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty, but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject ; and the Session Judge, having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused.

Held, that, by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472 and 474 and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal.

Although s. 337 of the Crim. Pro. Code does not in terms cover a case where a Magistrate, holding a preliminary inquiry for committal against several persons, tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339), such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same matter," while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit. QUEEN-EMPRESS v. GANGA CHARAN, 11 A. 79=8 A.W. N. (1888), 289=13 Ind. Jur. 193 ... 478

Account stated.

Hypothecation-bond for amount due—Obligor preventing registration—Suit on.— The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant, (ii) in the alternative, for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected novation of the contract implied by the statement of accounts.

Account stated—(*Concluded*). PAGE

Held that, under the circumstances of the case, the plaintiff was entitled to resort to the account stated and sue thereon. KIAM-UD-DIN v. RAJJO, 11 A. 13=8 A.W.N. (1888), 280 ... 436

Acknowledgment.

See LIMITATION ACT (XV OF 1877), 10 A. 93.

See MUHAMMADAN LAW (INHERITANCE), 10 A. 289.

Acquiescence.

Pre-emption.—Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute. AJAIB NATH v. MATHURA PRASAD, 11 A. 164=9 A.W.N. (1889), 48 ... 533

1.—Imperial Acts.

Act XVIII of 1850 (Judicial Officers' Protection).

Judicial officers, liability of—Judicial act within the limits of the officer's jurisdiction—Such act protected though done erroneously, illegally or not in good faith—"Jurisdiction."—Under Act XVIII of 1850, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

The word "Jurisdiction" is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder* v. *Halket*. It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within, and not without, the limits of his jurisdiction in this sense.

Where a Magistrate of the first class having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under ss. 379 and 411 of the Penal Code, and, having issued a warrant purporting to act under s. 386 of the Crim. Pro. Code for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, schedule V and s. 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court,—*held* that he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that, under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850. TEYEN v. RAM LAL, 12 A. 115=10 A.W.N. (1890) 32 ... 823

Act XXI of 1850 (Caste Disabilities Removal.)

Suit by person born a Muhammadan as reversioner in a Hindu family.—Act XXI of 1850 does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s. 1 protects any person from having any right of inheritance affected by reason of any person having renounced his religion of having been excluded from caste. This applies to a case where a person born a Muhammadan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu law a share in his father's family. BHAGWANT SINGH v. KALLU, 11 A. 100=8 A.W.N. (1888), 288 ... 492

Act XV of 1856 (Hindu Widow's Re-marriage).

S. 2—Hindu law—Hindu widow—Re-marriage—Re-marriage of widow who could have re-married before the Act was passed.—Act XV of 1856 was not intended to place under disability or liability persons who could marry

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second time before the Act was passed. It was intended to enable widows to re-marry who could not previously have done so, and s. 2 applies to such persons only.

Held, therefore, that a widow belonging to the sweeper caste, in which there is not, and in 1856 was not, any obstacle by law or custom against the re-marriage of widows, did not by marrying again forfeit her interest in the property left by her first husband; and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation. HAR SARAN DAS v. NANDI, 11 A. 330=9 A.W.N. (1889) 77 ... 638

Act XIII of 1859 (Workman's Breach of Contract.)

Preamble and s. 2—Wilful breach of contract—Construction of statute—Summary trial—Crim. Pro. Code, s. 260.—Offences under s. 2 of Act XIII of 1859, are triable summarily under s. 260 of the Crim. Pro. Code.

The offence made punishable by s. 2 of Act XIII of 1859 is the wilful and without lawful and reasonable excuse neglecting or refusing to perform the contract entered into by persons whom the Act concerns. Notwithstanding the preamble of the Act, it is not necessary to prove that a breach of contract is fraudulent in order to sustain a conviction under s. 2. QUEEN-EMPRESS v. INDARJIT, 11 A. 262=9 A.W.N. (1889) 85 ... 595

Act XLV of 1860 (Penal Code).

See PENAL CODE (ACT XLV OF 1860).

Act V of 1861 (Police).

Ss. 8, 29—Police Officer—Suspension—Breach of order.—A police constable was suspended and ordered to remain in the lines during suspension. Despite the order, he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861.

Held, s. 29 of Act V of 1861, contemplates that the person to be charged with an offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police officer is suspended, he ceases to be a police officer; the conviction was therefore wrong. QUEEN-EMPRESS v. DURGA, 10 A. 459=8 A.W.N. (1888) 169 ... 308

Act IX of 1861 (Minors).

Ss. 1, 3, 4—See MINOR AND GUARDIAN, 12 A. 213.

Act XX of 1863 (Religious Endowments).

See TRUST, 11 A. 18.

Act X of 1865 (Succession).

See SUCCESSION ACT (X OF 1865).

Act XI of 1865 (Small Cause Courts).

(1) S. 6—See SMALL CAUSE COURT SUIT, 10 A. 49.
(2) See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

Act X of 1866 (Companies).

See COMPANY, 11 A. 349.

Act I of 1868 (General Clauses).

(1) S. 2 (6)—See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.
(2) S. 6—See COMPANY, 11 A. 349.

Act IV of 1869 (Divorce).

Ss. 16, 17—See DISSOLUTION OF MARRIAGE, 10 A. 559.

Act VII of 1870 (Court Fees).

See COURT FEES ACT, 1870.

Act X of 1870 (Land Acquisition Act).

See LAND ACQUISITION ACT (X OF 1870).

Act VIII of 1871 (Registration).

See REGISTRATION ACT (VIII OF 1871).

Act XXIII of 1871 (Pensions). PAGE

Ss. 3, 4, 6, 9—*Grant of land revenue—Suit by assignees zemindars for arrears—Right of plaintiffs admitted by Government—Suit not barred for want of Collector's certificate.*—The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly.

Held, that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiffs' right thereto, came within s. 9 of the Pensions Act (XXIII of 1871) and was not barred by ss. 4 and 6 by reason of no certificate having been obtained as therein provided. NAGAR MAL *v.* ALI AHMAD, 10 A. 396 = 8 A.W.N. (1888) 72 ... 266

Act I of 1872 (Evidence).

See EVIDENCE ACT (I OF 1872).

Act IX of 1872 (Contract).

See CONTRACT ACT.

Act X of 1873 (Oaths).

(1) *Ss.* 6, 13—*Evidence—Witnesses—Competency of persons of tender years—Act I of* 1872 (*Evidence*), *s.* 118—*Judicial oath or affirmation—Omission to take evidence on oath or affirmation.*—S. 6 of the Oaths Act (X of 1873), imperatively requires that no person shall testify as a witness except on oath or affirmation; and, notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation.

The nature of judicial oaths and affirmation, and the history of Indian legislation on the subject discussed. QUEEN-EMPRESS *v.* MARU, 10 A. 207 = 8 A.W.N. (1888), 86 ... 139

(2) *Ss.* 6, 13—*Judicial oath or affirmation—Omission to take evidence on oath or affirmation*—Having regard to the language of the Oaths Act (X of 1873), a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require.

In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation.

Held that there was nothing in the law to sanction this procedure on the part of the Judge.

The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred. QUEEN-EMPRESS *v.* LAL SAHAI, 11 A. 183 = 9 A.W.N. (1889) 65 ... 545

Act XIX of 1873 (N.W.P. Land Revenue).

(1) *Ss.* 94, 97—*Assent to and validity of mutation of names in the Collectorate record-of rights.*—The question was according to the judgment of the High Court, whether a change of names in the Collectorate record-of-rights represented a *bona fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that on the evidence, no intimidation had been proved, and that a suit to cancel this "dakhil kharij" and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court. HAR LAL *v.* SARDAR, 11 A. 399 (P.C.) = 5 Sar. P.C.J. 384 = 13 Ind. Jur. 253 ... 683

(2) *S.* 113—*Partition—Question of title—Appeal from order under first part of s.* 113.—No appeal lies to the High Court from a decision of a Collector

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or Assistant Collector under the first part of s. 113 of the North-Western Provinces Land Revenue Act (XIX of 1873), declining to grant an application for partition until the question in dispute has been determined by a competent Court. IMTIAZ BANO v. LATAFAT-UN-NISSA, 11 A. 328=9 A.W.N. (1889) 108 ... 637

(3) Ss. 135, 241 (*f*)—See PARTITION, 10 A. 5.

(4) S. 243—See CIV. PRO. CODE, 1882, s. 320, 12 A. 564.

Act IX of 1875 (Indian Majority).

S. 3—See MINOR AND GUARDIAN, 12 A. 213.

Act I of 1877 (Specific Relief).

See SPECIFIC RELIEF ACT, 1877.

Act III of 1877 (Registration).

See REGISTRATION ACT (III OF 1877).

Act XV of 1877 (Limitation).

See LIMITATION ACT (XV OF 1877).

Act I of 1879 (Stamp).

See STAMP ACT (I OF 1879).

Act XVIII of 1879 (Legal Practitioners).

See LEGAL PRACTITIONERS ACT (XVIII OF 1879).

Act XII of 1881 (N.W.P. Rent).

(1) S. 9—See EXECUTION OF DECREE, 10 A. 130.

(2) S. 9—See LANDLORD AND TENANT, 10 A. 159 ; 12 A. 419.

(3) Ss. 36, 39 (*c*), 40—See LANDLORD AND TENANT, 10 A. 13.

(4) Ss. 61, 83, 85, 86, 93 (*f*)—See JURISDICTION OF CIVIL COURTS, 12 A. 409.

(5) *Ss. 84, 148—Suit to contest demand of destrainer—Intervenor—Decree of Rent Court in such suit not conclusive in civil suit for declaration of right to and possession of land—Limitation for such suit.*—Decree of a Rent Court passed upon enquiries made under ss. 84 and 148 of the Rent Act (XII of 1881, is not conclusive as between the parties to the enquiry, upon the question of title, in a suit instituted in a Civil Court for a declaration of right to, and possession of, the land in respect of which the Rent Court decree was passed.

The period of limitation, for instituting a suit in the Civil Court as prescribed in these sections, apply only to suits brought by plaintiff, or unsuccessful intervenor, to have it declared that plaintiff had a title to receive the particular rent claimed, and which the Rent Court has refused to give him ; and not to suits for declaration of title to, and possession of, the land in respect of which the rent accrued due.

In the year 1881, plaintiffs had, under the provision of the Rent Act (XII of 1881), made a distraint for rent alleging to be due by one of their tenants. The tenant contested the legality of the distraint by a proceeding in the Rent Court, and the defendant intervened on the ground that he had been actually and in good faith in receipt and enjoyment of the rent of the land occupied by the tenant. On the 28th of June, 1881, Rent Court decided against the defendant ; but owing to some irregularity the distraint was withdrawn. Plaintiffs subsequently instituted a suit in the Rent Court against the tenant for recovery of arrears of rent and the defendant again intervened, and upon enquiry under s. 148 of the Rent Act (XII of 1881), plaintiffs' suit for arrears of rent was dismissed. Plaintiffs then instituted this suit in the Civil Court for declaration of their right to, and possession of, the land in respect of which distraint proceedings had been taken and suit for recovery of arrears of rent instituted. The Court of first instance dismissed the suit on the merits. The plaintiffs appealed and urged, *inter alia*, that the defendant was estopped by the decision of the 28th June, 1881, from contesting plaintiff's title.

Held that the decision of the 28th June, 1881, in the enquiry held under s. 84 of the Rent Act (XII of 1881) was not conclusive between the parties

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in a subsequent suit between them to determine their title to the land in respect of which the distraint proceedings had been taken. GANGA PRASAD v. BALDEO RAM, 10 A. 347=8 A.W.N. (1882) 62 ... 233

(6) *Ss.* 93 (*h*), 106, 148—*Jurisdiction—Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahal for declaration of title to receive proportionate share of rent and for recovery thereof—Denial of plaintiff's title co-sharers-defendants—Suit not maintainable—Act I of 1877 (Specific Relief) s.* 43—*Civ. Pro. Code, s.* 11.—The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahal for a declaration of their title to receive a proportionate share of the rent payable by the tenants.

Having regard to s. 11 of the Civ. Pro. Code, a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been wrongfully received by the defendants, their co-shares, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (*h*) of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted.

But a suit by some of the co-sharers in a joint and undivided mahal for such declaration and such recovery of a proportionate share of rent as above refered to, is barred by the provisions of s. 106 of the North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorizing sush suits. MAHADEO SINGH v. BACHU SINGH, 11 A. 224 9 A.W.N. (1889) 87 ... 570

(7) Ss. 93 (*h*), 209—See BURDEN OF PROOF, 12 A. 301.

(8) Ss. 124, 125, 128—See CRIM. PRO. CODE, 1882, 10 A. 582.

(9) Ss. 183, 199—See REVISION, 12 A. 198.

(10) *S.* 208—*Jurisdiction—Remand.*—An Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal, the District Judge held that it was unnecessary to determine the question of jurisdiction, as he had power, in any event under s. 208 of the N.W.P. Rent Act, to remand the suit to the Assistant Collector, and he remanded it accordingly.

Held that the Judge had rightly construed s. 208 of the Rent Act, and that the remand was proper. GIRWAR SINGH v. SITARAM, 11 A. 31=8 A.W.N. (1888) 282 ... 448

Act XXII of 1881 (Excise).

Ss. 5, 12, 35, 42—*License—Sub-lease—Breach of conditions of license—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of* 1872 (*Contract*), *s.* 23.—The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of license granted under the Act is made a punishable offence. The plaintiff sub-let the license to defendants who, on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

On second appeal, the plaintiff contended on the authority of *Gauri Shankar v. Mumtaz Ali Khan* that his suit had been wrongly dismissed.

Held, that the sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act

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(IX of 1872) and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of justice. DEBI PRASAD v. RUP RAM, 10 A. 577=8 A.W.N. (1888) 215 ... 388

Act IV of 1882 (Transfer of Property).

See TRANSFER OF PROPERTY ACT (IV OF 1882).

Act VI of 1882 (Companies).

See COMPANIES ACT (VI OF 1882).

Act XIV of 1882 (Code of Civil Procedure).

See CIVIL PROCEDURE CODE (ACT XIV OF 1882).

Act XVII of 1886 (Jhansi and Morar).

(1) S. 8—See CIV. PRO. CODE, 1882, 10 A. 517.

(2) See STATUTE, 24 AND 25, VIC. C. 67, 11 A. 490.

Act IX of 1887 (Small Cause Courts).

S. 3 (*a*)—See SMALL CAUSE COURTS SUIT, 10 A. 49.

Act XII of 1887 (Bengal, Agra and Assam Civil Courts).

S. 37—See PRE-EMPTION, 12 A. 234 (F.B.)

Act VII of 1888 (Civ. Pro. Code Amendment).

S. 30—See CIV. PRO. CODE, 1882, s. 320, 12 A. 564.

2.—Bengal Act.

Act VI of 1871 (Bengal Civil Courts).

S. 20—See JURISDICTION, 12 A. 506.

Administration Bond.

Breach of condition—Compensation—Act X of 1865 *(Succession)*, ss. 256, 257 —*Act IX of* 1872 *(Contract)*, s, 74, *exception*.—An administration bond executed by an administrator in accordance with s. 256 of the Succession Act is not an instrument of the kind referred to in the exception to s. 74 of the Contract Act, so as to make the obligor liable, upon breach of the condition thereof, to pay the whole amount mentioned therein; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond. *Held*, therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach. LACHMAN DAS v. CHATER, 10 A. 29=7 A.W.N. (1887) 279 ... 20

Admission.

See QUESTION IN ISSUE, 11 A. 396.

Agency.

See PRINCIPAL AND AGENT.

Agreement.

Opposed to public policy—See CONTRACT ACT (IX of 1872), 11 A. 118.

Amendment.

Power of lower Court to amend decree affirmed on appeal—See CIV. PRO. CODE, 1882, 10 A. 51.

Amin.

See MAHOMEDAN LAW (MOSQUE), 12 A. 494 (F.B.)

Appeal—1—General.

(1) *Death of plaintiff-appellant—Rival applicants for substitution—Order under Civ. Pro Code, s, 367, substituting one applicant—No appeal from such order—Unsuccessful applicant attempting to appeal from final decree on appeal—Civ. Pro. Code, s. 591—"Error, defect, or irregularity, effecting the decision of the case."*—Pending an appeal before the lower

Appeal—1.—General—(*Concluded*). PAGE

appellate Court, the plaintiff-appellant died, and two persons separately applied to be substituted as the deceased's representative. The Court, applying ss. 367 and 582 of the Civ. Pro. Code, decided in favour of one of the applicants, and brought him upon the record. No appeal was made against this order by the unsuccessful applicant. The lower appellate Court decided the appeal adversely to the successful applicant. Subsequently the unsuccessful applicant established by a separate suit that she was the deceased's legal representative, and that her opponent was not. She attempted to appeal to the High Court against the lower appellate Court's decree dismissing the appeal.

Held that the appellant not having been a party to the decree below, and the order below having decided that she was not entitled to be a party to the proceedings of the lower appellate Court, she was not entitled to maintain the appeal to the High Court, and s. 591 of the Civ. Pro. Code, was not applicable to the case.

Where an order under the group of sections in the Civil Procedure Code relating to representatives has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands.

Error, defect or irregularity within the meaning of s. 591 of the Code, means error, defect or irregularity in procedure or in law, and not in matters of fact. In the present case there was no error, defect or irregularity within the meaning of the section, and even if there were, it did not affect the decision of the case in appeal below. SANKALI v. MURLIDHAR, 12 A. 200=10 A.W.N. (1890) 23 ... 876

(2) *Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second appeal—Civ. Pro. Code, ss. 584, 586.*—For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed.

Therefore, where execution was applied for in the Munsiff's Court in respect of a sum of Rs. 422-14 0 the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above Rs. 500, and, the Munsiff's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court.

Held that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge. NAZAR HUSAIN v. KESRI MAL, 12 A. 581=10 A.W.N. (1890), 203.

(3) *Execution of decree—Sale of immoveable property set aside—Order refusing refund of price to purchaser—No appeal from such order—Civ. Pro. Code*, 1882, s. 315.—No appeal lies from an order refusing a refund of price to a purchaser the sale to whom has been set aside under s. 315 of the Civ. Pro. Code. RAHIM BAKHSH v. DHURI, 12 A. 397=10 A.W.N. (1890), 135. ... 998

(4) See CIV. PRO. CODE, 1884, 11 A. 392 (F.B.) 11 A. 408.

(5) See EXECUTION OF DECREE, 12 A. 313 (F.B.).

(6) See LIMITATION ACT, 1877, 12 A. 461 (F. B.)

(7) See TRANSFER OF PROPERTY ACT, s. 87, 12 A. 61.

Appeal—2.—(Second Appeal).

(1) *Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Second Appeal—Transfer of decree—Civ. Pro. Code, ss.* 223, 228, 586.—Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution-proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. HARAKH v. RAM SARUP, 12 A. 579=10 A.W.N. (1890), 206 ... 1115

(2) See APPEAL (GENERAL), 12 A. 581.

Appeal—2.—(Second Appeal)—(*Concluded*). PAGE

(3) See CIV. PRO. CODE, 1882, 10 A. 8 ; 11 A. 35 ; 11 A. 283.

(4) See PRACTICE AND PROCEDURE, 10 A. 28.

Appearance.

See PARDANASHIN WOMAN, 12 A. 69.

Arbitration.

(1) *Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Effect of acceptance of award by the Court—Effect of arbitrator first tendering and then withdrawing resignation—Civ. Pro. Code, ss. 508, 514, 521.*—The provision contained in s. 508 of the Civ. Pro. Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad.

Under s. 514 of the Code, the Court may extend the time for making the award after the time fixed therefor has expired.

The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award.

Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award,—*held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award.

The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. HAR NARAIN SINGH v. BHAGWANT KUAR, 10 A. 137=8 A. W.N. (1888) 28 ... 92

(2) See CIV. PRO. CODE, 1882, 10 A. 8.

Assignment.

of interest, pending suit.—See CIV. PRO. CODE. 1882, 10 A. 97.

Attachment.

See HINDU LAW (JOINT FAMILY), 12 A. 209.

Attachment before Judgment.

See CIV. PRO. CODE, 1882, 10 A. 506.

Bond.

(1) *Interest* post diem—*Non-payment of principal and interest at agreed date.*—Interest as interest cannot be allowed on money lent on a hypothecation-bond or on a deed of conditional sale, unless it appears from the bond or deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be give only by way of damages. MANSAB ALI v. GULAB, 10 A. 85=7 A.W.N. (1887) 292 ... 58

(2) *Interest* post diem—*Damages for non-payment on due date—Limitation—Act* XV *of* 1877 (*Limitation*), *sch.* II, *art.* 116—*Charge on hypothecated property—Successive or continuing breaches of contract—Practice—Danger of deciding case upon a document by construction put on another document in another suit.*—A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particulary the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage.

Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract ; and under art. 116 sch. ii, of the Limitation Act (XV of 1877), a suit to recover such

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damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable.

In such cases, there is one breach of the contract, namely, the non-payment on the date agreed upon; and there is no question of continuing or successive breaches.

The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond. BHAGWANT SINGH v. DARYAO SINGH, 11 A. 416=9 A.W.N. (1889) 165 694

Burden of Proof.

(1) *Lambardar and co-sharer— Suit by recorded co-sharer for profits—Claim for profits not collected in consequence of defendant's negligence or misconduct—Jamabandi—Evidence—Burden of proof—Act* XII *of* 1881 (*N.W.P. Rent*), ss. 93 (*h*), 209—*Act* I *of* 1872 (*Evidence*), s. 106.—In a suit under s. 93 (*h*) of the N.W.P. Rent Act (XII of 1881), by a recorded co-sharer against a lambardar for his recorded share of the profits of a mahal, in which the plaintiff seeks to make the defendant liable under s. 209, not only for the profits which the latter has actually collected, but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the *quantum* of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant. The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. S. 106 of the Evidence Act (I of 1872) does not apply to such a case.

So *held* by the Full Bench, Mahomed, J., dissenting.

Held, by MAHMOOD, J. *contra*, that the production of the *jamabandi* by the plaintiff in a case where he claims his share of the profits according to the *jamabandi* and the lambardar-defendant pleads that the actual collections fell short of the *jamabandi* established a *prima facie* presumption in favour of the plaintiff so as to throw upon the defendant, with reference to s. 106 of the Evidence Act, the necessity of proving circumstances which rendered it impossible for him to collect the profits according to the *jamabandi*. MUHAMMAD INAYAT HUSAIN v. MUHAMMAD KUMARAT, 12 A. 301 (F.B.)=10 A.W.N. (1890), 131 ... 939

(2) *Suit for cancellation of instrument—Act I of* 1877 (*Specific Relief*), s. 39 —*Fiduciary relation—Gift to spiritual adviser—Undue influence—Burden of proof—Act I of* 1872 (*Evidence*) s. 111.—In a suit under s. 39 of the Specific Relief Act (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *Chatri* by caste, well advanced in years, and the defendant was his *guru* or spiritual adviser, a Brahman held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book called Bhagwat. Almost immediately after execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud.

Held, that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principle recognized by s. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed. MANNU SINGH v. UMADAT PANDE, 12 A. 523=10 A.W.N. (1890), 56 ... 1077

(3) See EVIDENCE ACT, s. 110, 12 A. 46.

(4) See MORTGAGE (USUFRUCTUARY), 11 A. 438.

Cancellation of instrument.

See BURDEN OF PROOF, 12 A. 523.

Cause of action. PAGE

(1) See DEFAMATION, 10 A. 425.

(2) See MORTGAGE (USUFRUCTUARY), 12 A. 103.

(3) See MORTGAGE (CONDITIONAL SALE), 18 A. 144.

" Chakdars . "

See PRE-EMPTION, 10 A. 107.

Civil and Revenue Courts.

Jurisdiction—See PARTITION, 10 A. 5.

Civil Procedure Code (Act VIII of 1859.)

S. 205—See EXECUTION OF DECREE, 10 A. 462.

Civil Procedure Code (Act XIV of 1882).

(1) Ss. 2, 54, 158—*Dismissal of suit for insufficient Court fee on plaint—Decree—Appeal—Act* VII *of* 1870 (*Court Fees*), *s.* 12.—The Court of first instance being of opinion that the plaint bore an insufficient Court-fee and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal, the lower appellate Court held that the Court-fee was sufficient, and remanded the case for trial on the merits.

Held, that s. 158 of the Civ. Pro. Code was not applicable to the case; that the first Court's disposal of the suit must be treated as being under s. 54 and was therefore a decree within the meaning of s. 2, and appealable as such, and that such appeal was not prohibited by s. 12 of the Court Fees Act. MUHAMMAD SADIK v. MUHAMMAD JAN, 11 A. 91 (F.B.)=8 A.W.N. (1888) 286 ... 486

(2) Ss. 2, 244, sch. IV, art. 129—See TRANSFER OF PROPERTY ACT, s. 87, 12 A. 61.

(3) Ss. 3, 568, 582—See LIMITATION ACT (XV OF 1877), 10 A. 260.

(4) S. 11—See ACT XII OF 1881 (N.W.P. RENT), 11 A. 224.

(5) S. 11—See JURISDICTION OF CIVIL COURTS, 12 A. 409.

(6) Ss. 12, 13, 582, 587, 647—*Pending suits—Malikana—Recurring liability—Different reliefs claimed*—Res judicata—*Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—"Final" judgment—Judgment liable to appeal or under-appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of lower appellate Court, but before hearing of second appeal in second suit*—The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12 of the Civ. Pro. Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared.

For the purposes of the rule of *res judicata*, it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment.

A judgment liable to appeal or under-appeal is only a provisional and not a definite or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civ. Pro. Code, commented on.

The rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an *issue*, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity

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of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation.

On the 17th August, 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291 and 1292 fasli. On the 5th October, 1885, the Munsif dismissed the suit. On the 10th March, 1886, the Subordinate Judge on appeal reversed the Munsif's decree and decreed the suit. On the 21st June, 1886, the defendant appealed to the High Court which, on the 4th July 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June, 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November, 1886, the lower Courts decreed this suit holding that the Subordinate Judge's decree of the 10th March, 1886, in the former suit, operated as *res judicata* and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May, 1887, the defendant appealed to the High Court, and on the 16th May, 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July, 1887) the appeal came on for hearing.

Held (i) that the trial of the present suit by either of the lower Courts was not barred by s. 12 of the Civ. Pro. Code by reason of the fact that, at the time of such trial in August and November, 1886, the previous litigation between the parties was pending in second appeal before the High Court.

(ii) that the lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March, 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June, 1886, was liable to appeal, and, at the dates of the decisions of those Courts in August and November, 1886, was the subject of a second appeal pending in the High Court, could operate as *res judicata* in favour of the plaintiff's title to *malikana*.

(iii) that the High Court's judgment dismissing the former suit on the 4th July, 1887, though passed after the decisions of the lower Courts in the present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and being final, was conclusive as *res judicata* againt the plaintiff's title to *malikana*.

(iv) that the effect of the High Court's judgment dismissing the former suit on the 4th July, 1887, was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of the plaintiff's title to *malikana* and its scope was not limited to the particular item then claimed. BALKISHAN v. KISHAN LAL, 11 A. 148=9 A.W.N. (1889) 42=13 Ind. Jur. 309 ... 523

(7) S. 13—See MORTGAGE (USUFRUCTUARY), 11 A. 386.

(8) S. 13—Res judicata—*Cross-appeals—Finding in appeal first heard barring trial of same issue in appeal subsequently heard*—The plaintiff and defendant in a suit each appealed separately, and the defendant's appeal first came on for hearing and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court.

Held, that although s. 13 of the Civ. Pro. Code, did not apply, still the principle of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. RAM LAL v. CHAB NATH, 12 A. 578=10 A.W.N. (1890) 183. ... 1114

(9) S. 13—*Act* XVII *of* 1886, s. 8—*Decree made in British India—Suit on Judgment in Native territory—Cession of territory to British Government pending suit.*—Prior to the cession of the town of Jhansi to the British Government, plaintiff has instituted a suit in the Subah's Court in the Gwalior State

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on a judgment of the British Court in Jhansi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower appellate Court for trial on the merits.

Held, that the recital in part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhansi to the British Government should be continued in the Courts of the Jhansi district after the cession thereof; therefore the present suit, which, if it had been originally instituted in a Court of British India, could not have been maintained, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court where it was instituted, and it is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of the British India may now be applied.

King v. *Hoare* referred to as illustrating the distinction between an original cause of action and cause of action founded upon a judgment recovered on the original cause of action. SALONI v. HAR LAL, 10 A. 517=8 A. W. N. (1888) 183. ... 348

(10) *S. 13, explanation v.—Joint Hindu family—Suit against two members—Second suit against third member*—Res judicata.—The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree had been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother.

Held, that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civ. Pro. Code.

Held, also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V of s. 13 of the Code of Civil Procedure. RAM NARAIN v. BISHESHAR PRASAD, 10 A. 411=8 A.W N. 1888), 149 ... 276

(11) *Ss. 13, 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter*—Res judicata.—A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

Held by the Full Bench that the Court in the former suit had no power to inlcude in its decree of dismissal any such reservation or order, that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civ. Pro. Code, and the present suit was consequently barred as *res judicata*. SUKH LAL v. BHIKHI 11 A. 187 (F.B.)=9 A.W.N. (1889) 13 ... 548

(12) S. 17—See MINOR AND GUARDIAN, 12 A. 213.

(13) *Ss. 28, 45—Mis joinder of causes of action.*—The judgment of the majority of the Full Bench in *Narsingh Das* v. *Mangal Dubey* except in its general observations as to the provisions of the Civil Procedure Code, relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations

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made by the plaintiff in his plaint, and was not intended to be carried further. In a suit for possession of immoveable property part of which had been usufructuarily mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendant maintained such title.

Held, that inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right, by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action. INDAR KUAR v. GUR PRASAD, 11 A. 33=8 A.W.N. (1888) 283 ... 449

(14) S. 30—See TRUST, 11 A. 18.

(15) *Ss.* 32, 365, 366, 367, 368, 582, 587—*Death of plaintiff-respondent pending appeal—Substitution of alleged legal representative on her own application—Application by defendants-appellants to substitute another person as true legal representative—Power of Court to determine which of such persons is the true legal representative.*—In a suit for declaration of title to, and for possession of, a share in alleged ancestral property with mesne profits, the plaintiff obtained a decree in the lower appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was deceased plaintiff-respondent's true legal representative.

Held, by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may be" and "as far as may be" in s. 582 of the Civil Procedure Code, ss. 365, 366 and 367 might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the earlier words of the section so as to make s. 368 the only provision applicable to the case; that the Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly.

Held, also by the Full Bench (MAHMOOD, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff respondent.

Held, by MAHMOOD, J., *contra*, that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and the deceased respondent in that of a defendant for the purposes of array of parties; that consequently the provisions of ss. 363, 364, 365, 366 and 367, had no application; that, applying s. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying s. 32, the widow occupied a position which gave her a sufficient *prima facie* status to be impleaded as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased-plaintiff respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both. MUHAMMAD HUSAIN v. KHUSHALO, 10 A. 223 (F.B.)=8 A.W.N. (1888) 98 ... 149

(16) S. 43—See MORTGAGE (USUFRUCTUARY), 12 A. 203.

(17) S. 50—See MORTGAGE (USUFRUCTUARY), 11 A. 438.

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(18) *Ss.* 54, 56—*Plaint, rejection of*—S. 54 of the Civil Procedure Code may be applied at any stage of a suit. KISHORE SINGH (*Defendant*) v. SABDAL SINGH, 12 A. 553=9 A.W.N. (1889), 185 ... 1097

(19) Ss. 54, 541, 582, 632—See 12 A. 129.

(19-*a*) *Ss.* 111, 216—*Suit for dissolution of partnership—Set-off.* A suit for dissolution of partnership in which the claim was valued at Rs. 2,300, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000 then by reason of the provision in paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court. RAMJIWAN MAL v. CHAND MAL, 10 A. 587=8 A.W. N. (1888) 258 ... 395

(20) *S.* 206—*Power of lower Courts to amend decree affirmed on appeal.*—Where a decree for possession of immoveable property, passed by a lower appellate Court, omitted to specify the plots of land, to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower appellate Court subsequently on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification—*Held*, that inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect property other than that actually claimed and decreed, the amendment was not contrary to law. RAM SARAN v. PERSHIDHER RAI, 10 A. 51=7 A.W.N. (1887) 284 ... 35

(21) *Ss.* 276, 579, 623, 624—*Practice—Amendment of decree—Decree affirmed on appeal—Jurisdiction—Limitation—Review of judgment*—Res judicata. —The effect of s. 579 of the Civil Procedure Code is to cause the decree of the appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree and does not reverse or modify it.

Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree.

The only Court which has jurisdiction to amend the appellate decree is the Court of appeal.

So *held* by the Full Bench, MAHMOOD, J., dissenting.

The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh* v. *Bridgman* (4 A. 370) was a clerical error.

Per MAHMOOD, J.—Where a decree has been simply affirmed on appeal s. 579 of the Code does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code ; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624.

A decree awarding the plaintiffs possession of immoveable property did not comply with s. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused ; and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree.

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Held, by the Full Bench (MAHMOOD, J., dissenting) that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree.

Held, by MAHMOOD, J., *contra*, that the Court below had jurisdiction to make such amendment, and could make it at any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*; that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended. M. SULAIMAN KHAN v. M. YAR KHAN, 11 A. 267 (F.B.) =9 A.W.N. (1889) 55=13 Ind. Jur. 437 ... 598

(22) Ss. 210 & 230—See EXECUTION OF DECREE, 12 A. 571.

(23) S. 214—*Pre-emption—Conditional decree—Deposit of purchase-money—Appeal—Computation of time allowed for payment.*—In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the appellate Court.

Held, that the decree of the appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance that the period of one month allowed for payment of the purchase-money must be calculated from the date of the appellate Court's decree and that payment by the decree-holder within one month from that date was in time. RUP CHAND v. SHAMSH-UL JEHAN, 11 A. 346=9 A.W.N. (1889) 127 ...

(24) Ss. 214, 583—*Pre-emption—Conditional decree—Appeal—Purhase-money.*—A Court of first instance decreed a claim for pre-emption conditionally, on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court raising the Rs. 195 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the appellate Court's decree the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period.

Held, by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favour for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realized in execution of the first Court's decree.

Held, by Tyrrell, J., *contra*, that although the pre-emptor had once made a payment which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the appellate Court's decreee, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed. BALMUKAND v. PANCHAM, 10 A. 400=8 A.W.N. (1888) 74=13 Ind. Jur. 73 ... 269

(25) S. 220—See TRANSFER OF PROPERTY ACT, 1882, 10 A. 179.

(26) Ss. 234, 276, 311, 312—*Execution of decree—Death of judgment debtor after attachment but before sale in execution—Subsequent sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss. 234, 276, 311, 312.*—S. 234 of the Civil Procedure Code, applies only to cases where, after the

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death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's lifetime. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damnified by the sale, his remedy is by application under s. 311 of the Code.

So *held* by the Full Bench, Mahmood, J., dissenting.

Where, subsequent to the attachment of immoveable property in execution of a simple money-decree, the judgment-debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale-proceedings,—*held*, by the Full Bench (Mahmood, J., dissenting), that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar* v. *Bagrathi Ammal* (1) dissented from.

Held, by Mahmood, J., that on the principle of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under s. 647, be applied to execution proceedings (those proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale proceedings, was an irregularity; but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311; and that as in the present case no such substantial injury was either alleged or proved, the sale was valid.

Held, also by Mahmood, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of s. 311 of the Code. SHEO PRASAD v. HIRA LAL, 12 A. 440 (F.B.) = 10 A.W.N. (1890), 103 ... 1026

(27) *Ss.* 234, 244 (*c*). 278—See EXECUTION OF DECREE, 12 A. 313.

(28) *Ss.* 235, (*d*), 243, 581, 583—*Execution of decree—Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—" Such Court."* An appeal lies from an order passed under s. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor.

The words " such Court " in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to ss. 235 (*d*), 581 and 583, that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.

The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending, defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court but granted by the District Court. On appeal by defendant to the High Court, *held*, that an appeal lies from the order, and the Judge's order was correct. KASSA MAL v. GOPI, 10 A. 389 = 8 A.W.N. (1888) 51 261

(29) *S.* 244—*Question for Court executing decree—Money paid into Court by pre-emptor under Civil Procedure Code, s. 214—Suit for pre-emption dismissed on appeal—Suit for refund of money paid into Court.*—A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595 which the Court determined was the amount of the sale-consideration. He paid the amount to the vendees and the payment was certified under s. 258 of the Civil

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Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale consideration to Rs. 1,995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the appellate Court and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who after unsuccessful application made to the Court of first instance, under s. 244 of the Civil Procedure Code, to recover the amount, instituted this suit.

Held, that the assignee was a representative of the plaintiff in the pre-emption suit, within the meaning of s. 244 of the Civil Procedure Code, and the suit was therefore barred under the provisions of that section. ISHUR DAS v. KOJI RAM, 10 A. 354=8 A.W.N. (1888) 57=13 Ind. Jur. 34 ... 239

(30) *Ss.* 244, 283—*Decree against mortgagor for mortgage money and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagors right to property.*—In a suit upon a hypothecation bond, a third party was made defendant as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree the debt not being satisfied by sale of the mortgaged property, the decree-holder, caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree.

Held, that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. JANGI NATH v. PHUNDO, 11 A. 74=8 A.W.N. (1888) 275 ... 475

(31) *Ss.* 244, 291—*Sale in execution of decree—Tender of debt by transferee of property—Question for Court executing decree—Separate suit.*—*Held*, that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civ. Pro. Code, and that the executing Court was bound to accept the money and stop the sale.

Held, also, where the executing Court had refused to accept the money and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291, was not barred by s. 244 of the Code. BEHARI LAL v. GANPAT RAI, 10 A. 1=7 A.W.N. (1887) 238 ... 1

(32) *S.* 244 (*c*)—*Execution of decree—Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished* pro tanto—*Validity of sale and extent of rights purchased to be determined by Court executing the decree,*—Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend allike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

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Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of cl. (c) of s. 244 of the Code of Civil Procedure and must be determined by order of the Court executing the decree. KUDHAI v. SHEO DAYAL, 10 A. 570=8 A.W.N. (1888) 231=13 Ind. Jur. 275 ... 383

(33) S. 244 (c)—See PARTIES TO SUITS 12 A. 73.

(34) Ss. 246, 247—*Execution of decree—Cross-decrees—Set-off—Limitation.*—Under two decrees of the Sudder Diwani Adawlat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April 1866, pending the appeal, *A*. applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January, 1867, *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set off against the amount claimed by *A*.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit, of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity.

Held also that until the amount due to A had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off was therefore not barred by limitation; that the order of January, 1867, was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to A, that decision also would be a decree, and that s. 246 of the Code could then be applied. MATA DIN v. CHANDI DIN, 10 A. 188=8 A.W.N. (1888) 66 ... 126

(35) Ss. 257-A, 375, 647—*Execution of decree—Compromise—Estoppel.*—Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civ. Pro. Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution proceedings the word "suit" in s. 375 must, with reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257-A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree.

When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position assumed by them in the matter of the compromise.

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Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and until that happens, the parties are bound by it in all proceedings relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity. MUHAMMAD SULAIMAN v. JHUKKI LAL, 11 A. 228=9 A.W.N. (1889) 53. 573

(36) S. 258—See EXECUTION OF DECREE, 12 A. 569.

(37) S. 258—See LIMITATION ACT, Art. 179 (4), 12 A. 64. ...

(38) S. 258—See STEP-IN-AID OF EXECUTION, 12 A. 399 (F.B.).

(39) S. 266 (*k*)—See EXECUTION OF DECREE, 10 A. 462.

(40) S. 278—See HINDU LAW (JOINT FAMILY), 12 A. 209.

(41) *Ss.* 290, 311—*Execution of decree—Sale of immoveable property in execution—Sale held before expiration of thirty days from the proclamation—Application by judgment-debtor to set aside sale—"Illegality"—"Material irregularity"—Proof of substantial injury, whether necessary.*—Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor,—*held*, by EDGE, C.J. (BRODHURST, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an *illegality*, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury.

Held, by BRODHURST, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury *by reason of such irregularity*. GANGA PRASAD v. JAG LAL RAI, 11 A. 333=9 A.W.N. (1889) 115=13 Ind. Jur. 471 ... 640

(42) *S.* 295—*Execution of decree—Sale in execution—Rateable distribution among decree-holders—"Decrees for money"—"Same judgment-debtor"—Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.*—*U* held a money-decree against *B*, *P* and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R* and *S*, which so far as *P*, *R* and *S* were concerned, was a decree against enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U*'s execution was rejected.

Held that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code because it directed sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in *D*'s decree and only three in *U*'s would not deprive *D* of the right to share rateably. LONDON BANK v. UNCOVENANTED SERVICE BANK, 10 A. 35=7 A.W.N. (1887) 262 ... 24

(43) *S.* 295, *Proviso* (c)—*Execution of decree—Distribution of proceeds of execution-sale—Sale in execution of decree enforcing mortgage—Priority of mortgages—Act IV of* 1882 (*Transfer of Property*), s. 80.—*A* mortgaged certain property to *B* in July 1874, to *C* in March 1877, and again to *B* in November, 1877. *B* obtained a decree directing the sale of the property in satisfaction of his two mortgages, and it was sold accordingly. Subsequent to the sale, *C* obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale proceeds after payment of *B*'s first mortgage of July 1874, brought a suit under the last paragraph but one of s. 295 of the Civil Procedure Code to recover the amount received by *B* in respect of *B*'s mortgage of November 1877.

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Held that to read the words "an incumbrance" in s. 295, proviso (*c*) of the Civil Procedure Code as "an incumbrance or incumbrances" so as to give priority to *B's* mortgage of November 1877, over *C's* earlier mortgage of March 1877, would be to defeat the intention of the Legislature as expressed in that section and also in s. 80 of the Transfer of Property Act (IV of 1882) and that *C* was entitled to maintain the suit. MITHU LAL v. KISHAN LAL, 12 A. 546=10 A.W.N. (1890) 77 ... 1093

(44) S. 311—See EXECUTION SALE, 12 A. 96.

(45) Ss. 311, 313, 320, 322-*B*, 322-*C*, 322-*D*—*Execution of decree—Transfer of execution to Collector—Application to Civil Court to set aside sale held by Collector on the ground of irregularity.*—*Held* by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code, a sale held by the Collector in execution of a decree transferred to him for execution under s. 320, cannot be entertained by a Civil Court.

Per EDGE, C.J.—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322-B, 322-C, or 322-D KESHAB-DEO v. RADHE PRASAD, 11 A. 94 (F.B.)=9 A.W.N. (1889) 10=13 Ind. Jur. 272 ... 487

(46) Ss. 311, 483—*Attachment before judgment—Termination of attachment—Execution of decree—Sale in execution—Material irregularity in publishing or conducting sale without attachment.*—The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January, 1885, applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed: but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February, 1887, and accordingly on the 21st December, 1886, a sale notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale urging that the property sold was never attached in execution of the decree and the attachment previous to judgment was infructuous because afterwards the claim was dismissed by the Court of first instance; that there had been several other irregularities in publishing and conducting the sale; and that owing to the irregularities property had been sold at a grossly inadequate price causing substantial injury. The Subordinate Judge overruling the objections confirmed the sale. On appeal by the judgment-debtor, *held*, following *Mahadeo Dubey* v. *Bholanath Dichit*, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity", attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale. RAM CHAND v. PITAM MAL, 10 A. 506=8 A.W.N. (1888) 195 ... 340

(47) S. 312—*Execution of decree—Sale in execution pending appeal from decree—Application for confirmation of sale after reversal of decree—Court not competent to grant confirmation.*—Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been

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reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. MUL CHAND v. MUKTA PRASAD, 10 A. 83=7 A.W.N. (1887) 287 ... 56

(48) S. 315—*Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Act XV of* 1877 (*Limitation*), *sch.* II, *No.* 178.—A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

Held that the limitation applicable was that provided by art. 178 of sch. II of the Limitation Act (XV of 1877); that the right to apply accrued on the passing of the High Court's decree, and the application was therefore not barred by limitation, but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs. GIRDHARI v. SITAL PRASAD, 11 A. 372=9 A.W.N, (1889) 113 ... 665

(49) S. 315—See APPEAL, 12 A. 397.

(50) S. 320—*Execution of decree—Transmission of decree to Collector for execution—Civil Procedure Code, s.* 320—*Power of Local Government to make rules for regulating procedure of Collector—Rule providing for appeal from Collector to Commissioner not* ultra vires—*Rule No.* 17 *of cl. XIX, of* 12*th November,* 1883—*Act VII of* 1886 (*Civ. Pro. Code*), *s.* 30—*Act XIX of* 1873 (*N.W P. Land Revenue*), *s* 243.—The authority conferred upon the Local Government by s. 320 of the Civil Procedure Code prior to the amendment of that section by s. 30 of the Civil Procedure Code Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decree transmitted to him, included power to make a rule providing for an appeal from the Collector's orders.

Clause XIX of Rule 17 which was added to the Rules (No. 671 of 30th August, 1880) published in the *N.W.P. and Oudh Gazette* of the 4th September, 1880, by a notification in the Gazette of the 17th November, 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division was therefore not *ultra vires* of the Local Government.

S. 243 of the N.W.P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector. TAKUDDUS FATIMA v. BALDEO DAS, 12 A. 564=10 A.W.N. (1890) 185 ... 1105

(51) S. 325 (*j*)—See LIMITATION ACT, Art. 179 (4), 12 A. 64.

(52) S. 341—See LIMITATION ACT, Art. 179 (4), 12 A 64.

(53) S. 352—*Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s.* 352—*Effect of schedule not to make suit unmaintainable.*—A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code.

Held, that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable. ABDUL RAHMAN v. BEHARI PURI, 10 A. 194=8 A.W.N. (1888) 53 ... 130

(54) Ss. 368, 582—*Appeal—Abatement—Death of plaintiff-respondent—Application by defendants-appellants for substitution—Application presented after the* 1st *July,* 1888—*Limitation, Civil Procedure Code, Amendment Act* (*VII of* 1888), *ss.* 58, 66—*Act XV of* 1877 (*Limitation*), *sch.* II, *No.* 175-*C.*—The plaintiff-respondent in an appeal pending before the High Court died on the 17th September, 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased;

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on the 15th April, 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February, 1887, such suit was dismissed. On the 8th February, 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das* v. *Jagdamba Prasad*. On 24th July, 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent.

Held that the application having been made subsequent to the 1st July, 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and Art. 175-C of the Limitation Act (XV of 1877).

Held also that the petitioners had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. CHAJMAL DAS v. JAGDAMBA PRASAD, 11 A. 408 (F.B.). 688

(55) *Ss. 372, 647—Assignment of interest pending suit—Assignment after decree in Court of first instance—Assignee made a party after appellate decree for purposes of execution.*—S. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading s. 372 with s. 647, to bring in a party after decree and make him a judgment debtor for the purposes of execution.

Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 (21) of the Code,—*held* that as there was on jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor. GOODALL v. THE MUSSOORIE BANK, LIMITED, 10 A. 97=7 A.W.N. (1887) 288. ... 65

(56) *Ss. 373, 647—Application for execution withdrawn by decree-holder—Rule in Sarju Prasad* v. *Sita Ram—Civil Procedure Code, ss. 373, 647—"Suit"—"Appeal."*—S. 647 of the Civil Procedure Code makes s. 373 applicable to proceedings in execution of decree. The words "suit" and 'appeal" in s. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal.

An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off, upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid nor had the diet money been deposited, and, no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held*, by the Full Bench that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civ. Pro. Code. RADHA CHARAN v. MAN SINGH, 12 A. 392 (F.B.)=10 A.W.N. (1890) 119 ... 995

(57) *Ss. 373, 647—Execution of decree—Application for execution withdrawn by decree-holder—Rule in Sarju Prasad* v. *Sita Ram explained.*—The ruling in *Sarju Prasad.* v. *Sita Ram* only decided that where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder or execution is prohibited by s. 373 read with s. 647 of the Civ. Pro. Code.

But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an

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application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution.

A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader "that at present, the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings.

Held that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civ. Pro. Code.

Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under s. 647 of the Civ. Pro. Code, the provisions relating to proceedings in suits are to be followed and adopted in execution proceedings, so far as may be fairly and properly applicable thereto. FAKIR-ULLAH v. THAKUR PRASAD, 12 A. 179=10 A.W.N. (1890) 53 ... 863

(58) *S. 401, Explanation.—S. 622—High Court's powers of revision—Practice—Suit* in forma pauperis—"*Pauper*"—*Inquiry into pauperism*—On an application to sue *in forma pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the explanation to s. 401 of the Code of Civil Procedure, and in deciding it to ascertain the exact property, its market value and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.

All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code. *Chatterpal Singh* v. *Raja Ram*, notwithstanding.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence ; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order MUHAMMAD HUSAIN v. AJUDHIA PRASAD, 10 A. 467=8 A.W.N. (1888) 179 ... 313

(59) *S. 492—Temporary injunction "wrongfully" sold in execution of decree.*—An objection made under s. 278 of the Civ. Pro. Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtor under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond, and (*b*) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree.

Held that although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution sale, and no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the applicant. KIRPA DAYAL v. RANI KISHORI, 10 A. 80=8 A.W.N. (1888) 7 ... 54

(60) *Ss. 508, 521, 522, 582—Arbitration—Revocation of submission to arbitration—Appellate decree in accordance with award—Second appeal.*—By reason of s. 582 of the Civil Procedure Code where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in s. 521 passes a

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decree strictly in accordance with the award, such appellate decree is entitled to same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. NAURANG SINGH v. SADAPAL SINGH, 10 A. 8=7 A.W.N. (1887) 240 ... 6

(61) Ss. 503, 514, 521—See ARBITRATION, 10 A. 137.

(62) S. 539—See TRUST, 11 A. 18.

(63) *Ss.*544, 561, 562, 578—*Practice—Appeal on full Court-fee from decree dismissing suit in part—Remand of whole case though no cross appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed.* —A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff, not appealing under s. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the lower appellate Court confirmed the decree. On a second appeal to the High Court—

Held (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower appellate Court not having jurisdiction in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code.

Per MAHMOOD, J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole. CHEDA LAL v. BADULLAH, 11 A. 35=8 A.W.N.=(1888) 284=13 Ind. Jur. 190... 451

(63-*a*) S. 561—*Dismissal of appeal as barred by limitation—Objections not entertainable.*—The entertainment of objections under s. 561 of the Civ. Pro. Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either. RAMJIWAN MAL v. CHAND MAL, 10 A. 587=8 A.W.N. (1888) 258 ... 395

(64) *Ss.* 562, 546—" *Suit.* "—S. 562 of the Civil Procedure Code authorises a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point. BANWARI LAL v. SAMMAN LAL, 11 A. 488=9 A.W.N. (1889) 188 ... 739

(64-*a*) *Ses.* 562, 563, 564, 566—*Practice—Remand.*—In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiff's legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below.

Held, by EDGE, C.J. and MAHMOOD, J. (STRAIGHT, J., dissenting) that s. 562, of the Civ. Pro. Code, applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues

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or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the persent case, evidence had been excluded in this broad sense, s. 562, (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues.

Held by STRAIGHT, J., *contra*, that, with reference to ss. 562, 563 and 564, the case could not be remanded under s. 562, because it had not been disposed of upon a preliminary point so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under s. 566. M. ALLADAD KHAN v. M. ISMAIL KHAN, 10 A. 289 ... 193

(65) *Ss*. 562, 564. 588, (28), 591—*Remand in contravention of s*. 564—*Remand and all subsequent proceedings illegal—Omission to appeal from remand order—Objection to order allowed on appeal from final decree—Construction of statutes—Distinction between affirmative commands and negative prohibitions—Irregularities and illegalities.*—Where a Court of first instance decided a suit, not upon the preliminary point as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed,—*Held*, by the Full Bench that, with reference to ss. 562, 564 of the Civil Procedure Code, the lower appellate Court had no jurisdiction to remand the case under the former section, and that both the remand order and all proceedings subsequent thereto were *ultra vires* and illegal.

Held further that the legality of the remand order and the subsequent proceedings could, under s. 591 of the Code, be questioned in sceond appeal from the decree in the suit, though no appeal had been preferred against the order itself under s. 588 (28).

As a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done, and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction. RAMESHUR SINGH v. SHEODIN SINGH, 12 A. 510 (F.B.) = 10 A.W.N. (1890) 188 ... 1069

(66) Ss. 566, 567—See PRACTICE AND PROCEDURE, 10 A. 28.

(67) *Ss*. 575, 623, 647—*Practice—Appeal—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Act XV of* 1877 (*Limitation*), *s*. 5—*Letters Patent, N.W.P. s*. 27—*Civ. Pro. Code, ss*.575, 647—*Review of judgment—Civ. Pro. Code. s*.623—*Court-fee*—S. 27 of the Letters Patent for the High Court of the N.W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable.

One of the cases to which s. 575 of the Code does not apply is where a preliminary objection is being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail. HUSSAIN BEGAM v. COLLECTOR OF MUZAFFARNAGAR, 11 A. 176 ... 540

(68) Ss. 579, 592—See LIMITATION ACT, ss. 5, 12 and art. 170, 12 A. 79.

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(69) Ss. 584, 622, 629—*Second appeal—Order on appeal affirming order granting application for review of judgment—High Court's power of revision.*—No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment.

The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the rehearing. GOPAL DAS v. ALAF KHAN, 11 A. 383=9 A.W.N. (1889), 151 ... 672

(70) S. 586—*Small Cause Court suit.* For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance. KIAM-UD-DIN v. RAJJO, 11 A. 13 436

(71) Ss 588, 591—See LETTERS PATENT (N.W.P.) 11 A. 375.

(72) S. 591—See APPEAL, 12 A. 200.

(73) S. 622—*Jurisdiction, Presumption of—Maxim,* Omnia praesumuntur rite et solemniter esse acta—*Civil Procedure Code, ss.* 103, 283, 647—*High Court's power of revision*—The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it.

Held that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction ; that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or suit under s. 283 ; and that the High Court should not interfere in revision. SHEO PRASAD SINGH v. KASTURA KUAR, 10 A. 119=8 A.W.N. (1888) 26 ... 80

(74) S. 622—See REVISION, 12 A. 198.

(75) S. 632—See LETTERS PATENT, (N.W.P.) 11 A. 375.

(76) S. 646-B—*Reference by District Judge of proceedings in Small Cause Court attacked for want of jurisdiction.*—Before a District Court can make a reference under s. 646-B of the Civil Procedure Code, it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court should be sought. The word "shall" in s. 646-B, clause (1) is not mandatory but directory. MADAN GOPAL v. BHAGWAN DAS, 11 A. 304=9 A.W.N. (1889) 75 ... 621

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Ss. 53, 66—See CIVIL PROCEDURE CODE, 1882, 11 A. 403.

Collector.

See CIVIL PROCEDURE CODE, 1882, s. 320, 12 A. 564.

Company.

(1) *Application for registration—Act X of 1866 (Indian Companies) Act—Application received while Act X of 1866 was in force—Delay in office of Registrar—Certificate purporting to be issued under Act X of 1866, but issued after repeal thereof by Act VI of 1882—Act I of 1868 (General Clauses Act), s. 6—"Proceedings commenced"—Company held to have been registered under Act X of 1866—Practice—Costs.*—Prior to the 1st May, 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May,

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and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued till the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) Repealing Act X of 1866 came into force, s. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The share holders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the Company having gone into liquidation, the Official Liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act, VI of 1882.

Held that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration, commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April 1882, while Act X of 1866 was in force; that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares. *In the matter of* THE WEST HOPETOWN TEA COMPANY, LIMITED, 11 A. 349=9 A.W.N. (1889), 119 ... 650

(2) See COMPANIES ACT, s. 144 (*c*), 12 A. 193.

Companies Act (VI of 1882).

S. 144 (*c*)—*Company—Winding up—Application by Official Liquidator for sanction to sale of Company's property—Lease—Covenant against assignment—Covenant not applying to assignments other than by act of parties—Act IV of* 1882 (*Transfer of Property Act*), *ss.* 10, 12.—The power of the Court under s. 144 (c) of the Indian Companies Act (VI of 1882) to give sanction to an Official Liquidator to sell the property of the Company, overrides a private contract against assignment made by the Company.

A covenant in a lease to a Company provided that the lessees should not "assign, underlet or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns." The Company having gone into liquidation, and the Official Liquidator having applied, under s. 144 (*e*) of the Indian Companies Act, for sanction to sell the Company's property, it was objected on behalf of the lessors' assigns that the proposed sale would be in contravention of the covenant.

Held that the covenant did not apply to assignments by operation of law or assignments authorised by statute.

Ss. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties. *In the matter of* THE WEST HOPETOWN TEA COMPANY, LIMITED, 12 A. 192=10 A.M.N. (1890), 71 ... 871

Compensation.

See ADMINISTRATION BOND, 10 A. 29.

Complaint.

See CRIMINAL PROCEDURE CODE, 1882, 10 A. 39; 10 A. 55.

Compromise.

See CIVIL PROCEDURE CODE, 1882, 11 A. 228.

Conditional Decree.

See TRANSFER OF PROPERTY ACT, 12 A. 539.

Confession. PAGE

See EVIDENCE ACT, 1872, ss. 74, 83 ; 2 A. 595.

Contempt of Court.

See CRIMINAL PROCEDURE CODE, 1882, 11 A. 361.

Continuing Guarantee.

See LEASE. 10 A. 531.

Contract Act (IX of 1872).

(1) S. 16—See VOLUNTARY TRANSFER, 10 A. 535.

(2) S. 23—*Unconscionable bargain—Gambling in litigation—Agreement opposed to public policy—Act* IX *of* 1872 (*Contract Act*). *s.* 23.—For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the moneys borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bona fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

Held that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class or professional money-lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of the defendant's success, it must be concluded either that they did not believe his claim to be well-founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well-founded, that the reward contracted for was excessive and unconscionable ; and in either case the contract could not be enforced in its terms.

Held also that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender ; that as there was no reason to suspect the plaintiff's motives, it would be inequitable to relieve the defendant from all liability ; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back ; that simple interest at 12 per cent. per annum on the amounts of the bonds for that period would be reasonable compensation for such use ; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case ; and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment. LOKE INDAR SINGH v. RUP SINGH, 11 A. 118=9 A.W.N. (1889) 72 ... 504

(3) S. 23—*Agreement opposed to public policy—Speculative transaction.*—For the purpose of meeting the expense of a suit for possession of immoveable

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property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that, if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000.

Held that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 per cent. per annum. HUSAIN BAKHSH v. RAHMAT HUSAIN, 11 A. 128=8 A.W.N. (1888) 273 510

(4) S. 23—See ACT XXII OF 1881 (EXCISE), 10 A. 577.

(5) S. 23—See UNCONSCIONABLE BARGAIN 11 A. 57.

(6) S. 65—See LIMITATION ACT (XV OF 1877), 11 A. 47.

(7) *Ss. 69, 70—"Lawfully"—Mortgage—Decree enforcing hypothecation—Satisfaction of decree by person not subject to legal obligation thereunder—Suit for contribution brought by such person against judgment-debtor—Gratuitous payment.*—The widow of *D* a seperated Hindu, hypothecated certain immoveable property which had belonged to her husband. The immediate revisioners to *D*'s estate were his nephew *S* and the three sons of his brother *O*. After the widow's death, the mortgagee put his bond in suit, impleading as defendants *S*, two of *S*'s four sons and the three sons of *O*. Only the three last-mentioned persons resisted the suit; and the mortgagee obtained a decree directing the sale of the mortgaged property in satisfaction of his claim. From the operation of this decree *S* was wholly exempted, and his sons were made liable only to pay their own costs. Before any sale in execution of the decree could take place, the sons of *S* paid the amount of the decree into Court, thus saving the property from sale. They subsequently sued the sons of *O* for contribution in respect of this payment. It was found that, at the time when the payment was made, *S* was a member of a joint Hindu family with the defendants, and that his sons, the plaintiffs, had at the time, no interest in the property by transfer from him.

Held that at the time of the payment, the plaintiffs could not properly be regarded as in the position of co-mortgagors with the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiff to make the payment could not be imported into the case, and the plaintiffs were not entitled to contribution.

Held also that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money not for the defendants but for themselves, they could not claim the benefits of that section.

The principle of the decision in *Pancham Singh* v. *Ali Ahmad*, has been recognized and provided for in the Transfer of Property Act.

By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. CHEDI LAL v. BHAGWAN DAS, 11 A. 234=9 A.W.N. (1899) 67 ... 577

(8) S. 74, Exception—See ADMINISTRATION-BOND, 10 A. 29.

Contract Act (IX of 1872)—(*Concluded*). PAGE

(9) Ss. 124, 125, cl. (2)—See LEASE, 10 A. 531.

(10) Ss. 129, 131—See LEASE, 10 A. 531.

(11) *Ss. 134, 137—Principal and surety—Omission by creditor to sue principal debtor within period of limitation—Discharge of surety.*—The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance.

S. 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as to the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. RADHA v. KINLOCK, 11 A. 310=9 A.W.N. (1889) 94 ... 625

(12) Ss. 201, 218—*Principal and agent—Suit by principal against agent to recover money received and not accounted for—Act XV of 1877 (Limitation Act) sch. ii, No. 89—Termination of agency.*—Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to ss. 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch ii, art. 89 of the Limitation Act (XV of 1877); and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty. BABU RAM v. RAM DAYAL, 12 A. 541=10 A.W.N. (1890) 99 ... 1089

Contribution.

(1) *Joinder of parties—Joinder of causes of action—Charge—Act XV of 1877 (Limitation Act), sch ii, Nos. 99, 120, 132.*—Where the owner of two villages sold under a decree obtained upon a mortgage claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners.

He may also bring a single suit in respect of the two sales, and is not bound to bring a separate suit in respect of each sale.

The owners of the other villages included in the mortgage are liable to contribution and the owner of the property sold is entitled to a charge on those other villages in respect of the several amounts to be contributed, and the suit for contribution is governed by the limitation provided by art. 132 and not by that provided by art. 99 or art. 120 of sch. ii of the Limitation Act. (XV of 1877) and must be instituted within twelve years from the date of confirmation of the sale. IBN HUSAIN v. RAMDAI, 12 A. 110=10 A.W.M. (1890) 31 ... 820

(2) See CONTRACT ACT (IX OF 1872), 11 A. 234.

Co-sharer.

See MAHOMEDAN LAW (PRE-EMPTION), 12 A. 426.

Costs.

(1) *Preliminary objection to appeal successful—Dismissal of appeal—Respondent's costs—Previous notice not given to appellant—Practice in English bankruptcy appeals.*—Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection. IMTIAZ BANO v. LATAFAT-UN-NISSA, 11 A. 328=9 A.W.N. (1889) 108 ... 637

(2) *Practice*:—An unsuccessful official liquidator's application to place certain shareholders upon the list of contributories having been *bona fide* made

Costs—(*Concluded*). PAGE

in the liquidation, the Court ordered that the costs of each site should be paid as a first charge out of the estate. *in then matter of* THE WEST HOPETOWN TEA COMPANY LTD., 11 A. 349 ... 650

(3) See DAMAGES. 12 A. 166.

(4) See TRANSFER of PROPERTY Act, 1882, 10 A. 179.

Court-Fee.

(1) *Suit to obtain a declaratory decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of* 1870 (*Court Fees Act*), *sch* ii *No.* 17 (i) *and* (ii)—*Held* that the court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (*a*) for a declaration of right to certain property, and (*b*) that the said property might be released from attachment in execution of a decree, was Rs. 10 in respect of each of the reliefs prayed. DILDAR FATIMA v. NARAIN DAS, 11 A. 365=9 A.W.N. (1889) 131 ... 661

(2) See CIVIL PROCEDURE CODE; 1882, 11 A. 91.

(3) See COURT-FEES ACT, (VII of 1870), 11 A. 176.

(4) See STAMP ACT (I OF 1879), 11 A. 16.

Court-Fees Act (VII of 1870).

(1) Ss. 4, 5, 6, 9, 10, 11, 12, 28, 30—See LIMITATION ACT, s. 4, 12 A. 129.

(2) *Ss.* 6, 28, *sch. i Nos.* 4, 5—*Review of judgment—Limitation—Act* XV *of* 1887 (*Limitation Act*), s. 5, *sch.* ii *No.* 172—*Act* VII *of* 1870 (*Court-Fees Act*), *ss.* 6, 28, *sch. i, Nos.* 4, 5—*Application insufficiently stamped—Sufficient cause for admitting application after period prescribed—Presentation of application to Munsarim instead of Judge.*—On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May, the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree.

Held that s. 6 and the first paragraph of s. 28 of the Court-fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of s. 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of s. 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected.

Held also that the application should have been presented to the Judge, and not to the Munsarim. MUNRO v. THE CAWNPORE MUNICIPAL BOARD, 12 A. 57=9 A.W.N. (1889), 197 ... 786

(3) *Sch.* i, *art.* 5—*Fee on application to review appellate decree under cl.* 10, *Letters Patent.*—Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment,—*held* that, under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree, under s. 623 of the Code.

For the purpose of ascertaining the Court-fee to be paid under sch. i, art. 5 of the Court-fees Act (VII of 1870) upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint nor—where the decree

Court-Fees Act (VII of 1870)—(*Concluded*). PAGE

sought to be reviewed was passed, on appeal under s. 10 of the Letters Patent from an appellate judgment of a Division Bench—the fee which was leviable on the memorandum of the appeal before such Bench. HUSAINI BEGAM v. COLTR. MUZAFFARNAGAR, 11 A. 176=9 A.W.N. (1889) 27=13 Ind. Jur. 316 ... 540

(4) Sch. ii, art. 6—See STAMP ACT (I OF 1879), 11 A. 16.

Criminal Procedure Code (X of 1882).

(1) Ss. 4, 198, 200—"*Complaint*"—*Charge of defamation not made in complaint, but added in subsequent examination.*—A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal "complaint" made by an aggrieved person within the meaning of ss. 4 (*a*) and 192, so as to enable the Magistrate to take cognizance of the offence. QUEEN-EMPRESS v. DEOKINANDAN, 10 A. 39=7 A.W.N. (1887), 264 ... 26

(2) Ss. 33, 235—*Act* XLV of 1860 (*Penal Code*), *ss.* 380, 454—*House-breaking in order to the commission of theft—Theft—Separate convictions and sentences—Practice—Revision—Crim.Pro.Code, s.* 438—*Reference by Magistrate of orders passed by Sessions Judge.*—Under ss. 35 and 235 of the Crim. Pro. Code, a Magistrate may legally pass a separate sentence of two years rigorous imprisonment and fine under each of the ss. 379 or 380 and 454 of the Penal Code for house-breaking in order to the commission of theft and theft; the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted,—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code.

But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft. QUEEN-EMPRESS v. ZOR SINGH, 10 A. 146=8 A. W. N. (1888), 5 ... 98

(3) S. 35—"*Distinct offences*"—*Act* XLV *of* 1860 (*Penal Code*), *ss.* 75, 411—*Practice.*—A person convicted under ss. 411—75 of the Penal Code is not convicted of "distinct offences," within the meaning of s. 35 of the Crim. Pro. Code.

Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt it to commit the accused for trial to the Court of Session. QUEEN-EMPRESS v. KHALAK, 11 A. 393=9 A. W. N. (1889), 152 ... 679

(4) Ss. 35, 235—See SEPARATE SENTENCES, 10 A. 58.

(5) Ss. 144, 518—*Duration of Magistrate's order—Act* XLV *of* 1860 (*Penal Code*), *s.* 188.—In 1876 a Magistrate passed an order under s. 518 of Act X of 1872 (Criminal Procedure Code), directing the Saraogis of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886, in which year there was no fresh promulgation of the order, the Saraogis took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code.

Held that the conviction was wrong, the order of 1876 having a temporary operation only. QUEEN-EMPRESS v. SHEODIN, 10 A. 115=8 A.W.N. (1888) 25 ... 77

(6) Ss. 192, 349, 350—*Practice—Criminal trial—Transfer of case by Subordinate Magistrate to District Magistrate—District Magistrate, deciding on evidence taken by subordinate.*—S. 360 of the Criminal Procedure Code was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to have jurisdiction in that post, and is succeeded by another officer.

Criminal Procedure Code (X of 1882)—(*Continued*). PAGE

A Subordinate Magistrate, having taken all the evidence for the prosecution and for the defence, sent the case to the Magistrate of the District, not on the grounds mentioned in s. 349 of the Criminal Procedure Code, and the District Magistrate, observing that none of the accused asked to have the witnesses reheard, gave judgment upon the evidence taken by the subordinate Magistrate. The Sessions Judge refused to interfere in revision with the District Magistrate's proceedings, on the ground that they were covered by s. 350 of the Code.

Held that this view was erroneous, that neither under s. 192 nor under s. 349 was there any transfer to the District Magistrate by his subordinate, that s. 350 was inapplicable, and that the order passed by the District Magistrate must be quashed. QUEEN-EMPRESS v. RADHE, 12 A. 66 = 10 A.W.N. (1890), 7 ... 792

(7) S. 195—See LIMITATION ACT (XV OF 1877), 10 A. 350.

(8) S. 195—*Sanction for prosecution for giving false evidence in a suit under Act XII of 1881 tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*—A suit for arrears of rent under s. 93, cl. (*a*) Act XII of 1881, was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer holding that he had no jurisdiction in the matter also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge.

Held, that the Court of a Collector when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the district, was still to be deemed subordinate to it, within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie. HARI PRASAD v. DEBI DIAL, 10 A. 582 = 8 A.W.N. (1888), 234 ... 391

(9) Ss. 226, 227—*Power of Sessions Judge to withdraw a charge framed by him.*—The word "alter" in s. 227 of the Criminal Procedure, Code includes withdrawal by a Sessions Judge of a charge added by him to the charge on which the commitment has been made. DWARKA LAL v. MAHADEO RAI, 12 A. 551 = 10 A.W.N. (1890), 178 ... 1096

(10) S. 260—*Summary trial—Complaint including charge not summarily triable—Summary jurisdiction not necessarily ousted thereby.*—The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. Whether a complaint affords sufficient ground for a summary trial, or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. QUEEN-EMPRESS v. JAGJIWAN, 10 A. 55 = 7 A.W.N. (1887), 280 ... 38

(11) S. 260—See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), 11 A. 262.

(12) Ss. 289, 537—"*No evidence*"—*Acquittal of accused without taking opinions of assessors.*—The words "there is no evidence" in s. 289 of the Code of Criminal Procedure, 1882, cannot be extended to mean *no satisfactory, trustworthy or conclusive evidence*; but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record, any evidence which, even if it

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were perfectly true, would amount to legal proof of the offence charged, then the Court has power without consulting the assessors, to record a finding of not guilty.

But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure. QUEEN-EMPRESS v. MUNNA LAL, 10 A. 414=8 A.W.N. (1888) 129=13 Ind. Jur. 76 ... 278

(13) Ss. 337, 339—See ACCOMPLICE, 11 A. 79

(14) S. 395—*Imprisonment in lieu of whipping—Court not authorized to inflict fine in lieu of whipping.*—A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c.

The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. QUEEN-EMPRESS v. SHEODIN, 11 A. 308=9 A.W.N. (1889) 93 ... 624

(15) S. 437—*Practice—Revision—Order of Sessions Judge rejecting application under s. 437—Subsequent order of District Magistrate granting similar application.*—Where a Sessions Judge has passed orders under s. 437 of the Crim. Pro. Code, a District Magistrate acting under the same section should not pass orders of a contrary kind, but if he thinks that the Judge's orders were wrong, he should submit them to the High Court through the medium of the Public Prosecutor.

Where a Sessions Judge had, under s. 437 of the Crim. Pro. Code, refused to order further inquiry into the case of an accused person who had been discharged, the High Court set aside a subsequent order of the Magistrate of the district passed under the same section and ordering further inquiry into the same case. QUEEN-EMPRESS v. PIRTHI, 12 A. 434=10 A.W.N. (1890) 99 ... 1021

(16) Ss. 480, 537—*Practice—Contempt of Court—Act* XLV *of* 1860 (*Penal Code*), s. 228.—The procedure laid down in s. 480 of the Criminal Procedure Code should be strictly followed. The provisions of this section should be applied then and there, at any rate before its raising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under s. 480.

Where a Magistrate in whose presence contempt was committed, took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days,—*held* that such action, though it might be irregular, was not illegal, and, as the accused had not been in any way prejudiced, was covered by s. 537 of the Criminal Procedure Code.

Held also that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused, and dealt with the matter at once or before his rising. QUEEN-EMPRESS v. PAIAMBAR BAKHSH, 11 A. 361=9 A.W.N. (1889) 128=13 Ind. Jur. 477 ... 658

(17) S. 488—*Husband and wife—Maintenance of wife—"Cruelty"*—The word cruelty in s. 488 of the Criminal Procedure Code is not necessary limited to personal violence. RUKMIN (*Petitioner*) v. PEARE LAL, 11 A. 480=9 A.W.N.8(1889) 162 ... 734

(18) S. 509—*Deposition of medical witness taken by Magistrate tendered at Sessions trial—Magistrate's record not showing and evidence not adduced to show that deposition was taken and attested in accused's presence—Act* I *of* 1872 (*Evidence Act*), s. 80.—Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the

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law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. QUEEN-EMPRESS v. POHP SINGH, 10 A. 174=8 A.W.N. (1888) 11 ... 117

Criminal Trial.

See DAMAGES, 12 A. 166.

Cross Appeals.

See CIVIL PROCEDURE CODE, 1882, s. 13, 12 A. 578.

Cross Decrees.

See CIVIL PROCEDURE CODE, 1882, 10 A. 188.

Cruelty.

See CRIMINAL PROCEDURE CODE, 1882, 11 A. 480.

Custom.

(1) See EASEMENT, 10 A. 358.
(2) See HINDU LAW (IMPARTIBLE ESTATES), 10 A. 272.
(3) See PRE-EMPTION, 10 A. 585.

Damage.

(1) Special. See DEFAMATION, 10 A. 425.
(2)—, See PUBLIC THOROUGHFARE, 10 A. 498.
(3)—, See PUBLIC WAY, 10 A. 553.

Damages.

(1) *Suit to recover costs by way of damages—Costs incurred in prosecuting case in Criminal Court.—Held* that a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a criminal Court. FAZAL IMAM v. FAZUL RASUL, 12 A. 166=10 A.W.N. (1890), 19 ... 854
(2) See HYPOTHECATION, 10 A. 133.
(3) See SMALL CAUSE COURT SUIT, 10 A. 49.

Debt.

Transfer of—See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

Declaratory Decree.

See SPECIFIC RELIEF ACT, 1877, s. 42, 12 A. 587 (P.C.).

Declaratory Suit.

See HINDU LAW (WIDOW), 11 A. 253.

Decree.

(1) Amendment of—See CIVIL PROCEDURE CODE, 1882, 11 A. 267.
(2) Amendment of—See PRACTICE AND PROCEDURE, 11 A. 314.
(3) Appeal—See CIVIL PROCEDURE CODE, 1882, 11 A. 91.
(4) See ACT XII OF 1881 (N.W.P. RENT), 10 A. 347.
(5) See TRANSFER OF PROPERTY ACT, s. 87, 12 A. 61.

Defamation.

(1) *Personal insult—Cause of action—Verbal abuse—Special damage—Witness—Privilege.*—The plaintiff was cited as a witness by one *S.* in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant, the defendant was examined by the Court, and stated that there was enmity between him and plaintiff and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate.

Held, by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness box, and therefore absolutely privileged.

Per *Mahmood, J.* (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, has not been tried, and the order remanding the case for trial on the merits was right.

Defamation—(*Concluded*). PAGE

Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

That whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred unless the contrary is shown.

That when the defendant is not absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

That the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness ; and such statements when made in the witness-box are previleged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase.

That even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good. DAWAN SINGH v. MAHIP SINGH, 10 A. 425=8 A.W.N. (1888) 157 ... 286

(2) *Suit by father in his own right for defamation of daughter—Suit not maintainable.*—A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civ. Pro. Code, by his guardian or next friend. DAYA v. PARAM SUKH, 11 A. 104=8 A.W.N. (1888) 287 ... 495

(3) Charge of, not made in complaint but added in subsequent examination. See CRIM. PRO. CODE, 1882, 10 A. 39.

Discharge of accused person.

See CRIM. PRO. CODE, 1882, s. 437, 12 A. 434.

Discretion.

(1) See INJUNCTION, 12 A. 436 (F.B.).

(2) See MINOR AND GUARDIAN, 12 A. 213.

Dissolution of Marriage.

Suit for—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of 1869 (*The Indian Divorce Act*), *ss.* 16, 17.—In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court, through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute.

Dissolution of Marriage—(*Concluded*). PAGE

Held, by Edge, C. J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh.

Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a *nisi* absolute without a motion being made to it to that effect.

Held, by Mahmood, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties.

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. CULLEY v. CULLEY, 10 A. 559=8 A.W.N. (1888) 249 ... 376

Distrainer.

See ACT XII OF 1881 (N.W.P. RENT), 10 A. 347.

District Magistrate.

See CRIM. PRO. CODE, 1882, s. 437, 12 A. 434.

Documents, Construction of.

Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for resale.—A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. BHAGWAN SAHAI v. BHAGWAN DIN, 12 A. 387 (P.C.)=17 I.A. 98=5 Sar P.C.J. 557 ... 992

Easement.

(1) *Privacy, right of—Custom.*—A customary right of privacy, under certain conditions, exists in India and in the North Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utero tuo ut alienum non lædas* and *aedificare in tuo proprio solo non licet quod alteri noccat.*

A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action.

Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being, whether, the privacy in fact, and substantially exists, and has been and in fact enjoyed. If this is answered in the negative, no further question arises. If in the affirmative, the next question is, whether, the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts.

In the case of a building for *parda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *pardanashin* woman, a custom preventing him from interfering with the privacy of such new building would not, in India, be unreasonable. The Indian case-law relating to the right of privacy reviewed. GOKAL PRASAD v. RADHO, 10 A. 358=8 A.W.N. (1888) 135 ... 241

2) *Customary—Privacy.*—Case where it was found that the plaintiff was by local custom entitled to an easement of privacy and in which the Court granted a mandatory order compelling the defendant to permanently close the door or window complained of. LACHMAN PRASAD v. JAMNA PRASAD, 10 A. 162=7 A.W.N. (1887) 295 ... 109

Ejectment. PAGE

See EVIDENCE ACT, s. 110, 12 A. 46.

Estoppel.

(1) See CIVIL PROCEDURE CODE, 1882, 11 A. 228.

(2) See MORTGAGE (USUFRUCTUARY), 11 A. 366.

Evidence.

(1) See ACT X OF 1873 (OATHS), 11 A. 183.

(2) See EVIDENCE ACT (I OF 1872), 10 A. 421 ; 11 A. 183 ; 12 A. 1.

(3) See MAHOMEDAN LAW (INHERITANCE), 12 A. 290.

(4) See PRE-EMPTION, 10 A. 585.

Evidence Act (I of 1872).

(1) *Ss. 8, 9, 13, 40, 43—Admissibility in evidence of judgments not* inter partes*—Judgment in criminal case.*—*P* brought a suit against *K*, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to *K*'s husband, and to have it declared that her husband died childless, and that *K* had falsely put forward a child of unknown parentage as her husband's son, *K* was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After *K*'s death *P* brought a suit against *D*, whom the Collector as Manager of the Court of Wards had accepted as the minor son of *K*, against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit.

Held, by the Full Bench that the judgment of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (BRODHURST, J., dissenting on this point) that they were admissible in evidence in the present suit.

Per Edge, C.J., and *Tyrrell, J.*—The judgments were admissible under s. 8 or s. 9 of the Evidence Act (I of 1872), nor was either of them a "transaction" or a "fact" within the meaning of s. 13. But the record, and not the judgments alone, in the former suit was, admissible under s. 13 (*b*), independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both clauses (*a*) and (*b*) of s. 13 including a right of ownership, and not being confined, as held by the majority in *Gujju Lâll* v. *Fatteh Lall* to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit.

Per Straight, J.—Under s. 43 of the Evidence Act, the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact but though s. 43 declared judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 irrelevant *qua* judgments orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a "transaction" or "instances" within the meaning of s. 13 ; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of *K*'s husband to obtain proprietary possession of his father's estate was claimed and recognised, and to establish that such a transaction or instance took place, they were the best evidence.

Per Brodhurst, J.—That for the reasons given by Garth, C.J., and Jackson and Pontifex, JJ., in *Gujju Lall* v. *Fatteh Lall*, the judgments in the former suit were not admissible in evidence.

Per Mahmood, J.—That for the reasons given in the dissentient judgment of Mitter, J., in *Gujju Lall* v. *Fateh Lall* the former judgment of the High Court was admissible in evidence.

It having been alleged that the defendant was in reality one *R*, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as *R* for causing simple hurt, and in which the

Evidence Act (I of 1872)—(*Continued*). PAGE

Court had found that *R* had died sometime before the date of the alleged offence, and expressed an opinion that the present plaintiff (who was not the prosecutor) had got up the case.

Held by Edge, C J., and *Brodhurst* and *Tyrrell, JJ.*, that the judgment of the criminal Court was not admissible in evidence.

Held by Straight, J., with doubt, and on the principle that in cases of doubt a Judge should decide in favour of admissibility rather than of non-admissibility, that the judgment was a fact which went to establish the identity of the defendant with the person he alleged himself to be, or at any rate to show that he was not the person the plaintiff said he was, and that it was therefore admissible under s. 9 of the Evidence Act.

Held by Mahmood, J., that the judgment was admissible under s. 8 and, if not, under other sections of the Evidence Act. COLTR. OF GORAKHPUR v. PALAKDHARI SINGH, 12 A. 1 (F.B.) ... 751

(2) *Ss. 74, 83—Presumptions in respect of record of foreign Court—Confession made before, and attested by, a judicial officer in a Native State, how far admissible as evidence in the Courts of British India.*—Certain persons charged with a dakaiti committed at Chawripura, a village on the borders of Gwalior, having gone over into Gwalior territory, were arrested and brought before the Magistrate of Bhind in Gwalior. That officer recorded their statement, attesting each statement in the following words :—

"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it, having heard it read out to him, stated it as correct. It contains a full and true account of the statement made by him."

Each statement also bore the mark (by way of signature) of the person by whom it purported to have been made.

Subsequently these persons were handed over to the British authorities and were tried by the Court of Session, who rejected the confessions above referred to as inadmissible in evidence. The accused having appealed to the High Court, it was held that each of the confessions recorded in the manner above described was admissible in evidence, certainly under s. 80 of the Evidence Act, and probably under s. 74 of that Act, as against the person by whom it was made. QUEEN-EMPRESS v. SUNDER SINGH, 12 A. 595=10 A.W.N. (1890) 199 ... 1125

(3) S. 80—See CRIMINAL PROCEDURE CODE, 1882, 10 A. 174.

(4) *S. 92—Evidence—Exclusion of evidence of oral agreement—" Between the parties "*—The words in s. 92 of the Evidence Act (I of 1872) " between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

M conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held*, that s. 92 of the Evidence Act will not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers. MULCHAND v. MADHO RAM, 10 A. 421=8 A.W.N. (1888) 127 ... 283

(5) S. 106—See BURDEN OF PROOF, 12 A. 301.

(6) *S. 110—Evidence—Burden of proof as to ownership—Possession—Suit for ejectment.*—It is usually for the plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership.

Evidence Act (I of 1872)—(*Concluded*). PAGE

In a suit for possession of immoveable property and other reliefs, it was proved that the plaintiff and his predecessors in title had been in undisturbed possession, for thirty or forty years previous to his dispossession by the defendant. The defendant alleged, but failed to prove, that the plaintiff had paid him rent as tenant-at-will of the premises. The lower appellate Court, upon the finding that the plaintiff's possession was that of a licensee, modified the first Court's decree, which had allowed the claim in full.

Held, with reference to s. 110 of the Evidence Act, that although in the first instance the burden of proving his title was on the plaintiff, it was shifted by his proving long undisturbed possession; that the defendant's failure to prove the alleged payment of rent went far to prove that the plaintiff's possession was adverse; and that the Court below, in acting upon the theory that such possession was that of a licensee, had wrongly set up for the defendant a defence which he had not set up for himself. LACHHO v. HAR SAHAI, 12 A. 46=8 A.W.N. (1888), 43 ... 778

(7) S. 110—See MORTGAGE (USUFRUCTUARY), 11 A. 438.

(8) S. 111—See BURDEN OF PROOF, 12 A. 523.

(9) S. 115—See MORTGAGE (USUFRUCTUARY), 11 A. 386.

(10) *S. 118—Judicial oath or affirmation—Act* X *of* 1873 (*Oaths Act*), *ss.* 6, 13—*Omission to take evidence on oath or affirmation.*—The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. QUEEN-EMPRESS v. LAL SAHAI, 11 A. 183=9 A.W.N. (1889) 65 ... 545

(11) S. 118—See ACT X OF 1873 (OATHS), 10 A. 207.

Execution of Decree.

(1) *Decree for enforcement of hypothecation—Decree limiting judgment-debtor's liability to the hypothecated property.*—A decree upon a hypothecation bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed. PRAN KUAR v. DURGA PRASAD, 10 A. 127=8 A. W.N. (1888) 21 ... 85

(2) *Decree for enforcement of hypothecation—Objection by judgment-debtor that property ordered to be sold is not legally transferable under N.W.P. Rent Act, s. 9—Such objection not entertainable in execution.*—In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable with reference to s. 9 of the N.W.P. Rent Act, cannot be entertained. MADHO LAL v. KATWARI, 10 A. 130=8 A.W.N. (1888) 41 ... 87

(3) *Decree payable by instalments—Default—Waiver—Limitation.*—A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years: and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default:

Held that the default if it was one had been waived by the decree-holder, and that such waiver was a good defence to the present application. BUDHU LAL v. REKKHAB DAS, 11 A. 482=9 A.W.N. (1889) 186 ... 735

(4) *Decree payable by instalment—Limitation—Waiver by decree-holder—Payment out of Court—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (6)—

Execution of Decree—(*Continued*). PAGE

Civil Procedure Code, s. 258.—An application for execution of a decree payable by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards and that the application was in time, having been made within three years from the date when the second instalment was due.

Held that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 228 of the Civil Procedure Code, be recognized. MITHU LAL v. KHAIRATI LAL, 12 A. 569 = 10 A.W.N (1890) 79 ... 1108

(5) *Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionary right of grantor—Act* VIII *of* 1859, *s.* 205—*Civil Procedure Code* (*Act* XIV *of* 1882), *s.* 266 (*k*)—"*Expectancy.*"—One *N*, the sole owner of a certain village, had a son *J*. *J* had two wives. By his first wife he had a son *U*. *J's* second wife was *G*, by whom he had a son whose widow is *K*, the defendant in the suit. *J*, died leaving *U*, his son, *G*, his widow, and *K*, his son's widow, and on his death *U* inherited the village. Prior to the year 1874 *U* had made a gift to *G*, of 105 bighas situate in the village. In 1874 the rights and interests of *U* in the village were sold by auction and purchased by *T*, the ancestor of the plaintiffs. *G* by a deed of gift conveyed the 105 bighas to *K* and ultimately died on 26th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to *G*, in lieu of her maintenance which she was to hold rent free for her life and that she had been in possession thereof for twenty years. Further that *U*, had the right to resume the land and assess it to rent on the death of *G*, and that all the rights and interests of *U* in the land were attached and sold in 1874. On second appeal it was contended that the interest of *U* in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that *U* gave to *G*, the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of *U*, in the land was of the same character and carried with it the same consequences, as the reversion which the lessor would have for land leased for life or years and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That *U*, had a vested right in the land which was capable of being sold, and that right passed to the auction purchaser at the sale of 1874. KACHWAIN v. SARUP CHAND, 10 A. 462 = 8 A.W.N. (1888) 200 ... 310

(6) *Deceased judgment-debtor—Execution against a person not the legal representative.*—The defendants, along with one *N* and *C*, had brought a suit against one *A* in the Civil Court at Peshawar in the Punjab and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881, application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother and Durga Kuar, widow, and Luchman Prasad and others, sons of Ajudhia Prasad, residents of Kundarkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was

Execution of Decree—(*Continued*). PAGE

the brother of A, deceased, yet he always lived separate and carried on business separately: that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as *A* left issue, it was wrong to call him as heir to *A*, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased, and had realized the amount from the Commissariat Office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge, and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie.

Held, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection, and lastly, of its being allowed or disallowed, and these do not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor. ANGAN LAL *v.* GUDAR MAL, 10 A. 479=8 A.W.N. (1888), 189 ... 321

(7) *Transfer of decree for execution—Agreement for satisfaction of judgment-debt by instalments—Civil Procedure Code*, ss. 210, 230, 257-*A*—*Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 179—Appeal No. 11 of 1890, under s. 10, Letters Patent.

A simple money-decree was passed in 1871, and was transferred to another Court for execution, and in June 1882 an application was made for execution; and, shortly afterwards, the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1888.

Held by EDGE, C.J., that the Court to which the decree was transferred had no power in 1882, to sanction the agreement under s. 257-A of the Civil Procedure Code; that if the order in June 1885, of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under s. 210 altering the decree; that if any decree in the case were capable of execution it was the decree of 1871, which had never been altered by a Court; and that inasmuch as a previous application for execution had been made in June 1882, that decree was dead, as well under s. 230 of the Code as under art. 179, sch. ii of the Limitation Act (XV of 1877).

Held by STRAIGHT, J., that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under s. 230 of the Code.

Per EDGE, C.J.—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257-A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree.

An agreement sanctioned under s. 257-A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under s. 210 though an order under s. 210 would operate as a sanction under s. 257-A.

Execution of Decree—(*Concluded*). PAGE

The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as, *e.g.*, by an order under s. 210. GANDHARAP SINGH *v.* SHEODARSHAN SINGH, 12 A. 571=10 A.W.N. (1890) 197 ... 1110

(8) *Question for Court executing decree—Appeal—Separate suit—Legal representative—Claim by legal representative to property as his own independently of deceased judgment debtor*—Jus tertii—*Civil Procedure Code, ss.* 234, 244 (*c*), 248, 278.—Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution-proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under s. 244 (c) of the Civil Procedure Code must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of s. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment-debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale; and the Court's order is subject to appeal but not to a separate suit under s. 283.

Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit.

So *held* by the Full Bench, TYRRELL, J., dissenting.

Held by TYRRELL, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree but in his personal character independent of the suit and decree, and prefers a claim under s. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution-proceedings.

Observations by STRAIGHT, J., as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable in accordance with the same procedure as that adopted in regular suits. SETH CHAND MAL *v.* DURGA DEI, 12 A. 813 (F.B.)=10 A.W.N. (1890) 137 ... 946

(9) See APPEAL, 12 A, 397.

(10) See APPEAL (SECOND APPEAL), 12 A. 579.

(11) See CIVIL PROCEDURE CODE, 1882, 10 A. 35; 10 A. 83; 10 A. 188; 10 A. 506; 10 A. 570; 11 A. 94; 11 A. 228; 11 A 372; 11 A. 333; 11 A. 392 (F.B.); 12 A. 179; 12 A. 440 (F.B); 12 A. 546; 12 A. 564.

(12) See LIMITATION ACT (XV OF 1877), 10 A. 71; 12 A. 64.

(13) See PARTIES TO SUITS, 12 A. 73.

(14) See PRACTICE AND PROCEDURE, 11 A. 314.

(15) See STEP-IN-AID OF EXECUTION, 12 A. 399 (F.B.).

(16) See TRANSFER OF PROPERTY ACT, s. 87, 12 A. 61; 12 A; 539.

Execution Sale.

Postponement of sale in execution—Sale held through order for postponement not reaching the conducting officer—Material irregularity in conducting sale—Illegal sale—Civil Procedure Code, 1882, *s.* 311.—The Court executing a decree passed an order postponing a sale in execution, but the

Execution Sale—(*Concluded*). PAGE

order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void.

Held that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed; that his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311 of the Civil Procedure Code; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor; and that the Court could not confirm the illegal sale, but must hold it to be void. SANT LAL v. UMRAO UN-NISSA, 12 A. 96=9 A.W.N. (1889), 201 ... 811

Excise.

See ACT XXII OF 1881 (EXCISE), 10 A. 577.

Extortion.

See SEPARATE SENTENCES, 10 A. 58.

False Personation.

See SEPARATE SENTENCES, 10 A. 58.

Fiduciary relation.

See BURDEN OF PROOF, 12 A. 523.

Further Enquiry.

See CRIM. PRO. CODE, 1882, S. 437, 12 A. 434.

Governor-General in Council.

Legislative power of—See STATUTE 24 AND 25 VIC., C. 67, 11 A. 490.

Harbouring offenders.

See PENAL CODE, 12 A. 432.

High Court.

(1) See CIVIL PROCEDURE CODE, 1882, 10 A. 119; 10 A. 467; 11 A. 333.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—ENDOWMENTS.
5.—GIFT.
6.—IMPARTIBLE ESTATES
7.—INHERITANCE.
8.—JOINT FAMILY.
9.—MAINTENANCE.
10.—REVERSIONER.
11.—STRIDHAN.
12.—WIDOW.

——**1.—Adoption.**

(1) *Hindu Law—Benares school—Mitakshara—Adoption—Power of Hindu widow to adopt—Necessity of express authority of deceased husband—Maxim quod fieri non debuit, factum valet.*—*Held* by the Full Bench that, according to the Benares school of Hindu law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void and that the maxim *quod fieri non debuit, factum valet*, is applicable to such an adoption. TULSHI RAM v. BEHARI LAL, 12 A. 328 (F B.) ... 956

(2) See POSSESSORY TITLE, 12 A. 51.

——**2.—Alienation.**

See HINDU LAW (WIDOW), 11 A. 253.

——**3.—Debts.**

See HINDU LAW (JOINT FAMILY), 12 A. 99.

Hindu Law—4.—Endowments. PAGE

See TRUST, 11 A. 18.

——5.—Gift.

Joint Hindu family—Maintenance—Gift to widow by member of joint family—Construction—Gift presumed to be of life estate only.—Disputes having arisen between the sole surviving member of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house, that she had been put in possession of the house and was in sole proprietary possession thereof, and that he had no connection whatever with it. Subsequently, the widow executed a deed-of-gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed-of-gift could not convey to him more than the life-interest of the widow donor.

Held that the deed-of-gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Held* also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance, and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed-of-gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate.

Held further, that there was nothing in the deeds under which the donor obtained possession of property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property, and that her estate therefore could at best be regarded as a life-estate, and the deed-of-gift as binding upon the plaintiff during her life-time, but not further. GANPAT RAO v. RAM CHANDAR, 11 A. 296=9 A.W.N. (1889), 111=13 Ind. Jur. 396 ... 616

——6.—Impartible Estates.

Custom—Right of possessor of impartible estate to alienate.—There is no such coparcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of the estate, that it does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability dependent on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable. SARTAJ KUARI v. DEORAJ KUARI, 10 A. 272 (P.C.)=15 I. A. 51=5 Sar. P.C.J. 139=12 Ind. Jur. 213 ... 182

——7.—Inheritance.

Hindu Law—Exclusion from inheritance—Idiocy—Madness. The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance should

Hindu Law—7.—Inheritance—(*Concluded*). PAGE

be enforced only upon the most clear and satisfactory proof that its requirements are satisfied.

The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endued with the business capacity to manage their affairs properly. SURTI v. NARAIN DAS, 12 A. 530=10 A.W.N. (1890) 110 ... 1082

——8.—Joint Family.

(1) *Evidence of separation—Definement of shares in ancestral property.*—A four-anna ancestral share in a zemindari village was owned by two brothers, in which the share of H, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs, the descendants of the other brother. In the village records there has been a definement of shares followed by entries of separate interest in the revenue records, and since 1264 Fasli the two plaintiffs have each been recorded as the owner of a one-anna share and H of a two-anna share thereof. The entire four-anna share has been in the possession of mortgagees from (the year 1844) excepting the *sir* lands of which H held separately his own share, *viz.*, 10 bighas. On the 7th July, 1883, H executed a deed-of-gift of his two-anna shares in favour of the defendants, and caused mutation of names to be made in their favour surrendering to them at the same time possession of the *sir* land. H died on the 21st January, 1884, leaving neither son, widow nor daughter, and the plaintiffs were his heirs-at-law. They brought this suit to set aside the deed-of-gift and for possession of the *sir* land from the defendants. The suit was dismissed by the Court of first instance, and in appeal the District Judge affirmed the decree, holding that the four-anna share was not joint and undivided property between the co-sharers, and that H was in separate possession of the two-anna share of which the defendants were the donees. On second appeal it was contended, that inasmuch as since 1844 there could have been no separate enjoyment of the four annas which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation.

Held, that from evidence of definement of shares followed by entries of separate interests in the Revenue records, if there be nothing to explain its separation as to estate may be inferred. Joint familiy property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated. RAM LAL v. DEBI DAT, 10 A. 490=8 A.W.N. (1888), 203=13 Ind. Jur. 117 ... 329

(2) *Money-decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed.*—The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree, the interest which the judgment-debtor had in the joint family property. JAGANNATH PRASAD v. SITA RAM, 11 A. 302=9 A.W.N. (1889) 81 ... 620

(3) *Hindu Law—Joint Hindu family.—Mortgage and decree thereon affecting joint family property—Mortgage effected by and decree passed against father only—Father's debt—Effect of mortgage and decree on son's rights and interests.*—Where a Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—Whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property was not covered by the mortgage or touched by the decree, or affected by the sale certificate. BENI MADHO v. BASDEO PATAK, 12 A. 99=10 A.W.N. (1890) 17 ... 813

Hindu Law—8.—Joint Family—(*Concluded*). PAGE

(4) *Joint Hindu family—Money-decree against father alone for his personal debt—Attachment of joint family property—Suit by sons to set aside attachment—C. P. Code*, 1882, s. 278.—Where in execution of a simple money-decree obtained against the father only in a joint Hindu family in respect of a bond debt incurred by him personally, the decree-holders attached the whole of the joint family property, and before sale in execution took place, the sons of the judgment-debtor objected to the attachment under s. 278 of the Civil Procedure Code, and, the objection having been disallowed, sued for a declaration that they were entitled to a share in the property and for its release from attachment, *held* that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch and which therefore could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution. RAM DAYAL v. DURGA SINGH, 12 A. 209=10 A.W.N. (1890) 83 ... 882

(5) See HINDU LAW (GIFT), 11 A. 296.

(6) See HINDU LAW (MAINTENANCE), 11 A. 194.

——9.—Maintenance.

(1) *Joint Hindu family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death and therefore before devolution of father's self-acquired estate—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.*—In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death, a minor: she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants.

Held (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants' hands from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had co-parcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested.

Held, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son who took the estate not for his own benefit but for the spiritual benefit of the last proprietor and against the property in question.

Per MAHMOOD, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu law regarding the principle that the right of inheritance is based on the spiritual benefits which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs, JANKI v. NAND RAM, 11 A. 194 (F B.)=A.W.N. (1886) 30=13 Ind. Jur. 347... 552

(2) *Hindu Law—Hindu widow—Maintenance.—Assessment of*—In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position

Hindu Law—9.—Maintenance—(*Concluded*). PAGE

and status of the deceased, and to the position and the status of the widow, and the expenses involved by the religious and other duties which she has to discharge.

Per MAHMOOD, *J.*—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance." The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction, and cannot be enforced by Courts of justice. The Courts should bear in mind that Hindu widows are by ancient custom debarred from re-marriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality. BAISNI v. RUP SINGH, 12 A. 558 =10 A.W.N. (1890), 112 ... 1101

(3) See HINDU LAW (GIFT), 11 A. 296.

——10.—Reversioner.

See HINDU LAW (WIDOW), 10 A. 485.

——11.—Stridhan.

Shares in village held by wife of former proprietor—Mitakshara—Mutation of names in the settlement record.—A share in a patidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section II, cl. 1. enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidence by mutation of names in the settlement record and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct. THAKRO v. GANGA PRASAD, 10 A. 197=15 I.A. 29=5 Sar. P.C.J. 133 ... 132

——12.—Widow.

(1) *Gift by Hindu widow of her own interest and that of consenting reversioner.* A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. RAMADHIN v. MATHURA SINGH, 10 A. 407=8 A.W.N. (1888), 79=13 Ind. Cas. 232 ... 274

(2) *Adverse possession against widow—Reversioners—Act XV of 1877 (Limitation Act), sch. ii, Nos. 141, 144.*—The plaintiffs sued for possession of certain zamindari property as reversioners to the estate of one *C*, their right to sue having accrued as alleged on the death of the widow of *C*, which took place on 14th October, 1884. The defendant, alleging himself, to be the adopted son of *C*, and being in possession of the property in dispute since the death of *C*, which happened in 1869, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendants' adverse possession over the property for more than 12 years. On second appeal, it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act and therefore not barred. *Held*, that as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. GHANDHARAP SINGH v. LACHMAN SINGH, 10 A. 485=8 A.W.N. (1888) 192 ... 32

(3) *Gift of immoveable property by husband—Life-interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.*—The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, suit to set aside an absolute gift of the house in suit made by *A*, in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower Appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid and dismissed the suit.

Hindu Law—12—Widow—(*Concluded*). PAGE

on appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed-of-gift she had no power to alienate.

Held, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed.

Held, further, that from the wording of the deed-of-gift it appeared that the husband intended to give and did give to his wife an heritable estate in and power of alienation over the property the subject of the gift and therefore the sale by the wife was valid. KANHIA v. MAHIN LAL, 10 A. 495=8 A.W.N. (1888) 181 ... 333

(4) *Alienation by widow to her married daughter—Reversioner—Declaratory suit —Act I of* 1877 (*Specific Relief Act*), *s.* 42 —The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter, is merely to accelerate the latter's succession and put her by anticipation in possession of her life estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift.

Per MAHMOOD, J., that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son who would be the next reversioner to the full ownership of the estate of the donor's deceased husband. BHUFAL RAM v. LACHMA KUAR, 11 A. 253=9 A.W.N. (1889) 22 ... 589

(5) See ACT XV OF 1856 (HINDU WIDOW'S RE-MARRIAGE), 11 A. 330.

(6) See HINDU LAW (ADOPTION), 12 A. 328.

(7) See HINDU LAW (MAINTENANCE), 12 A. 558.

Husband and Wife.

See CRIMINAL PROCEDURE CODE, 1882, 11 A. 480.

Hypothecation.

(1) *Moveable property—Non-existent moveable—Contract to assign after acquired chattels—Completion of assigument on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion—Measure of damages.—Held*, upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should comeinto existence; and that the hypothecation became complete when the crop was grown and the produce realized, and was enforcible against a transferee of such produce with notice of the obligee's equitable interest.

Held, also than an interest would not avail against a transferee without notice.

In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security—*held*, that the measure of damages, under ordinary circumstances, and where a fair obtained, would be the amount which the defendant had realized by sale. BANSIDHAR v. SANT LAL, 10 A. 133=8 A.W.N.; (1888) 35 ... 90

(2) See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

Idiocy.

See HINDU LAW (INHERITANCE), 12 A. 530.

Impartible estate.

See HINDU LAW (IMPARTIBLE ESTATES), 10 A. 272.

Indemnity.

See LEASE, 10 A. 531.

Indian Councils Act, 1861.

See STATUTE, 24 and 25 Vic., C. 67, 11 A. 490.

Injunction.

Co-sharers—Dealing with joint property—Building by one co-sharer against the wish of others—Suit for injunction to restrain building—Discretion of Court—Act I of 1877 (*Specific Relief Act*), *s.* 54.—One of several co-sharers in a mahal having begun to erect certain kachha buildings upon the

Injunction—(*Concluded*). PAGE

common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated.

Held, by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time.

Per Straight, J., that it was for the defendant-appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere. SHADI v. ANUP SINGH, 12 A. 436 (F.B.) = 10 A.W.N. (1890), 95 ... 1023

Injunction, Temporary.

See CIVIL PROCEDURE CODE, 1882, 10 A. 80.

Interest.

See BOND, 10 A. 85; 11 A. 416.

Intervenor.

See ACT XII OF 1881 (N.W.P. RENT), 10 A. 347.

Irregularity.

See APPEAL, 12 A. 200.

Jamabandi Papers.

See BURDEN OF PROOF, 12 A. 301.

Joinder of causes of action.

See CONTRIBUTION, 12 A. 110.

Joinder of Parties.

See CONTRIBUTION, 12 A. 110.

Joint Decree.

See CIVIL PROCEDURE CODE, 1882, 10 A. 570.
See POSSESSORY SUIT, 12 A. 556.

Judgment.

See EVIDENCE ACT (I OF 1872), 12 A. 752 (F.B.)

Judicial Officers, Liability of.

See ACT XVIII OF 1850, 12 A. 115.

Jurisdiction.

(1) *Partition, suit for—Claim for partition of share less than Rs.* 1,000 *in family property exceeding Rs.* 1,000*—Act VI of* 1871 (*Bengal Civil Courts Act*), s. 20—"*Subject-matter in dispute*"*—Jurisdiction of Munsif—Decree for partition of defendant's shares* inter se.—In a suit instituted in the Court of a Munsif by a member of a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000 and the value of the whole family property exceeded Rs. 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se*, though such partition was not asked for.

Held, that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871) was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit.

Jurisdiction—(*Concluded*). PAGE

Held, also that the lower appellate Court had no jurisdiction to partition as amongst the defendants the residue of the property left after the partitioning off of the plaintiff's share. HIKMAT ALI v. WALI-UN-NISSA, 12 A. 506=10 A.W.N. (1890) 128 ... 1067

(2) See ACT XVIII OF 1850, 12 A. 115.

(3) Presumption of—See CIVIL PROCEDURE CODE, 1882, 10 A. 119.

(4) See MINOR AND GUARDIAN, 12 A. 213.

Jurisdiction of Civil Courts.

(1) *Civil Procedure Code*, 1882, s. 11—*Act* XII *of* 1881 (*N.W.P. Rent*), *ss.* 61, 83, 85, 86, 93 (*f*)—*Distress—Suit for declaration of proprietary title in property said to have been wrongfully distrained—Jurisdiction of Civil Court.*—In execution of a decree against the tenants of certain zemindars, the plaintiff attached and sold certain trees upon the holding of the judgment-debtors, and the auction-purchaser in turn transferred them to the plaintiff, who obtained possession. Subsequently, one of the judgment-debtors vacated the land on which the trees were situate, and the zemindars let the land to another tenant. This last-mentioned tenant having fallen into arrears of rent, the zemindars, purporting to act under s. 56 of the North-Western Provinces Rent Act (XII of 1881), distrained some of the trees of which the plaintiff was in possession under his purchase, sold them, and themselves bought them. The plaintiff then brought a suit against the zemindars, praying for a declaration of his right to and maintenance of possession of the trees.

Held that the plaintiff was entitled, under s. 11 of the Civil Procedure Code, to bring the suit in a Civil Court and that the Civil Courts were not prevented from taking cognizance of it by ss. 83, 85, 93 (*f*) or any other provision of the North-Western Provinces Rent Act (XII of 1881). SHANKAR SAHAI v. DIN DIAL, 12 A. 409 (F.B.) = 10 A.W.N, 1890, 145 1006

See LANDLORD AND TENANT, 10 A. 615 ; 12 A. 419 (F.B.)

Jurisdiction of Civil and Revenue Courts.

(1) See ACT XII OF 1881 (N.W.P. RENT), 11 A. 31 ; 11 A. 224.

(2) See PARTITION, 10 A. 5.

Jurisdiction of Sessions Court.

See CRIMINAL PROCEDURE CODE, 1882, 10 A. 582.

Jus Tertii.

See EXECUTION OF DECREE, 12 A. 313.

Karinde.

See PENAL CODE, 12 A. 550.

Lambardar and Co-sharer.

See BURDEN OF PROOF, 12 A. 301.

Land Acquisition Act (X of 1870).

S. 55—*Part of property acquired for public purposes—Owner desiring that the whole shall be acquired—Right of owner not restricted to small or confined areas—Convenience of owner not the test.*—The Local Government having appropriated for public purposes under the Land Acquisition Act (X of 1870) some of the out-houses attached to a dwelling-house, and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances or the rest of the compound, the owner objected, under s. 55 of the Act, that the Government should take the whole of such property or none.

Held, applying to s. 55 the interpretation placed by the Courts in England upon the corresponding s. 92 of the Land Clauses Consolidation Act (8 & 9 Vic., c. 18), that the section was applicable, and the objection must be allowed.

Held, also that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner. KHAIRATI LAL v. SECRETARY OF STATE FOR INDIA, 11 A. 378=9 A.W.N. (1889) 104 ... 669

Landlord and Tenant. PAGE

(1) *Notice of ejectment—Determination of tenancy—Act XII of* 1881 *(N.W.P. Rent Act)* ; *ss.* 36, 39 *(c)*, 40—*Suit for ejectment and mesne profits—Payments by wrong-doer in possession not to be deducted from such profits.*—S. 39 (c) and s. 40 of the N.W.P. Rent Act (XII of 1881) imply that if a land holder has failed to give his tenant the written notice of ejectment required by s. 36, the tenancy is not to be treated in law as having ceased on determination of the term provided, but is to be treated as still subsisting.

Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 36 of the Act having been given by the lessor, possession was taken and rents collected by persons, claiming under a subsequent lease—*held* that the tenancy of the first lessees did not cease upon the determination of the term of their lease, that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits, after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents. SHITAB DEI v. AJUDHIA PRASAD, 10 A. 13=7 A.W.N. (1887) 269 ...

(2) *Agreement by occupancy tenant to relinquish his holding—Agreement not enforceable—Suit for specific performance of agreement—Jurisdiction of Civil Courts.*—The defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the agreement, and obtained a decree from the lower appellate Court. On second appeal by the defendant

Held that inasmuch as the plaintiff sought to enforce the covenant contained in the *kabuliat* in such a manner as to extinguish the right of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95 *(d)* and *(f)*, but not in the manner sought by the plaintiff in this action. KAURI THAKURAI v. GANGA NARAIN LAL, 10 A. 615=8 A.W.N. (1888), 239 ... 414

(3) *Occupancy tenant—Trees, sale of—Such sale invalid—Act XII of* 1881 *(N.W. P. Rent Act)*, *s.* 9.—The trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attached to such holding, and, like it, are not susceptible of transfer by the tenant. IMDAD KHATUN v. BHAGIRATH, 10 A. 159=8 A.W.N. (1888), 32 ... 107

(4) *Act XII of* 1881 *(N.W.P. Rent Act)*, *ss.* 9, 206—*Occupancy tenant—Mortgage of occupancy holding—Such mortgage not " act inconsistent with the purpose for which the land was let"—Suit to mortgagee in possession—Jurisdiction of Civil Court—Appeal—Objection to jurisdiction not taken in first Court.*—A mortgage of his holding by an occupancy tenant, under which the mortgagee obtains possession, is not an act " detrimental to the land" or " inconsistent with the purpose for which the land was let," within the meaning of s. 93 *(b)* of the N.W.P. Rent Act (XII of 1881). An act detrimental to the land means an act which injures the land itself. An act inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering the character of the land, as, for instance, turning it from agricultural land to building land.

But a mortgage with possession, whether the possession is given at the time of the granting of the mortgage, or is obtained later by virtue of the mortgage, is a transfer within the prohibition of s. 9 of the N.W.P. Rent Act.

A suit by the zemindar to eject the mortgagee of an occupancy holding or his representatives in possession, does not fall within ss. 93 *(b)* and 94 of the N.W.P. Rent Act, but is cognizable by a Civil Court, under the rules of limitation applicable to suits in such Courts.

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Under s. 206 of the N.W.P. Rent Act, when no objection to the jurisdiction was taken in the first Court, an objection to the jurisdiction is not to be entertained in the appellate Court, but the Judge must try the case upon the facts, and apply the law applicable to those facts. MADHO LAL v. SHEO PRADAD MISR. 12 A. 419 (F.B.)=10 A.W.N. (1890) 162 ... 1012

Lease.

(1) *Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Act IX of* 1872 (*Contract Act*), *ss.* 124, 125, *clause* (2), 126, 129, 131.—One *B* proposed to take a lease of zemindari property from *M* for the period of eight years at a rental of Rs. 3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died. and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

Held, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death.

Held further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, can be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit. GOPAL SINGH v. BHAWNI PRASAD, 10 A. 531=8 A. W. N. (1888) 211 ... 357

(2) See COMPANIES ACT, s. 144 (*c*), 12 A. 193.

(3) See PUBLIC THOROUGHFARE, 10 A. 498.

Legal Maxim.

(1) *Aedificare in tuo proprio sole non licet quod alteri noceat.*—See EASEMENT, 10 A. 358.

(2) *Omnia præsumuntur rite et solemniter esse acta*—See CIVIL PROCEDURE CODE, 1882, 10 A. 119.

(3) *Sic utero ut alienum non lœdas*—See EASEMENT, 10 A. 358.

(4) See HINDU LAW (ADOPTION), 12 A. 328.

Legal Practitioners Act (XVIII of 1879.)

Ss, 27, 28, 29, 30—*Suit by pleader to recover fee from client—Agreement for fee—Agreement not in writing and filed in Court.*—Ss. 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangements or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation. They do not provide as to matters which relate to the opposite party, or the

Legal Practioners Act (XVIII of 1879)—(*Concluded*). PAGE

fees that he has to pay the legal practitioner of the opposite party, but provide what, as between the pleader and his client, shall be the method in which certain special arrangements are to be entered into. They make provision for agreements between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation and were framed upon the principle which regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client. They were intended to protect necessitous, improvident or careless litigants, from being taken advantage of by unscrupulous legal advisers. RAZI-UD-IN v. KARIM BAKSH, 12 A. 169 =10 A.W.N (1890) 36 ... 856

Legal Representative.

(1) See CIVIL PROCEDURE CODE, 1892, 12 A. 440 (F.B.)

(2) See EXECUTION OF DECREE, 12 A. 313.

Letters Patent, N.W.P.

(1) S. 10—*Practice—Appeal from single Judge—"Judgment"—Interlocutory order—Order refusing leave to appeal* in forma pauperis—*Civil Procedure Code*, ss. 588, 591, 632.—Under ss. 588 and 591 of the Civil Procedure Code, no appeal lies, under s. 10 of the Letters Patent for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal *in forma pauperis*. BANNO BIBI v. MEHDI HUSAIN, 11 A. 375=9 A.W.N. (1889) 70 ... 667

(2) S. 10—See COURT FEES ACT (VII OF 1870), 11 A. 182.

(3) S. 207—See CIVIL PROCEDURE CODE, 1882, 11 A. 176.

License.

See ACT XXII OF 1881 (EXCISE), 10 A. 577.

Limitation.

(1) See CIVIL PROCEDURE CODE, 1882, 11 A. 267.

(2) See LIMITATION ACT (XV OF 1877).

Limitation Act (XIV of 1859).

S. 1 (12)—See MORTGAGE (CONDITIONAL SALE) 11 A. 144.

Limitation Act (XV of 1877).

(1) S. 4—*Court-fee—Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Act* VII *of* 1870 (*Court Fees Act*), ss. 4, 5, 6, 9, 10, 11, 12, 28, 30—"*Finality*" *of taxing officer's decision as to Court-fee—Civ. Pro. Code* 54, ss. 541, 582, 638—*Memorandum of appeal from decree granting two distinct declarations—Construction of state—Practice of Court.*—An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Limitation Act (XV of 1877) unless it is accompanied by the copies required by the Code.

A memorandum of appeal is a document included in the first and second schedules to the Court Fees Act (VII of 1870), and is a document within the meaning of ss. 4, 25, 28 and 30 of the Act, and therefore cannot be filed or recorded in or received by the High Court unless and until the proper court-fee in respect of it is paid, and is of no validity unless and until it is properly stamped. Consequently, if it is not, when tendered properly stamped, it is not at that time a memorandum of appeal within the meaning of s 541 of the Code and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of the Limitation Act, or as valid for any other purpose, except in the events specified in s. 28 of the Court Fees Act.

Where a memorandum of appeal which, when tendered, was insufficiently stamped has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of the Court Fees Act. In the case of a High Court, such an order can be made only by a Judge, and by him only in cases of

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"mistake or inadvertence." These words mean mistake or inadvertence on the part of the Court or its officers, and not on the part of the appellant or his advisers. The expression "head of the office" in s. 28 does not refer to the head of the office of the Courts, or at all events to the head of the office of High Court, acting not as such but as a taxing officer; but it refers to the head of a public office such as the Board of Revenue.

Ss. 9, 10 and 11 of the Court Fees Act are not in conflict with s. 28, nor are ss. 9, 10, 11 and 28, read together, in conflict with s. 54 of the Civ. Pro. Code. Cases within s. 10 or s. 11 of the Act would arise only where, through mistake or inadvertence of the Court, a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed, or used in the Court; and clauses (*a*) and (*b*) of s. 54 of the Code are similarly related to s. 28 of the Act, and were not intended to cut down or limit its provisions. The "dismissal" of a suit under s. 10 or s. 11 of the Act has the same effect as that provided by s. 56 of the Code in the case of "rejection" of a plaint under s. 54.

Clauses (*a*) and (*b*) of s. 54, which are declared by s. 638 to be inapplicable to the original and civil jurisdiction of the High Court, are also inapplicable to its appellate jurisdiction, notwithstanding the provisions of s. 582.

The word "final" in s. 5 of the Court Fees Act has the same meaning as in s. 12, though it is applied to a different subject. The cases in which it has been held that, notwithstanding the use of the word in s. 12, an appeal lies from a decision as to the category in which the relief sought by a plaintiff or appellant falls, do not mean that decisions which the section declares to be "final" are nevertheless appealable, but that the question of category is not a "question relating to valuation," and therefore is not declared by the section to be final. In both s 5 and s. 12 "final" is used in its ordinary legal sense of unappealable. A decision under s. 5 of the Act is not open to appeal, revision, or review and is final for all purposes, and no means have been provided or suggested by the Legislature for questioning it.

The officer mentioned in s. 5 of the Court Fees Act is not bound to advise parties as to the stamp required under the Act, or to give them notice that they have not sufficiently stamped documents which the Act requires to be stamped before presentation.

A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act, be influenced by extraneous considerations, such as questions of hardship.

A plaint contained a prayer for a declaration (*i*) that certain property was the joint property of the plaintiff, and (*ii*) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree, and stamped their memorandum of appeal with a stamp of Rs. 10 only. On the 9th November 1887, it was tendered to a Judge for admission, and it there bore a report dated the 7th November by the officer appointed under s. 5 of the Court-fees Act, "report will be made on receipt of record." The Judge made an order, "admit, subject to stamp report;" and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September 1888, the office reported that there was a deficiency in the stamp of Rs. 615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888, it was made good. At the hearing of the appeal a preliminary objection was taken that appeal had never been validly presented within time, or admitted, and that it could not be heard.

Held that there was before the Court no valid appeal as to the merits of which the Court could give a decision.

Held also that the stamp of Rs. 10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal

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sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection. BALKARAN RAI v. GOBIND NATH TIWARI, 12 A. 129 (F.B.)=10 A.W.N. (1890), 39 ... 831

(2) *Ss. 4, 5, 12 and art. 152 (2)—Civ. Pro. Code. ss. 542, 587—Court competent to raise question of limitation not raised by the parties—Act XV of 1877 (Limitation Act), ss. 4, 5 and 12, sch. ii, art. 152—Time requisite for obtaining a copy of a decree—Exclusion of time between delivery of judgment and signing of decree—Exclusion of time between furnishing of estimate of cost of copy and compliance with the estimate.*—Judgment was pronounced by the Court of first instance on the 23rd May 1887. The decree was signed on the 31st May. An application for copies was made by the defendants on the same day. Information of the estimate of the cost of copies was given to them on the 1st June; but they did not comply with that estimate until the 9th June. The copies were delivered on the 11th June. On the 20th June, the defendants filed their memorandum of appeal in the lower appellate Court which, on an office report that it was within time, admitted it, and fixed the 19th August for the hearing. On the 1st August, another office report was submitted, which showed that the appeal was beyond time. Accordingly the Judge on the 2nd August, directed the defendants to be informed that their appeal was dismissed. On the 27th August, however, the defendants presented a petition to the Judge in consequence of which he readmitted the appeal and, cancelling his order of the 2nd August, directed that the appeal should be heard.

Held that the appeal was barred by limitation under art. 152, sch. ii of the Limitation Act (XV of 1877).

A question of limitation when it arises upon the facts before a Court must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a Subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause within the meaning of s. 5 of the Limitation Act, for the appellant, in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal.

S. 5 of the Limitation Act cannot be applied in making the computation of time provided for by s. 12, and does not become applicable until after such computation has been made *Raj Coomar Roy* v. *Saikh Mahomed Wais* (7 W.R. 337), dissented from.

In computing the time to be excluded under s. 10 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies had been made. I therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhu Mitter* v. *Matungini Dassi* (13 C. 104), dissented from. BECHI v. AHSAN-ULLAH KHAN, 12 A. 461 (F.B.)=10 A.W.N. (1890) 149 ... 1039

(3) *Ss. 5, 12—" Time requisite for obtaining a copy of the decree appealed "—Neglect of Court officials in issuing copies.*—A decree of a lower appellate Court was passed on the 26th March 1888, and an appeal therefrom was presented to the High Court on the 16th July, or twelve days beyond the time allowed by art 156, sch. ii of the Limitation Act (XV of 1877). An application for a copy of the judgment under appeal was made by the appellants on the 28th March, and the 29th March was fixed by the office as the date when the estimate of the costs of such copy was to be delivered, and it was delivered on that day. The estimate was not complied with until the 5th April, when the appellants put in the necessary stamp paper according to the estimate. Upon the entry of the stamp paper no intimation was made by the office to the appellants as to when the copy would be ready for delivery. The copy was delivered on the 10th April.

Held that under s. 12 of the Limitation Act the appellants were entitled to a deduction of the whole period between the 28th March and the 10th April, and that, if this were not so, the appeal should be admitted under S. 5 of the Act.

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The words in s. 12 "the time requisite for obtaining a copy of the decree appealed against" imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies or who are required to give notice when such copies are ready. SHEOGOBIND v. ABLAKHI, 12 A. 105=10 A.W.N. (1890) 10 ... 817

(4) *Ss.* 5, 12 *& art* 170—*Civil Procedure Code, ss.* 579, 592—*Application for leave to appeal as a pauper—Time requisite for obtaining copy of decree-Exclusion of time between delivery of judgment and signing of decree.*—Judgment was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with s. 579 of the Civ. Pro. Code, it bore date the day on which the judgment was pronounced. On the 15th April the plaintiff applied for a copy of the decree ; on the 16th she received notice that the estimate of the costs of preparing the copy was prepared ; on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May, she presented in the High Court, to the proper officer, an application under s. 592 of the Code, for leave to appeal as a pauper.

Held that the application was barred by limitation under art. 170, sch. ii. of the Limitation Act (XV of 1877), and that s. 5 of the Act did not apply.

Per Edge, C. J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should under s. 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy of the decree, and not otherwise.

A delay caused by the carelessness or negligence of a party applying for copy of decree, such as negligence in coming forward to pay the money required, cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of s. 12 of the Limitation Act, does not mean requisite, by reason of the carelessness or negligence of the applicant, it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to s. 12 and art. 170, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date. PARBATI v. BHOLA. 12 A. 79=10 A.W.N. (1890) 25 ... 800

(5) *Ss.* 5, 14—*Appeal preferred to wrong Court through mistake of law—Exclusion of time.*—S. 14 of the Limitation (Act XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent, but is limited to cases where from *bona fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase "other causes of a like nature" in the section is vague, and cannot be held to release a person from the obligation to know the law of the land.

The decree in this suit was passed by the Subordinate Judge as the Court of first instance on the 31st March, 1886. Against the decree the plaintiff preferred an appeal to the District Court on the 1st July, 1886, and on the 11th December, 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject matter in dispute was above Rs. 5,000. The plaintiff then on the 20th December, 1886, presented the memorandum of appeal to the High Court and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation.

Held, that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed. RAMJIWAN MAL v. CHAND MAL, 10 A. 587=8 A.W.N. (1888) 258 ... 595

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(6) *Ss. 5, 15—Admission of appeal beyond time—" Sufficient cause"—Appeal filed in wrong Court*—Bona fide *proceedings—Jurisdiction—Valuation of suit.*—Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provisions of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.

To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court "*bona fide*," that is, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court. JAG LAL v. HAR NARAIN SINGH, 10 A. 524=8 A.W.N. (1888) 218 ... 353

(7) *S. 14—Exclusion of time—Act XV of* 1877 (*Limitation*) *Act, s.* 14—" *Other cause of like nature.*"—The words "other cause of a like nature" in s. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction.

Where a suit was dismissed on the ground that the debt sued for was due not to the plaintiff alone but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequenly brought a fresh suit for the same debt, making his co-partner a party,

Held that the case was not within s. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. JEMA v. AHMAD ALI KHAN, 12 A. 207=10 A.W.N. (1890) 76 ... 881

(8) S. 19, *Explanation I—Limitation—Acknowledgment in writing.*—In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with reference to s. 19, explanation I, of the Limitation Act (XV of 1877). THE UNCOVENANTED SERVICE BANK v. GRANT, 10 A. 93=8 A. W.N. (1888) 13 ... 63

(9) *S. 21—Limitation—Acknowledgment signed by one of several partners.*—The word "only" in s. 21 of the Limitation Act (XV of 1877), is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him. GADU BIBI v. PARSOTAM, 10 A. 418=8 A. W.N. (1888) 93 ... 281

(10) S. 23, *sch.* ii, *Nos.* 115, 116—*Limitation—Continuing breach.*—Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of s. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation Act XV of 1877. MANSAB ALI v. GULAB CHAND, 10 A. 85=7 A.W.N. (1887) 292 ... 58

(11) S. 28—See MORTGAGE (USUFRUCTUARY), 11 A. 438.

(12) *Sch. II, Nos.* 32, 120—*Suit for removal of trees—Limitation.*—A suit by a zemindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, sch. ii of the Limitation Act, and not by art. 32, schedule ii of the Act.

Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in

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respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, sch. ii of the Limitation Act. MUSHARF ALI v. IFTKHAR HUSAIN, 10 A. 634 = 8 A.W.N. (1888) 257 ... 427

(13) *Sch.* ii, *Nos.* 60, 127—"*Joint family property*"—"*Exclusion*" *from such property*.—A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit, upon any allegation of fraud. It was contended that art. 127, sch. ii of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand. AHMAD ALI KHAN v. HUSAIN ALI KHAN, 10 A. 109 = 8 A.W.N. (1888) 8 ... 74

(14) *Sch.* ii, *Nos.* 64 *and* 97—*Act IX of* 1872 (*Contract Act*) *s.* 65.—Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. ii, art 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.

contemplation of a sale of land by the debtor to the creditor, it was agreed that the book debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.

Held that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97.

The matter might also be regarded as falling under s. 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it." BASSU KUAR v. DHUM SINGH, 11 A. 47 (P.C.) = 15 I.A. 211 = 5 Sar. P.C.J. 260 = 12 Ind. Jur. 450 ... 458

(15) *Sch.* ii, *Nos.* 91, 144—*Limitation* —*Muhammadan Law*—*Inheritance*—*Gift*—*Suit by heir for share of donor's property by declaration of invalidity of gift.*—A Muhammadan who in October, 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June, 1885, never having taken any steps to have the deed of gift set aside. In February, 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit.

Held that the plaintiff had, during the donor's life-time, no reversionary or vested interest, in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff, came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877),

Limitation Act (XV of 1877)—(*Continued*). PAGE

such a suit was also barred against the plaintiff who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. HASAN ALI v. NAZO, 11 A. 456=9 A.W.N. (1889) 109 ... 718

(16) Arts. 99, 120, 132—See CONTRIBUTION, 12 A. 110.

(17) Sch. ii, No. 113—See SPECIFIC PERFORMANCE, 11 A. 27.

(18) Sch. ii, No. 116—See BOND, 11 A. 416.

(19) *Sch.* ii, *art.* 141—*Limitation—Suit by Muhammadans for possession of immoveable property by right of inheritance to mother.*—Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step-mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation inasmuch, as their mother died on the 22nd January. 1873, and the suit was not instituted till the 29th of January, 1885. The Court below finding that the mother died on the 22nd January, 1873, held that art. 141, sch. ii, Limitation Act, barred the claim and dismissed the suit.

Held that art. 141 of the Limitation Act does not apply to a suit by an heir-at law for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainder-man or reversioner or a devisee, and on the death of the female sues on the basis of that character. HASHMAT BEGAM v. MAZHAR HUSAIN, 10 A. 343=8 A.W.N. (1888) 38 ... 229

(20) Sch. II, Nos. 141, 144—See HINDU LAW (WIDOW), 10 A. 485.

(21) Sch. II, Nos. 144, 148—See MORTGAGE (REDEMPTION,) 11 A. 423.

(22) Art. 152—See CONTRACT ACT, 1872, ss 201, 218, 12 A. 541.

(23) *Sch.* II, *Nos.* 171-*B*, 178—*Civil Procedure Code*, *ss.* 3, 368, 582—*Death of defendant respondent—Application by plaintiff-appellant to have representative of deceased substituted as respondent.*—*Held* by the Full Bench (MAHMOOD, J., dissenting,) that art. 171-B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit ; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent.

Held by MAHMOOD, J., *contra*, that the word "defendant" in art. 171-B includes a defendant respondent, and, reading art. 171-B with clause 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code includes also a plaintiff-respondent ; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent's death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement. DEBI DIN v. CHUNNA LAL, 10 A. 264 (F.B.)=8 A.W.N. (1888) 112 ... 176

(24) *Sch.* II, *Nos.* 171-*B*, 178—*Death of plaintiff respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.*—*Held*, by the Full Bench that inasmuch as art. 178 and not art. 171-B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place. RAM SARUP v. RAM SAHAI, 10 A. 270 (F.B.)=8 A.W.N. (1888) 114 ... 180

(25) *Civil Procedure Code*, *ss.* 3, 368, 582—*Sch.* II, *Nos.* 171-*B*, 178—*Death of plaintiff-respondent—Application by defendants-appellants for substitution of legal representative.*—The judgment of the majority of the Full Bench in *Narain Das* v. *Lajja Ram* only decided that art. 171-B, sch. ii, of the Limitation Act of 1887, did not apply to an application by a defendant-appellant to have the representative of a deceased laintiff-respondent made a respondent. Art. 178 applies to such applications.

So *held* by the Full Bench, MAHMOOD, J., dissenting.

Limitation Act (XV of 1877)—(*Concluded*). PAGE

Held by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code, the word "defendant" in art. 171-B of the Limitation Act necessarily includes a plaintiff-respondent. CHAJMAL DAS v. JAGDAMBA PRASAD, 10 A. 260 (F.B.)=8 A.W.N. (1888) 111 ... 174

(26) Sch. II, No. 175, C—See CIVIL PROCEDURE CODE, 1882, 11 A. 408.

(27) *Sch.* II, *art* 178—*Limitation—Sanction to prosecution—Application for such sanction—Criminal Procedure Code, s.* 195.—Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases.

Art. 178, sch. II, Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis.*

A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where, on the 24th June, 1846, the Munsif's decree was affirmed. Defendants then applied to the Munsif for sanction to prosecute the plaintiffs for the offence of using a forged document knowing the same to be forged. Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge such sanction was granted. On application to revise the Sessions Judge's order granting sanction, it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted.

Held: that there is no fixed period of limitation for making applications for sanction under s. 195 of the Criminal Procedure Code. QUEEN-EMPRESS v. AJUDHIA SINGH, 10 A. 350=8 A.W.N. (1888) 92=13 Ind. Jur. 36 ... 236

(28) Sch. II, No, 178—See CIVIL PROCEDURE CODE, 1882, 11 A. 372.

(29) Art. 179—See EXECUTION OF DECREE, 12 A. 571.

(30) *Sch. II, No.* 179 (4)—*Limitation—Execution of decree—Application for execution, withdrawn by decree-holder—Civil Procedure Code, ss.* 373, 374, 647.—S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held* that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application preseuted five years after the decree was barred by limitation, with reference to art. 179 of the Limitation Act. SARJU PRASAD v. SITA RAM, 10 A. 71=8 A.W.N. (1888) 1 ... 48

(31) *Art.* 179 (4)—*Execution of decree—Application "in accordance with law" Civil Procedure Code, ss.* 325 (*j*) 341—*Act IV of* 1882 (*Transfer of Property Act*), s. 99.—The expression "applying in accordance with law" in Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4),—means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

Held therefore that an application to have the judgment-debtor arrested in execution of decree, which was in contravention of the terms of s. 341 of the Civil Procedure Code, and on application to bring mortgaged property to sale, which was in contravention of s. 99 of the Transfer of Property Act (IV of 1882), were not applications "in accordance with law" within the meaning of No. 179 (4) of sch. ii of the Limitation Act. CHATTER v. NEWAL SINGH, 12 A. 64=9 A.W.N. (1889) 200 ... 790

(32) Art. 179 (4)—See STEP-IN-AID OF EXECUTION, 12 A. 399 (F.B.)

Local Government. PAGE

See CIVIL PROCEDURE CODE, 1882, s. 320, 12 A. 561.

Madness.

See HINDU LAW (INHERITANCE), 12 A. 530.

Mahomedan Law.

1.—ACKNOWLEDGMENT.
2.—GIFT.
3.—INHERITANCE.
4.—LEGITIMACY.
5.—MOSQUE.
6.—PRE-EMPTION.

——1.—Acknowledgment.

Inheritance—Legitimacy—Acknowledgment of sonship.—Per EDGE, C.J., and STRAIGHT, J.—The rules of the Muhammadan law relating to acknowledgment by a Muhammadan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him.

Per MAHMOOD, J.—Although, according to the Muhammadan law, *ikrar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Muhammadan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by the Muhammadan law as a means where by marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and there is nothing in the Muhammadan law similar to adoption as recognised by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty. M. ALLAHDAD KHAN v. M. ISMAIL KHAN, 10 A. 289 . 193

——2.—Gift.

(1) Hiba-bil-iwaz—*Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee—Gift invalid.*—The fundamental conception of *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan Law, is that it is a transaction made up of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwaz* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan law provides.

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by

Mahomedan Law—2.—Gift—(*Concluded*). PAGE

the donor to the donee, is void under the Muhammadan Law. RAHIM BAKHSH v. MUHAMMAD HASAN, 11 A. 1=8 A.W.N. (1888) 266=13 Ind. Jur. 152 ... 429

(2) *Claim to possession of property under deed of sale—Consideration—"Mushaa"—Effect of possession following upon gift to render it valid.*—The law relating to the invalidity of gifts of "musha," *i e.*, the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules; and the authorities on the Muhammadan law show that possession taken under a gift, even although that gift might with reference to "mushaa" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before then.

Held, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, the sufficient possession had been taken on behalf of the daughter, to render the gift effectual, and to defeat the claim as against her heirs. MUHAMMAD MUMTAZ AHMAD v. ZUBAIDA JAN, 11 A. 460 (P.C.)=16 I.A. 205=5 Sar. P.C.J. 433 ... 721

——3.—Inheritance.

(1) *Inheritance by Muhammadan law—Sunni and Shia rules of descent—Evidence as to deceased having been a Sunni.*—A Muhammadan widow, who by birth was a Sunni, but whose deceased husband had been a Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

The evidence relating to the period after her husband's death let to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia. HAYAT-UN-NISSA v. MUHAMMAD ALI, 12 A. 290 (P.C.)=17 I.A. 73=5 Sar. P.C.J. 521 ... 932

(2) See LIMITATION ACT (XV OF 1877), 10 A. 343.

——4.—Legitimacy.

See MAHOMEDAN LAW (ACKNOWLEDGMENT), 10 A. 289.

——5.—Mosque.

Muhammadan Law—Mosque not capable of dedication or exclusive appropriation to particular sect—Muhammadans—Muhammadi or Wahabi sect—Disturbing a religious assembly—Right to say "Amin" loudly during worship.—According to the Muhammadan Law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of Sunni Muhammadans. It is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience. No one sect or portion of the Muhammadan community can restrain any other from the exercise of this right.

Members of the Muhammadi or Wahabi sect are Muhammadans, and as such entitled to perform their devotions in a mosque, though they may differ from the majority of Sunni Muhammadans on particular points.

But any Muhammadan would commit a criminal offence who, not in the *bona fide* performance of his duties, but *mala fide*, for the purpose of disturbing others engaged in their devotions, made any demonstration, oral or otherwise, in a mosque, and disturbance was the result.

Mahomedan Law—5.—Mosque—(*Concluded*). PAGE

So *held* by the Full Bench.

Per MAHMOOD, J.—According to the Muhammadan ecclesiastical law, the word "*Amin*" must be said and should be pronounced at the end of the prayer ending with *Sura-i-Fateha*; but there is no authority for holding that it should be pronounced in a loud or in a low tone of voice; and (provided no disturbance of the public peace is caused) a Muhammadan pronouncing the word loudly, in the honest exercise of conscience, commits no offence or civil wrong. ATA-ULLAH v. AZIM ULLAH, 12 A 494 (F.B.) =10 A.W.N. (1890), 179 ... 1059

——6.—Pre-emption.

(1) *Pre-emption—Muhammadan Law—Shias—Property owned by more than two co-sharers.*—The prevalent doctrine of the Muhammadan law governing the Shia sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. ABBAS ALI v. MAYA RAM, 12 A. 229 =10 A.W.N. (1890), 93 ... 895

(2) *Pre-emption—Wajib-ul-arz—"Co-sharer"—Purchaser of isolated plot of land in mahal—Purchaser of sir land.*—The *wajib-ul-arz* of a village gave a right of pre-emption to "co-shares in the mahal." One of the co-sharers brought a suit for pre-emption which the vendee defendant resisted on the ground that he also was a co-sharer in the mahal, and the plaintiff had therefore no preferential right. This contention was based on a former purchase by the defendant under a deed of sale executed by a co-sharer, and comprising (i) an isolated plot of land in the mahal, (ii) sir lands in the mehal.

Held by the Full Bench that it being found that the vendee defendant had already become a co-sharer in the mahal prior to the date of the purchase which was in question in the suit, the plaintiff had no preferential right of pre-emption.

Per MAHMOOD, J.—The decisions of the Full Bench in *Niamat Ali* v. *Asmat Bibi* and *Sital Prasad* v. *Amtul Bibi* have overruled *Hasrai Lal* v. *Ugrah Rai and Rup Ram* v. *Mangni*. SAFDAR ALI v. DOST MUHAMMAD, 12 A. 426 (F.B.)=10 A.W.N. (1890), 117 ... 1016

(3) See PRE-EMPTION, 10 A. 472.

Maintenance.

See CRIMINAL PROCEDURE CODE, 1882, 11 A. 480.

Majority Act.

See ACT IX OF 1875.

Marriage.

Suit for dissolution of—See DISSOLUTION OF MARRIAGE, 10 A. 559.

Mesne profits.

(1) See LANDLORD AND TENANT, 10 A. 13.

(2) See OCCUPANCY TENANCY, 10 A. 15.

Minor and Guardian.

Minor—Custody—Guardianship—Act IX of 1861, ss. 1, 3, 4—Jurisdiction—Civil Procedure Code, s. 17—Act IX of 1875 (Majority), s. 3—Discretion of Court under Act IX of 1861, s. 3.—An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore.

Held that, under ss. 1, 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.

Under s. 3 of Act IX of 1875 (the Indian Majority Act) a person under the age of eighteen is a minor within the meaning of Act IX of 1861.

Minor and Guardian—(*Concluded*). PAGE

No such restriction as is imposed by s. 27 of Act XL of 1858, prohibiting the appointment of a guardian of any minor whose father is living and is not a minor, applies to persons applying under s. 1 of Act IX of 1861. Where the father of a minor was old and unable to work from age and weakness, and the minor's elder brother had been maintaining and educating the minor at his own expense,—*held* that, under the circumstances, the brother was competent to apply under s. 1 of Act IX of 1861, and to ask for a certificate of guardianship.

The words in s. 3 of Act IX of 1861, "and thereupon proceed to make such order as it shall think fit in respect to the custody of guardianship of such minor" confer on the Court an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances do not call for such an order being made.

Where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up appeared to be well able to take care of and provide for himself, and preferred to be left as he was, and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship. SARAT CHANDRA CHAKARBATI v. FORMAN, 12 A. 213 = 10 A.W.N. (1890), 80 ... 885

Misjoinder.

Of cause of action. See CIVIL PROCEDURE CODE, 1882, 11 A. 33.

Mortgage.

1—GENERAL.
2—CONDITIONAL SALE.
3—FORECLOSURE.
4—REDEMPTION.
5—SALE OF MORTGAGED PROPERTY.
6—USUFRUCTUARY.

——1.—General.

(1) *Mortgage—Hypothecation of "our zamindari" property—Ascertainment of mortgagor's zamindari interest at date of mortgage—Mortgage not void for uncertainty—Act IX of* 1872 (*Contract*) *s.* 29—*Act IV of* 1882 (*Transfer of Property*), *s.* 58.—A deed of simple mortgage described the mortgaged property as "our zamindari property" (*zemindari apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two zamindaries.

Held that the words "our zamindari property" were sufficienely certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific zemindari interest; and that the mortgage was therefore not void for uncertainty. SHADI LAL v. THAKUR DAS, 12 A. 175 = 10 A.W.N. (1890), 60 ... 860

(2) See DOCUMENT, CONSTRUCTION OF, 12 A. 387.

(3) See LANDLORD AND TENANT, 12 A. 419.

——2.—Conditional Sale.

(1) *Payment by mortgagee by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagee for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.*—*B* made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zemindari property in favour of *P*. On 27th January, 1874, *B* mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zemindari for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his zemindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August, 1878, *B* made another mortgage to the defendant for Rs. 300 of the same 117 bighas, 7 biswas and 10 dhurs. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10th August, 1878, and on his application for execution of the decree the property

Mortgage—2.—Conditional Sale—(*Concluded*). PAGE

mortgaged to him was advertised for sale on the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale the property mortgaged to him.

Held that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances.

Held further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January, 1874, for he had no right under the instrument in his favour of the 10th August, 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January, 1874, when he had satisfied and discharged the two mortgage-bonds held by the plaintiff of the 10th October, 1871, and 10th October, 1872. ZALIM GIR v. RAM CHARAN SINGH, 10 A. 629=8 A.W.N. (1888) 247 ... 424

(2) *Foreclosure—Suit for possession—Regulation XVII of* 1806, *s.* 8—*Cause of action—Limitation Act XIV of* 1859, *s.* 1 (12).—A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor.

Held that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863.

Held also that, even if foreclosure proceedings under Regulation XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. MURLIDHAR v. KANCHAN SINGH, 11 A. 144=9 A.W.N. (1889) 41 ... 520

—3.—Foreclosure.

(1) *Mortgage—Foreclosure—Regulation XVII of* 1806, *s.* 8—*Notice of foreclosure—Notice not signed by Judge.*—*Held* that where the notice of foreclosure under s. 8 of Regulation XVII of 1806 was signed not by the Judge but only by the Munsarim, the foreclosure proceedings were void *ab initio*.

Held also that the notice which was upon the record of the foreclosure proceedings and bore the mortgagor's signature must be regarded as the original notice in the matter; and that the acknowledgment of receipt of notice by the mortgagor did not cure the inherent defect of its non-signature by the Judge. HANUMAN SARAN SINGH v. BHAIRON SINGH, 12 A. 189=9 A.W.N. (1889) 199 ... 869

(2) See MORTGAGE (CONDITIONAL SALE), 11 A. 144.

—4.—Redemption.

(1) *Redemption before expiration of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage.*—No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him

Mortgage—4.—Redemption—(*Concluded*). PAGE

to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point.

The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown. BHAGWAT DAS v. PARSHAD SINGH, 10 A. 602=8 A.W.N. (1888) 263 ... 405

(2) *Mortgage—Redemption by co-mortgagor—Suit by other mortgagors against redeeming mortgagor for redemption of their shares—Limitation—Act XV of 1877 (Limitation Act), sch.* ii, *Nos* 144, 148.—In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1886, for redemption of their shares in the mortgaged property.

Held that the limitation applicable to the suit was that provided by art. 148, sch. ii, of the Limitation Act (XV of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagee if he had been a defendant, *i.e*, the date of the original mortgage of 1822; and that the suit was therefore barred by limitation. ASHFAQ AHMAD v. WAZIR ALI, 11 A. 423 ... 698

(3) *Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.*—On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D* and in August, 1872, in execution of that decree, sold the said groves and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* has been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves.

Held, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interests of the mortgagee, and although at sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of the mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act. GAJADHAR v. MUL CHAND, 10 A. 520=8 A.W.N. (1888), 210 ... 349

—— **5.—Sale of mortgaged property.**

(1) *Mortgage—Second mortgage of the same property to the same person—Sale in execution of decree on first mortgage—Purchase by mortgagee decree-holder.*—A decree-holder holding two decrees of different Courts on separate bonds hypothecating the same property, in execution of the first decree purchased the property himself. The surplus of the sale-proceeds was distributed by the Court among other persons who held money decrees against the same judgment-debtor.

Held that the decree-holder could not afterwards execute the second decree against property of the judgment-debtor not included in the hypothecation bond. BALLAM DAS v. AMAR RAJ, 12 A. 537=10 A.W.N. (1890) 90 1086

Mortgage—5,—Sale of Mortgaged property—(*Concluded*). PAGE

(2) *Mortgage- First and second mortgages—Purchase of mortgaged property by first mortgagee—Suit by second mortgagee for sale—Plaint denying or ignoring title of first mortgagee—Suit to be dismissed.*—Where a second mortgagee coming into Court and, denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. SALIG RAM v. HAR CHARAN LAL, 12 A. 548=10 A.W.N. (1890) 89 ... 1094

—— 6.—Usufructuary.-

(1) *Suit for sale by usufructuary mortgagee—Suit not maintainable—Act IV of* 1882 (*Transfer of Property Act*). *s.* 67 (*a*).—Under s. 67 (*a*) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. UMDA v. UMRAO BEGAM, 11 A. 367=9 A.W.N. (1889) 140 ... 662

(2) *Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption*—Res judicata—*Civil Procedure Code s.* 13—*Foreclosure—Act IV of* 1882 (*Transfer of Property Act*), *s.* 93—*Estoppel—Act I of* 1872 (*Evidence Act*), *s.* 115.—In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct.

Held, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem—*held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption. MUHAMMAD SAMI-UD DIN KHAN v. MANNU LAL, 11 A. 386=9 A.W.N. (1889) 136 ... 674

(3) *Redemption—Limitation—Pleading—Burden of proof—Civil Procedure Code, s.* 50—*Act XV of* 1877 (*Limitation Act*), *s.* 28, *sch.* ii, *No.* 148. *Act I of* 1872 (*Evidence Act*), *s.* 110 —There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelves years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been

Mortgage—6.—Usufructuary—(*Concluded*). PAGE

proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property. PARMANAND MISR v. SAHIB ALI, 11 A. 438=9 A.W.N. (1889) 155 ... 708

(4) *Act IV of* 1882 (*Transfer of Property*), *ss.* 58 (*d*), 98—*Splitting claims—Suit by usufructuary mortgagee excluded from possession for unpaid interest—Cause of action—Subsequent suit for principal and residue of interest barred—Civ. Pro. Code, s.* 43.—A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession ; and in 1882 he brought a suit against the mortgagor, to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal, together with the residue of interest up to the date of suit.

Held that, inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage-money, the instrument did not strictly fall within s. 58 (*d*) of the Transfer of Property Act (IV of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in s. 98 of that Act.

Held, upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four years, but after their expiration.

Held that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct ; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered ; that the cause of action to recover the principal accrued at the same time and was the same cause of action ; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal ; and that the present suit was consequently barred by s. 43 of the Civ. Pro. Code. HIKMATULLA KHAN v. IMAM ALI, 12 A. 203=10 A.W.N. (1890) 87 ... 878

Mosque.

See MAHOMEDAN LAW (MOSQUE), 12 A. 494.

Moveable property.

(1) See HYPOTHECATION, 10 A. 133.

(2) See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

"Mushaa."

See MAHOMEDAN LAW (GIFT), 11 A. 460.

Notice.

(1) See MORTGAGE (FORECLOSURE), 12 A. 189.

(2) See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

(3) Of ejectment. See LAND-HOLDER AND TENANT, 10 A. 13.

Nuisance, public.

See PENAL CODE, 10 A. 44.

Oath.

or affirmation. See ACT X OF 1873 (OATHS), 11 A. 183.

Occupancy tenancy. PAGE

(1) *Sale by occupancy-tenant—Decree in favour of zemindar against purchaser for mesne profits—Mesne profits how to be assessed.*—Where in a suit against an occupancy-tenant and his vendee, the zemindar obtained a decree for cancelment of the deed of sale for possession of the land by ejectment, and for mesne profits from the date of suit to the date of recovery of possession,—*held* that the mesne profits awarded must be assessed as damages against the vendee as a trespasser, and that the proper measure of such damages was not the rent which was payable by the vendor, but the actual market-value of the land for the purpose of letting. MATUK DHARI SINGH v. ALI NAQI, 10 A. 15=7 A.W.N. (1887) 242 ... 11

Occupancy tenant.

(1) See LANDHOLDER AND TENANT, 10 A. 159.
(2) See LANDLORD AND TENANT, 12 A. 419.
(3) See OCCUPANCY TENANCY, 10 A. 15.

Offences against religion.

See MAHOMEDAN LAW (MOSQUE), 12 A. 494.

Owner.

See PENAL CODE, 12 A. 550.

Pardanashin Woman.

Practice—Pardanashin lady—Personal appearance in Court.—Although there is no provision in the Crim. Pro. Code which protects pardanashin ladies from appearing in a Court of justice, nevertheless it is very undesirable to compel the attendance of such persons.

It cannot be admitted as a general principle that pardanashin ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them at some other place than the Court-house itself.

Where a Magistrate considered it necessary to take the evidence of a pardanashin lady, who objected to appear in Court, the High Court directed him to make arrangements so as to take her evidence either in an empty Court room in the presence of himself the accused, and the pleader for the prosecution, or if no empty Court-room were available in his is own private room or some other room in the Court building. IN THE MATTER OF THE PETITION OF BASANT BIBI, 12 A. 69=9 A.W.N. (1889) 202 ... 794

Pardon.

Effect of tender of—See ACCOMPLICE, 11 A. 79.

Parties to Suits.

(1) *Execution of decree—Civ. Pro. Code,* 1882, s. 244 (c).—*Question for Court executing decree—Parties to the suit—Representative.*—After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold, and was purchased by the decree-holder : one of the judgment debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property ; and his vendor sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu wisdow, the defendant as purchaser could not acquire by the sale any right superior to those of the widow ; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor, and had thence passed to the plaintiff.

Held, that the plaintiff's vendor was a party to the suit within the meaning of s. 244 (c) of the Civ. Pro. Code, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings : and that the suit was barred by s. 244. RAGHUBAR DIAL v. HAMED JAN, 12 A. 73=10 A.W.N. (1890) 13 ... 797

(2) See CIVIL PROCEDURE CODE, 1882, 12 A. 440 (F.B.).

Partition. PAGE

(1) *Jurisdiction—Civil and Revenue Courts—Suit for partition and possession of a share in a particular plot in a patti—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 135, 241 (f).*—A suit by a co-sharer in a joint zemindari estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a Civil Court, with reference to ss. 135 and 241 of the N.W.P. Land Revenue Act (XIX of 1873), IJRAIL v. KANHAI, 10 A. 5=7 A.W.N. (1887) 218 ... 4

(2) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 11 A. 328.

(3) See JURISDICTION, 12 A. 506.

Partnership.

See CIVIL PROCEDURE CODE, 1882, 10 A. 587.

"Pattidars"

See PRE-EMPTION, 10 A. 107.

Pauper.

See CIVIL PROCEDURE CODE, 1882, 10 A. 467.

Pauper Appeal.

See LIMITATION ACT, 1877, ss. 5, 12 and art. 170, 12 A. 79.

Penal Code (Act XLV of 1860).

(1) Ss. 71, 170, 383—See SEPARATE SENTENCES, 10 A. 58.

(2) Ss. 75, 411—See CRIMINAL PROCEDURE CODE, 1882, 11 A. 393.

(3) S. 154—*Liability of owner or occupier of land on which an unlawful assembly is held.*—It is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that they should be aware of the likelihood of such an occurrence. That his *karinda* should have taken an active part in the riot is sufficient to warrant the conviction of the owner under s. 154 of the Penal Code. QUEEN-EMPRESS v. PAYAG SINGH, 12 A. 550=10 A.W.N. (1890) 176 ... 1095

(4) S 188, See CRIMINAL PROCEDURE CODE, (Act X OF 1872), 10 A. 115.

(5) S. 212—*Harbouring an offender*—To justify a conviction under s. 212 of the Penal Code, it is necessary that there should be an offence committed, and consequently an offender who has been harboured or concealed. QUEEN-EMPRESS v. FATEH SINGH, 12 A. 432=10 A.W.N. (1890) 73 ... 1020

(6) S. 228—See CRIM. PRO. CODE, 1882, 11 A. 361.

(7) Ss. 268, 290—*Public nuisance—Slaughter of kine by Muhammadans on their own property—Act XLV of 1860 (Penal Code), ss. 268, 290.*—A person wilfully slaughtering cattle in a public street, so that the slaughter could be heard and seen by the passers-by, would commit an offence punishable under s. 290 of Penal Code.

But where certain Muhammadans, for a religious purpose, killed and cut up two cows before sunrise in a private compound, partly visible from a public road, and the killing of one of the cows only was witnessed by one Hindu—*held* that the circumstances proved did not amount to the commission of a public nuisance as defined in section 268 of the Code. QUEEN-EMPRESS v. ZAKIUDDIN, 10 A. 44=7 A.W.N. (1887) 232 ... 30

(8) S. 295—*"Object" held sacred by any class of persons—Killing cows in a public place.*—The word "object" in s. 295 of the Penal Code does not include animate objects. QUEEN-EMPRESS v. IMAM ALI, 10 A. 150 (F.B.)=8 A.W.N. (1888) 17 ... 101

(9) Ss. 380, 454—See CRIMINAL PROCEDURE CODE, 1882, 10 A. 146.

(10) S. 383—See SEPARATE SENTENCES, 10 A. 58.

(11) S. 498—*Detaining with criminal intent a married woman.*—The words "such woman" in s. 498 of the Indian Penal Code do not mean such a woman as has been so enticed as mentioned in that section but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section. EMPRESS v. NIADAR, 10 A. 580=8 A.W.N. (1888) 217 ... 390

Personal Injury.

See SMALL CAUSE COURT SUIT, 10 A. 49.

Personal insult. PAGE

See DEFAMATION, 10 A. 425.

Plaint.

See CIVIL PROCEDURE CODE, 1882, ss. 54, 56, 12 A. 553.

Pleader and Client.

See LEGAL PRACTITIONERS ACT, ss. 27, 28, 29, 30, 12 A. 169.

Police officer.

See ACT V OF 1861 (POLICE), 10 A. 459.

Possessory Suit.

Practice—Suit for exclusive possession of property—Court competent in such suit to decree joint possession.—Where the plaintiff claimed exclusive possession of immoveable property to which the defendants also claim to be exclusively entitled,—*held*, that the Court was competent, upon the finding that the property belonged to the parties jointly, to give the plaintiff a decree for joint possession. WAHID ALAM v. SAFAT ALAM, 12 A. 556 = 10 A. W. N. (1890) 130 ... 1100

Possessory title.

Possession of and partition between co-widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.—Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who being childless, had before his death, adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee; also, the estate, being jointly held by them, was partible, and that either widow might make a suit for partition.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would, probably, have had little difficulty in accepting the opinion of the High Court that a Brahman cannot fully adopt his sister's son. SUNDAR v. PARBATI, 12 A. 51 (P.C.) = 16 I.A. 186 = 5 Sar. P. C. J. 448 ... 782

Practice and Procedure.

(1) *Remand by lower appellate Court under Civil Procedure Code, s. 566—No objections filed by plaintiffs under s. 567—Objections raised for the first time in second appeal by plaintiffs—Such objections not entertainable.*—Objections which might have been, but were not, made under s. 567 of the Civil Procedure Code in a lower appellate Court to the findings on remand of the Court of first instance, cannot be raised for the first time as grounds of second appeal from the lower appellate Court's decree. MUHAMMAD ABDUL HAI v. SHEO BISHAL RAI, 10 A. 28 = 7 A.W.N. (1887) 234 ... 19

(2) *Practice—Remand—Power of appellate Court to deal with whole appeal after return of findings.*—In a second appeal by the defendant, in which the plaintiff filed objections to the decree under s. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled to succeed, and at the same time remitted an issue under s. 566 of the Code with reference to the plaintiffs' objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court.

Held, that upon the return of the findings on remand, the Court could not treat the appeal as already decided and the objections the sole matter for consideration, but must consider both appeal and objections and decide the whole case.

Held, however, that where Judges have heard arguments on some of the issues and have expressed their views thereon and have remitted another issue or issues under s. 566, they are not bound, on the return of findings, to hear the case *de novo* but may confine counsel to argument upon the findings. LACHMAN PRASAD v. JAMNA PRASAD, 10 A. 162 = 7 A.W.N. (1887) 295 ... 109

Practice and Procedure—(*Concluded*). PAGE

(3) *Issue raised by Court which was not raised by parties.*—The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court.

Held, that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause. WALI UL LAH KHAN v. M. ISRAR-UL-LAH KHAN, 10 A. 627=8 A.W.N. (1888) 242 ... 422

(4) *Execution of decree—Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on appeal.*—The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed.

Held, by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the appellate Court, and that the decree had been altered by the first Court, which had no power to alter it.

Held, by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed, could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree and, as such, was appealable. MUHAMMAD SULAIMAN KHAN v. FATIMA, 11 A. 314 (F.B.) =9 A.W.N. (1889) 107 ... 628

(5) See BOND, 11 A. 416.

(6) See CIVIL PROCEDURE CODE, 1882, 10 A. 289; 11 A. 35; 11 A. 267.

(7) See COSTS, 11 A. 349.

(8) See CRIMINAL PROCEDURE CODE, 1882, 11 A. 361.

(9) See HINDU LAW (WIDOW), 10 A. 495.

Pre-emption.

(1) *Pre-emption*—Wajib-ul-arz—"*Pattidars*"—"*Chakdars*".— *Held* that the terms of a *wajib-ul-arz* conferring a right of pre-emption upon "*pattidars*" did not apply to a *chakdar* holding a share in the same *chak* as the vendor. BALWANT SINGH v. SUBHAN ALI, 10 A. 107=7 A.W.N. (1887) 290 ... 72

(2) *Rival suits—Each pre-emptor made defendant in the other's suit—Suits tried together, but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit—Appeal by inferior pre-emptor in his own suit—Appellate Court not competent to alter decree so as to affect superior pre-emptor's right.*—In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree, in the terms of s. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right and the decree in the second suit should not have been made subject to the condition above stated.

Pre-emption—(*Continued*). PAGE

Held that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that that decree having become final, the questions between the two pre-emptors could not be reopened on appeal from the second pre-emptor's decree. CHAJJU v. SHEO SAHAI, 10 A. 123 =7 A.W.N. (1887) 301 ... 83

(3) *Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre emptive right.*—Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights, in the absence of any thing in the *wajib-ul arz* to the contrary, the rule of a Muhammadan law must be observed, and however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held, (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt. ARJUN SINGH v. SARFARAZ SINGH, 10 A. 182=8 A.W.N. (1888), 55 ... 122

(4) *Wajib ul-arz—Pre-emptor out of possession of his own share - His own share lost by him pending appeal—Muhammadan Law.*—The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged to be a co-sharer with the vendors. The defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre emption arose. The Court of first instance dismissed her suit. In appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January, 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that as since the appeal the share out of which plaintiff alleged that, her right arose was sold, she could not get any decree now in her favour.

Held, that this Court as a Court of appeal have only got to see what was the decree, which the Court of first instance should have passed and if the Court of first instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favour in the Court of first instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

Held, by MAHMOOD, J., that the passage from Hamilton's Hedaya by Grady, p. 562, means that in the pre-emptive tenement the pre-emptor should

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have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership. SAKINA BIBI v. AMIRAN, 10 A. 472=8 A.W.N. (1888) 177=13 Ind. Jur. 114 ... 317

(5) *Town—Custom—Evidence—Decrees enforcing right.*—In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. GURDAYAL MAL v. JHANDU MAL, 10 A. 585=8 A.W.N. (1888) 242 ... 393

(6) *Wajib-ul-arz—Clause fixing price in case of sale to a co-sharer—Agreement running with the land—Pre-emptor entitled to take property on payment of price fixed in* wajib-ul-arz.—The pre-emptive clause in the *wajib-ul-arz* of a village contained the provision that the right pre-emption could be enforced on payment of such sum as would represent the "*kimat-i-muravvajah*," that is, according to current rates. A suit for pre-emption was brought against the vendor and vendee of a certain fractional share in the village, and the plaintiff claiming the benefit of the above provision disputed the price entered in the sale deed as the proper price for the share according to current rates.

Held, following *Karim Bakhsh Khan* v. *Phulз Bibi*, that a co-sharer was entitled to purchase the share sold at a price to be ascertained according to the rule in that behalf contained in the *wajib-ul-arz* and the condition in the *wajib-ul-arz* regarding the price to be paid for the share sold was binding on the land and therefore binding on the stranger vendee. UPMANI KUAR v. RAM DIN, 10 A. 621=8 A.W.N. (1888) 243 ... 418

(7) *Wajib-ul-arz—Construction—"Karibi" meaning of.*—The word "*karibi*" used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders "near" to the vendor, is ambiguous and inadequate to express the intentions of the shareholders.

The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale by shareholders, first to "*bhai hakiki* (own brothers), next to "*karibi*" (near), and next to co-sharers in the same *thoke* as the vendor.

Held that although the word "*karibi*" must be read in connection with the preceding word "*bhai*," the words "*bhai karibi*" could not reasonably be confined to cousins, but must be construed as meaning "*bhai bund*" or "*bhai log*," so as to include all near relatives, both male and female.

Held also that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor. KHUMAN SINGH v. HARDAI, 11 A. 41 (F.B.) =9 A.W.N. (1889). 1 ... 455

(8) *Wajib-ul-arz—Muhammadan Law—Refusal by pre-emptor to purchase—Immediate demand—Pre-emptor claiming property as to part of which he has disqualified himself from suing.*—The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-sharers, and that first a nearer co-sharer and next a more distant co-sharer should have a right of pre-emption. Where, such notice having been given, the co-sharer receiving notice took no action thereon within a reasonable time, — *held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase.

A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October, 1884. The plaintiff-pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July, 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July, 1885. It was found as a fact that no such notice was given.

Held that even if such notice was given, it was too late, and was not prompt demand in accordance with the Muhammadan law.

The principle of the rule that a pre-emptor must claim the whole of the property included in the sale-transaction, and for which one price was

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paid, if he is entitle to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale.

Where therefore a pre-emptor was disqualified from claiming a portion of the property sold, by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion.—*Held* that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified. MUHAMMAD WILAYAT ALI KHAN v. ABDAL RAB, 11 A. 108=9 A.W.N. (1889) 17=13 Ind. Jur. 233 497

(9) *Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806—Suit by mortgagee for possession—Compromise and decree thereon—Mortgagee accepting part of the property in suit—Suit for pre-emption—Pre-emptor not asserting or proving validity of foreclosure proceedings—Pre-emptor's title referred to date of compromise and decree—Purchase money—Acquiescence of pre-emptor in transfer.*—The mortgagee under a deed of conditional sale executed in 1878 took foreclosure proceedings under Regulation XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded on the 18th September, 1882, declaring the mortgage to have been foreclosed. In August, 1885, the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September, 1885, the suit was compromised, the mortgagee accepting a part of the mortgaged property and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September, 1885.

Held that although upon the expiration of the year of grace, the ownership of mortgaged property vested in a conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September, 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. AJAIB NATH v. MATHURA PRASAD, 11 A. 164 ... 533

(10) *Wajib-ul-arz—Partition of village into separate mahals—New* wajib-ul-arz *for each mahal.*—Cases where, after the division of a village area into separate mahals for which no new *wajib-ul-arz* is drawn up, the old *wajib-ul-arz* for the whole area has been held to apply generally to the new mahals, and such division has been held not to affect covenants existing between the co-sharers under such *wajib-ul arz*, distinguished from cases where a new *wajib-ul-arz* has after the division been drawn up for each mahal. KUAR DAT PRASAD SINGH v. NAHAR SINGH, 11 A. 257=9 A.W.N. (1889), 79 ... 592

(11) *Pre-emption—Decree for pre-emption—Profits of property accruing between sale and decree becoming final—Act XII of* 1887, *s.* 37.—In a suit for pre-emption based on the *wajib-ul-arz* of a village, the plaintiff pre-emptor did not ask for a declaration that he was entitled to be treated as a purchaser as from the date of the sales of the vendees-defendants, nor

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that he was entitled to the rents and profits as from the date of the sale, nor did he ask for mesne profits. The decree in his favour did not grant him any such relief. The *wajib ul-arz* was silent as to whether the purchaser or the pre-emptor was entitled to the profits accruing subsequently to the date of the sale being avoided.

Held by the Full Bench that the decree merely avoided the sale and divested the original owners of all interest in the property as from the date when the decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emptive price decreed, and vested in the pre-emptor the rights of ownership from that date, and his rights were not postponed until he had obtained possession of the property.

Held that the profits of the property which accrued between the date of the sale and the date when the pre-emptor, in accordance with the decree, paid the decreed pre-emptive price, belonged not to the pre-emptor, nor to the original vendor, but to the original vendees.

Held by MAHMOOD, J., that the vendee defendants were entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree.

Observations by MAHMOOD, J., upon the texts of the Muhammadan Law applicable to the case by way of analogy; upon the contention that there is a Hindu Law of pre-emption applicable to Hindus under s. 37 of the Bengal Civil Courts Act (XII of 1887); and upon the relation of the Muhammadan Law to cases in which pre-emption is claimed on the basis of contract or custom embodied in the *wajib ul-arz* of a village. DEOKI-NANDAN v SRI RAM. 12 A. 234 (F.B.) ... 898

(12) See CIVIL PROCEDURE CODE, 1882, 10 A. 354; 10 A. 400; 11 A. 346.

(13) See MAHOMEDAN LAW (PRE-EMPTION).

Presumption.

See EVIDENCE ACT, 1872, ss. 74, 83, 12 A. 595.

Principal and Agent.

See CONTRACT ACT, 1872, ss. 201, 218, 12 A. 541.

Principal and Surety.

See CONTRACT ACT (IX OF 1872), 11 A. 310.

Privacy.

See EASEMENT, 10 A. 162; 10 A. 358.

Privilege.

See DEFAMATION, 10 A. 425.

Public Thoroughfare

Public thoroughfare—Obstruction—Right to sue—Special damage—Lease—Right lessee to sue—Trespass—The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public have been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, has legally and justly a right to bring the action. The findings of fact were, that by the terms of the lease plaintiff was entitled to maintain the action as representing the zemindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of have encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower appellate Court. *Held*, that in the absence of damage over and above that which in common with the rest of public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case-law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land

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upon which the defendant has built is included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease. RAMPHAL RAI v. RAGHUNANDAN PRASAD, 10 A. 498=8 A.W.N. (1888) 205 ... 335

Public Way.

Obstruction by building—Suit by zemindar for removal of building—Special damage—Right to sue.—The plaintiff who is the zemindar of the village brought an action claiming to have a chabutra or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public have a right of way and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the chabutra and the defendant appealed.

Held, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. A zemindar in giving the public right of road or way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the zemindar has in common with the public the right to use the road as a road and, over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public but in respect of an interference with his own rights of property. TOTA v. SARDUL SINGH, 10 A. 553=8 A.W.N. (1888) 263 ... 372

Question for Court executing decree.

(1) See CIVIL PROCEDURE CODE, (1882), 10 A. 1; 10 A. 354.

(2) See EXECUTION OF DECREE, 12 A. 313.

Question in issue.

Parties—Admission.—The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the appellate Court that even if this deed had been executed it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution and the plaint also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest. ANAND KUAR v. TANSUKH, 11 A. 396 (P.C.)=5 Sar. P.C.J. 372=13 Ind. Jur. 171 ... 681

Quod Fieri Non-Debuit, Factum Valet.

See HINDU LAW (ADOPTION), 12 A. 328.

Record of Rights.

See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 11 A. 399.

Refund.

(1) See APPEAL, 12 A. 397.

(2) See CIVIL PROCEDURE CODE, (1882), 10 A. 354.

Registration.

(1) *Duty of parties, when obligatory.*—Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration. KIAM-UD-DIN v. RAJJO, 11 A. 13=8 A.W.N. (1888) 280 ... 436

(2) See COMPANY, 11 A. 349.

(3) See REGISTRATION ACT (III OF 1877).

Registration Act (VIII of 1871).

Ss. 28, 64, 65, 66—Place of registration of documents.—The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immoveable property in the office of the Sub-Registrar within whose

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sub-districtany portion of the property is situate. The words "some portion of the property" are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect, by the carrying out of the provisions of ss. 64, 65 and 66. HARI RAM v. SHEODAYAL MAL, 11 A. 136 (P.C.) = 16 I. A. 12 = 5 Sar. P.C.J. 281 ... 515

Registration Act (III of 1877).

(1) Ss. 2, 17—See TRANSFER OF PROPERTY ACT (1882), 10 A. 20.

(2) *Ss. 49, 60—Certificate of registration—Distinction between act of registering officer and conduct of parties—Certificate not invalidated and document not made inadmissible by erroneous procedure in presenting or admitting execution.*—The word "registered" as used in s. 49 of the Registration Act (III of 1877) refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. S. 49, read with s. 60, only means that a document to be admissible in evidence for the purposes of the former section, must be registered *i.e.*, the officer must, under s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence: if he has not, or there has been no registration of the document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60, and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49.

Where, therefore, the lower appellate Court rejected as inadmissible in evidence under s. 49, a deed of gift of immoveable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (*a*)—*held* that the Court was wrong in so doing, and ought to have looked at and dealt with the document. HARDEI v. RAM LAL, 11 A. 319 (F.B.) = 9 A.W.N. (1889) 101 ... 631

Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure).

(1) See MORTGAGE (CONDITIONAL SALE), 11 A. 144.

(2) S. 8—See MORTGAGE (FORECLOSURE) 12 A. 189.

Remand.

(1) See ACT XII OF 1881 (N.W.P. RENT) 11 A. 31.

(2) See CIVIL PROCEDURE CODE (1882), 10 A. 289; 11 A. 35; 12 A. 510.

(3) See PRACTICE AND PROCEDURE, 10 A. 28.

Rent, Suit for.

See REVISION, 12 A. 198.

Res judicata.

(1) See CIVIL PROCEDURE CODE, (1882), 10 A. 411; 12 A. 392; 12 A. 578.

(2) See MORTGAGE (USUFRUCTUARY), 11 A. 386.

(3) See TRANSFER OF PROPERTY ACT, 12 A. 539.

Review.

(1) See CIVIL PROCEDURE CODE, (1882), 11 A. 267.

(2) See COURT FEES ACT, ss. 6, 28, sch. i, arts. 4 and 5, 12 A. 57.

Revision.

(1) *High Court's powers of revision—Civil Procedure Code, 1882, s. 622—Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—Act XII of 1881 (N.W.P. Rent Act), ss. 183, 199.*—The High Court has no power to revise, under s. 622 of the Civil Procedure Code, and order passed by a Collector under s. 183 of the N.W.P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. RAM DAYAL v. RAMADHIN, 12 A. 198 = 10 A.W.N. (1890), 59 ... 875

(2) See APPEAL (GENERAL), 12 A. 581.

(3) See CRIM. PRO. CODE, 1882, s. 437, 12 A. 434.

Right of suit. PAGE

See PUBLIC WAY, 10 A. 553.

Riot.

See PENAL CODE, 12 A. 550.

Sale.

(1) *Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to* bona fide *purchaser not a party to the decree, distinguished from sale to decree-holder.*—A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it.

Held, that, as against the latter purchaser, whose position was different from that of the decree-holding purchasers, the suit must be dismissed. ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN, 10 A. 166=15 I.A. 12=5 Sar. P.C.J. 129 ... 112

(2) See CIVIL PROCEDURE CODE, 1882, 10 A. 83.

(3) See DOCUMENT, CONSTRUCTION OF, 12 A. 397.

Sanction to prosecute.

(1) See CRIMINAL PROCEDURE CODE, 1882, 10 A. 582.

(2) See LIMITATION ACT (XV OF 1877), 10 A. 350.

Security bond.

See STAMP ACT (I OF 1879), 11 A. 16.

Separate Sentences.

Personating public servant—Extortion—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Act XLV of 1860 (*Penal Code*), *ss.* 71, 170, 383—*Crim. Pro. Code, ss.* 35, 235.—Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction.

Under s. 35 of the Crim. Pro. Code, sentences of imprisonment cannot be passed so as to run concurrently.

In a trial for offences under ss. 170 and 383 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of.

Held, that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply, because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383; that in the present case the former offence was completed before the latter had begun; and that separate sentences for each offence, were, therefore, not illegal. QUEEN-EMPRESS v. WAZIR JAN, 10 A. 58=7 A.W.N. (1887) 274 ... 40

Separate Suit.

See EXECUTION OF DECREE, 12 A. 313.

Sessions Judge.

See CRIM. PRO. CODE, 1882, s. 437, 12 A. 434.

Set-off. PAGE

See CIV. PRO. CODE, 1882, 10 A. 188; 10 A. 587.

Sir land.

See MAHOMEDAN LAW (PRE-EMPTION), 12 A. 426.

Small Cause Court Suit.

(1) *Suit for damages—Personal injury—Actual pecuniary damage—Act XI of* 1865 (*Small Cause Courts Act*), s. 6—*Suit instituted before commencement of Act IX of* 1887 (*Small Cause Courts Act*)—*Act IX of* 1887, s. 3 (*a*).—The plaintiff in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings.

Held, that inasmuch as part of the claim related to alleged actual pecuniary damages resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mufussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. JIWA RAM SINGH v. BHOLA, 10 A. 49=7 A.W.N. (1887) 268 ... 33

(2) See APPEAL (GENERAL), 12 A. 581.

(3) See CIV. PRO. CODE, 1882, 11 A. 13.

(4) See TRANSFER OF PROPERTY ACT, 1882, 10 A. 20.

Specific Performance.

Suit for—Exchange—Agreement that if either party where deprived of land received he should receive other land—Suit for specific performance—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 113.—In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiffs' title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendands refused to give them other land) they sued on the deed of 1871 to have the exchange therein provided for carried out.

Held, by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by art. 113, sch. ii of the Limitation Act (XV of 1877). HARI TIWARI v. RAGHUNATH TIWARI, 11 A 27 (F.B.)=8 A.W.N. (1888) 254 ... 446

Specific Relief Act (I of 1877.)

(1) S. 39—See BURDEN OF PROOF, 12 A. 523.

(2) *S.* 42—*Refusal of declaratory decree, the case made for it being defective.*—Under the Specific Relief Act (I of 1877), s. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutawalis and managers of property from ancient times connected with religious observances, *viz.*, a ghat upon the Jumna with temples adjoining of their title also to receive a proportion of the offerings, and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs.

Held, that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed with respect to other rights, which either of the parties might have, or

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claim to have, relating to the property. MAINA v. BRIJMOHUN, 12 A. 587 (P. C.) = 17 I.A. 187 = 5 Sar P.C.J. 624 ... 1120

(3) S. 42—See ACT XII OF 1881 (N.W.P. RENT), 11 A. 224.

(4) S. 42—See HINDU LAW (WIDOW), 11 A. 253.

(5) S. 54—See INJUNCTION, 12 A. 436.

Stamp Act (I of 1879).

Sch. i, No. 13—Stamp—Court fee—Security bond for costs of appeal—Act VII of 1870 (*Court-fees Act*) *sch. ii, No. 6.—Held*, by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(*a*) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i (*b*) a Court fee of eight annas under the Court-fees Act, art. 6, sch. ii. KULWANTA v. MAHABIR PRASAD, 11 A. 16 (F.B.) = 8 A.W.N. (1888) 281 ... 438

Statute, Construction of.

(1) *Preamble—Construction.*—Where the enacting sections of statute are clear, the terms of the preamble cannot be called in to restrict their operation, or to out them down. QUEEN-EMPRESS v. INDARJEET, 11 A. 262 = 9 A.W.N. (1889) 85 ... 595

(2) See CIVIL PROCEDURE CODE, 1882, 12 A. 510.

(3) See STATUTE, 24 and 25 VIC., C. 67, 11 A. 490.

Statute 24 and 25 Vic., c. 67, (Indian Councils Act).

S. 22—*Act XVII of* 1886 *(Jhansi and Morar Act)—Legislative power of the Governor-General in Council—"Indian territories now under the dominion of Her Majesty"— "Said territories"—28 and 29 Vic., c. 17, preamble—32 and 33 Vic., c. 98, s. 1—Construction of Statutes.*—Act XVII of 1886 (the Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council, and the town and fort of the Jhansi are subject to the jurisdiction of High Court for the N.W. Provinces in the same manner as the rest of the Jhansi district.

The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 and 25 Vic., c. 67, received the Royal assent (*i.e.* the 1st August, 1861), were under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic., c. 17, and in s. 1 of the 32 and 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act.

Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature, concerning the law, does not make the law, yet it may be so declared as to operate in future.

It must be presumed that the laws and regulations of the Governor General in Council are known to Parliament. ABDUL v. MOHAN GIR, 11 A. 490 (F.B.) = 9 A.W.N. (1889) 194 ... 741

Statute 28 29, Vic., c. 17 (Government of India Act.)

Preamble—See STATUTES 24 and 25 VIC., C. 67, 11 A. 490.

Statute 32 and 33 Vic., c. 98 (Indian Councils Act.)

S. 1—See STATUTE 24 and 25 VIC , C. 67, 11 A. 490.

Step-in-aid of execution.

Execution of decree—Act XV of 1877 (*Limitation Act*). *sch. ii., No.* 179 (4)—*"Step-in-aid of execution"—Application by decree-holder under Civil Procedure Code*, 1882, *s.* 258.—The expression "step-in-aid of execution" in Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4) was intended to cover any application made according to law in furtherance of the execution-proceedings under a decree. It includes applications made by a decree-holder under s. 258 of the Civil Procedure Code to enter up part satisfaction of the decree.

Per MAHMOOD, J.—Provided that the payment asserted in the application was actually made. SUJAN SINGH v. HIRA SINGH, 12 A. 399 (F.B.) = 10 A.W.N. (1890) 125 ... 1000

Succession Act (X of 1865). PAGE

Ss. 256, 257—See ADMINISTRATION BOND, 10 A. 329.

Suit.

(1) See ACT XXIII OF 1871 (PENSIONS), 10 A. 396.

(2) See CIVIL PROCEDURE CODE, 1882, 11 A. 392 (F.B.).

Summary trial.

(1) See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 11 A. 262.

(2) See CRIMINAL PROCEDURE CODE, 1882, 10 A. 55.

Transfer of Case.

See CRIM. PRO. CODE, 12 A. 66.

Transfer of Property Act (IV of 1882).

(1) Ss. 10, 12—See COMPANIES ACT, 12 A. 193.

(2) S. 54—See VENDOR AND PURCHASER, 11 A. 244.

(3) Ss. 58 (*d*), 98—See MORTGAGE (USUFRUCTUARY), 12 A. 203.

(4) S. 67 (*a*)—*Suit for sale by usufructuary mortgagee—Suit not maintainable—Act IV of 1882 (Transfer of Property Act), s. 67 (a).* Under s. 67 (*a*) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. UMDA v. UMRAO BEGAM, 11 A. 367=9 A.W.N. (1889) 140 ... 662

(5) S. 67 (*a*)—*See* MORTGAGE (USUFRUCTUARY), 11 A. 367.

(6) S. 68 (*b*), (*c*)—*Mortgagee of non-transferable property—Right to sue for mortgage-money.*—Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession, and brought a suit against the mortgagor to recover the mortgage-money —*held*, that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security whithin the meaning of s. 68 (*b*) of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to succeed. GANESH SINGH v. SUJHARI KUAR, 10 A. 47=7 A.W.N. (1877) 252 ... 32

(7) S. 72 (*b*)—*Mortgage—Usufructuary mortgage—Covenant by the mortgagor to pay the mortgagee arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to re-imbursement before redemption.*—On the 27th August 1883, M and B jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants, was due to them, and decreed redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed.

Held that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage-deeds ; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realise it, thereby putting an end to all the rights of the mortgagors and mortgagees ; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed.

Held further, that s. 72 of the Transfer of Property Act only re-produces the rules of law which Courts of Justice in India have uniformly adopted. GIRDHAR LAL v. BHOLA NATH, 10 A. 611=8 A.W.N. (1888), 238 ... 411

Transfer of Property Act (IV of 1882)—(*Continued*). PAGE

(8) S. 80—See CIV. PRO. CODE, 1882, s. 295 (c), 12 A. 546.

(9) *Ss. 86, 87, 94—Cost—Mortgagee—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220.*—A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. DAMODAR DAS v. BUDH KUAR, 10 A. 179=8 A.W.N. (1888) 68 ... 120

(10) *S. 87—Appeal—Order absolute for foreclosure—Execution of decree—"Decree"—Civil Procedure Code, ss. 2, 244, sch. IV, No. 129—Practice—Appeal wrongly presented as appeal from order—Such appeal not to be converted into appeal from decree.*—The order mentioned in s. 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable as a decree under s. 244 read with s. 2 of the Civil Procedure Code, upon the stamp payable in respect of such orders.

So *held* by the Full Bench, EDGE, C.J., doubting.

Where an appeal has been erroneously presented to the High Court as a first appeal from order, the Court will not convert it into a first appeal from a decree under s. 244 read with s. 2 of the Civil Procedure Code.

So *held* by the Division Bench. KEDAR NATH v. LALJI SHAHAI, 12 A. 61 (F.B.) = 9 A.W.N. (1889) 198 ... 788

(11) *Ss. 88, 89—Mortgage—Execution of decree—Conditional decree for sale not made absolute*—Res judicata.—A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882) cannot be executed unless and until it is made absolute by an order passed under s. 89.

Where on a previous application being made for execution of such a conditional decree, the judgment-debtor did not appear to oppose the decree-holder's application for attachment and sale, but the application was dismissed for want of prosecution, *held*, that as the question whether the conditional decree was capable of execution before it was made absolute was never before in issue, and was not judicially treated on the occasion of the former application, there was no *res judicata* on the point. RAM LAL v. NARAIN, 12 A. 539=10 A.W.N. (1890) 97 ... 1088

(12) *Ss. 88, 89, 90—Mortgage—Decree for sale—Decree not to be treated as a money-decree.*—A decree in favour of a morgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89 and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance. GOPAL DAS v. ALI MUHAMMAD, 10 A. 632=8 A.W.N. (1888) 254 ... 426

(13) *Ss. 88, 89, 90 Mortgage—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage.*—The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree. RAJ SINGH v. PARMANAND, 11 A. 486=9 A.W.N. (1889) 191 ... 738

(14) S. 93—See MORTGAGE (USUFRUCTUARY), 11 A. 386.

(15) *Ss. 131, 543—Hypothecation—Registration—"Moveable property"—Act I of 1868 (General Clauses Act), s. 2 (6)—Act III of 1877 Registration Act, ss. 2, 17—Act IV of 1882, ss. 3, 54—Small Cause Court suit—Suit for enforcement of hypothecation against moveable property—Act XI of 1865 (Small Cause Courts Act) s. 6—Transfer of debt—Notice to debtor.*—*Held* that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of

Transfer of Property Act (IV of 1882)—(*Concluded*). PAGE

such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882); and that a suit by the assignee to enforce the hypothecation was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code.

Held also that the assignment was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effect of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time when such a notice was received; that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit; and that if the had prior notice, and sold the property to *bona fide* transferees for value without notice either of the charge created by the bond or of the assignment, such transferees would be protected from liability. KALKA PRASAD v. CHANDAN SINGH, 10 A. 20=7 A.W.N. (1887) 270 ... 14

Trees.

See LANDLORD AND TENANT, 10 A. 159.

See LIMITATION ACT (XV OF 1877), 10 A. 634.

Trespass.

See PUBLIC THOROUGHFARE, 10 A. 498.

Trust.

Trust for "public religious purposes"—Private trust—Suit by worshipper at Hindu temple relating to trust—Right to sue—Civil Procedure Code, ss. 30, 539—*Act XX of* 1863—*Hindu Law.*—The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the Revenue authorities mutation of names in the idol's favour an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently re-possessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers, thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code.

Held by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple.

Per EDGE, C.J., and TYRRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense.

Held also by the Full Bench that the suit was not maintainable as against those defendants.

Per STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religious purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit.

Per EDGE, C.J., and TYRRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code, and if for private or *quasi*-private religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple, could maintain it against those defendants who were not trustees but (if they had wrongfully taken possession) trespassers; that Act XX of 1863 could not apply; and that, with reference

Trust—(*Concluded*). PAGE

to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants. RAGHUBAR DIAL v. KISHO RAMANUJ DAS, 11 A. 18 (F.B.)=8 A.W.N. (1888) 276=13 Ind. Jur. 148 ... 439

Unconscionable bargain.

(1) *Maintenance—Gambling in litigation—Agreement opposed to public policy—Act IX of* 1872 (*Contract Act*), s. 23.—The result of the English cases regarding "hard" or "unconscionable bargain" is that in dealing with expectant heirs, reversioners or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous—does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners or remaindermen. The judgment of the Privy Council in *Srimati Kamini Sundari Chaudhrani* v. *Kali Prossunno Ghose* does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain.

The judgment of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced.

For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application.

Held that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable

Unconscionable bargain—(*Concluded*). PAGE

doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced.

Held also that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700; and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce.

The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3, 700, interest and costs, from the date of the decree until payment. CHUNNI KUAR v. RUP SINGH, 11 A. 57=8 A.W.N. (1888), 296 ... 465

(2) See CONTRACT (IX OF 1872), 11 A. 118.

Undue Influence.

See BURDEN OF PROOF.

(1) See VOLUNTARY TRANSFER, 10 A. 535.

Unlawful assembly.

See PENAL CODE, s. 154, 12 A. 550.

Valuation of appeal.

See APPEAL (GENERAL), 12 A. 581.

Valuation of Suit.

See LIMITATION ACT (XV of 1877), 10 A. 524.

Vendor and Purchaser.

Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Act IV of 1882 (*Transfer of Property Act*), s. 54.—Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser: and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. The difference between an executed contract of sale and an executory contract to sell observed on. A deed of sale of immoveable property having been duly executed and registered, and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property Act, (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed. SHIB LAL v. BHAGWAN DAS, 11 A. 244=9 A.W.N. (1889) 96 ... 583

Voluntary transfer.

Undue influence—Act IX of 1872 (*Contract Act*), s.16.—In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see, that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize.

Where a fiduciary or quasi-fiduciary relation had existed, Courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

Voluntary transfer—(*Concluded*). PAGE

The plaintiff who on the death of the widow of his brother became entitled to the estate of the deceased found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favour of defendant's brother for the nominal consideration of Rs. 9,500 of half the property he claimed, and again, shortly after the mutation case had terminated in his favour, he executed a deed of endowment of the remaining half in favour of a temple founded by the ancestor of the defendant and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands.

Plaintiff sued for the cancellation of the deed of endowment on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree.

On appeal by the defendant it was held; that looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest and *bona fide* transaction and one that ought to be upheld. SITAL PRASAD v. PARBHU LAL, 10 A. 535 = 8 A. W.N. (1888) 221 ... 360

Wahabis.

See MAHOMEDAN LAW (MOSQUE), 12 A. 494.

Waiver.

See EXECUTION OF DECREE, 11 A. 482.

Wajbi ul-arz.

(1) See MAHOMEDEN LAW (PRE-EMPTION), 12 A. 426.

(2) See PRE-EMPTION, 10 A. 107; 10 A. 182; 10 A. 472; 10 A. 621; 11 A. 41; 11 A. 108; 11 A. 257; 12 A. 234.

Witness.

(1) See ACT X OF 1873 (OATHS), 10 A. 207.

(2) See CRIM. PRO. CODE, 1882, 10 A. 174.

(3) See DEFAMATION, 10 A. 425.

Words and Phrases.

(1) "Amin"—See MAHOMEDAN LAW (MOSQUE), 12 A. 494.

(2) "Between the parties"—See EVIDENCE ACT (I OF 1872), 10 A. 421.

(3) "Complaint"—See CRIM. PRO. CODE (1882), 10 A. 39.

(4) "Constitute an offence"—See SEPARATE SENTENCES, 10 A. 58.

(5) "Continuing breach"—See LIMITATION ACT (XV OF 1877), 10 A. 85.

(6) "Imprisonment"—See CRIM. PRO. CODE (1882), 11 A. 308.

(7) "Karibi"—See PRE-EMPTION, 11 A. 41.

(8) "Lawfully"—See CONTRACT ACT (IX OF 1872), 11 A. 234.

(9) "Material irregularity"—See CIV. PRO. CODE (1882), 11 A. 333.

(10) "Object"—See PENAL CODE 10 A. 150.

(11) "Only"—See LIMITATION ACT (XV OF 1877), 10 A. 418.

(12) "Registered"—See REGISTRATION ACT (III OF 1877), 11 A. 319.

(13) "Shall"—See CIV. PRO. CODE (1882), 11 A. 304.

(14) "Some portion of the property"—See REGISTRATION ACT (VIII OF 1871), 11 A. 136.

(15) "Successive breaches"—See LIMITATION ACT (XV of 1877), 10 A. 85.

(16) "Such Court"—See CIV. PRO. CODE (1882), 10 A. 389.

(17) "Such woman"—See PENAL CODE, 10 A. 580.

(18) "Sufficient cause"—See LIMITATION ACT (XV OF 1877), 10 A. 524.

(19) "Suit"—See CIV. PRO. CODE (1882), 11 A. 228.

(20) "There is no evidence"—See CRIM. PRO. CODE (1882), 10 A. 414.

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